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## Indian Water Rights, the Missouri River, and the Administrative Process: What are the Questions?

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# INDIAN WATER RIGHTS, THE MISSOURI RIVER, AND THE ADMINISTRATIVE PROCESS: WHAT ARE THE QUESTIONS?

John H. Davidson\*

## Table of Contents

I. Background and Summary .....	1
II. The Missouri River .....	6
III. The Missouri: Indian Reserved Water Rights and the Law of the River .....	8
IV. The Flow is the Resource .....	16
V. A Search for Process: The Master Manual Review .....	17
VI. The Claims of the Missouri River Tribes .....	19

### I. Background and Summary

The legal rules which govern the allocation of interstate surface waters for consumptive uses in the Western United States typically assume some sort of diversion from the stream and the existence of scarcity. By custom, the legal framework of allocation is referred to as the "Law of the River" — shorthand for a catalog of principles that emerge from the legal and political history of competition for the limited flows of the Colorado River. Through interstate compacts, treaties, Congressional legislation, and litigation before the Supreme Court, the Colorado has been carved-up among basins, tribes, states and the major use constituencies, including hydropower, domestic water supply and irrigation. The resulting legal forms and rules provide a template to be used in resolving controversies in other western basins.<sup>1</sup>

The prerequisite to an interstate allocation is over-appropriation of the available supply. Claimants include private water users — principally irrigators, industry and municipalities — which have established claims under state property law, usually in some form of the prior appropriation system. These property interests are represented by their respective state governments acting *parens patriae*. Indian tribes and the United States as landowner also assert claims, as do foreign nations. Finally, the United States as developer and regulator of interstate streams may also assert claims pursuant to some governing act of Congress, such as that which authorizes the construction of a dam or irrigation project.<sup>2</sup>

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1. See generally Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1 (1966).

2. See A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated and*

The process of legal allocation is complicated by the fact that most rivers in the West flow through a number of states and tribal reservations as well as federal land. These political boundaries ignore nature's hydrologic features, thus creating "problems of government that are defined by natural rather than political boundaries."<sup>3</sup> In addition, there are always pressures to export water from a basin to areas of greater need.

Where there are interstate, inter-region, inter-jurisdiction or international water disputes, no one decision maker can establish all of the rules, but interstate water law — the Law of the River — is the sum of the effort in the American West. Contributions come from interstate compact, allocation by Congress, or adjudication before the Supreme Court of the United States.

Interstate compacts are provided for by Article I of the United States Constitution.<sup>4</sup> Negotiation typically occurs among states, tribes and the United States. The results of compact negotiation are ratified by state legislatures and the Congress. An interstate stream compact serves as a permanent allocation of water among the states involved, subject only to the power of Congress to modify or revoke its approval of the compact.<sup>5</sup> The Supreme Court regularly emphasizes that compact negotiation is superior to litigation.<sup>6</sup>

Once a state has ratified a compact, it is binding upon the state and its citizens, and cannot be unilaterally nullified.<sup>7</sup> The original jurisdiction of the Supreme Court may be invoked by a State to enforce a compact obligation, or to interpret compact language.<sup>8</sup>

A second method of stream allocation is available by direct action of the federal Congress. The federal government has extensive powers over interstate waters, navigable waters, and nonnavigable tributaries of navigable waters.<sup>9</sup> As a result Congress is able to deal extensively with the question of water allocation among the states, tribes and regions. There are some advantages to this approach. Congress can act with dispatch when compared to the nearly endless duration of complex litigation. Congress can fashion a comprehensive solution, whereas a Court is limited by the controversy presented to it. Congress, through its hearing procedure can weigh all viewpoints, and develop an equitable solution. In addition Congress can mitigate the more disagreeable effects of a proposed solution by appropriating

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Restated, 56 U. COLO. L. REV. 381 (1985).

3. State *ex rel. Dyer v. Sims*, 341 U.S. 22, 24 (1951).

4. U. S. CONST. art. I, § 10, cl. 3.

5. William A. Garton, *South Dakota's System of Water Management and Its Relation to Land Use and Economic Development*, 21 S.D. L. REV. 1, 63 (1976).

6. *Colorado v. Kansas*, 320 U.S. 383, 392 (1943).

7. *Dyer*, 341 U.S. at 28.

8. *Id.*

9. See Eva H. Morreale, *Federal Power in Western Waters: The Navigation Power and The Rule of No Compensation*, 3 NAT. RES. J. 1 (1963).

funds for water use efforts such as development projects. Of course, Congress can bring to bear a concern for the larger national interest.

A third method of allocation is by litigation before the Supreme Court of the United States pursuant to its original jurisdiction.<sup>10</sup> In litigation of this type, one state, representing the interests of its citizen water users *parens patriae* brings an original action before the Supreme Court of the United States against another state or states.<sup>11</sup> For such an action to be brought there must be an actual controversy over the use of water from an interstate stream, and this exists when the waters of an interstate stream are in fact over-appropriated, although an actual water shortage need not exist.<sup>12</sup>

No precise doctrine has emerged that the Court will rely upon in resolving cases of this type, although the name given to the resulting doctrine — equitable apportionment — provides a reasonably apt description. The Court decides these on a case-by-case basis, reaching an "exercise of an informed judgment on a consideration of many factors."<sup>13</sup> As the Court stated in an early decision:

Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on down-stream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former — these are all relevant factors. They are merely an illustrative, not an exhaustive catalog. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.<sup>14</sup>

It is against this background that the Law of the River emerged in the form of the 1960 Supreme Court decision in *Arizona v. California*.<sup>15</sup> That case grew out of a complex history and is only summarized here.<sup>16</sup> In it, all three legal devices for interstate allocation are involved.

The case began with the 1922 Colorado River Compact which was negotiated in an attempt to resolve competing claims to the interstate flows of the Colorado. It apportioned the river waters on an essentially equal basis between the upper and lower basins. The Compact made it possible for the

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10. U. S. CONST. art. III, § 2, cls. 1, 2.

11. *Kansas v. Colorado*, 206 U.S. 46 (1906).

12. *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

13. *Id.* at 618.

14. *Id.*

15. 373 U.S. 546 (1963).

16. *Meyers*, *supra* note 1.

lower basin states to use water needed for its growing population, and to undertake major water project engineering. The upper basin states saw the Compact as the means by which they would prevent Colorado River water from being monopolized by the faster-growing lower basin states through the establishment of legal and equitable priorities of appropriation. The compact did not, however, divide the water among the states themselves; that question remained open.<sup>17</sup>

In 1929 Congress enacted the Boulder Canyon Project Act<sup>18</sup> which among other things authorized construction of the Hoover Dam. The practical effect of this dam and associated facilities was that California was to be able to increase substantially its diversions from the river in order to fuel the phenomenal economic and population growth that was then occurring in the southern part of that state. The growth of Arizona remained in the future, and it felt threatened by the California diversions. As a result, it filed an original suit in the Supreme Court, asking for a judicial determination of its water rights.<sup>19</sup> The United States intervened, and a full apportionment of the stream was underway. More than five years later, a decision was handed down by the high court. Arizona had asked the Court to allocate the waters judicially, following the doctrine of equitable apportionment. The Court declined to do so, holding instead that Congress had effected an allocation of the lower basin water in the Boulder Canyon Project Act. On this basis the Court came up with a specific quantitative allocation.<sup>20</sup>

An enduring sub-theme in the decision of *Arizona v. California* is that of Indian water rights. The Court recognized rights of Indian tribes living within the Colorado River basin to water necessary to achieve the purpose of the five reservations located along the main stem of the river in the lower basin.<sup>21</sup> In addition to recognizing the prior water rights of those tribes, it adopted a standard of "practicably irrigable acreage" as the measure of the tribes water right. The dates of the establishment of the reservations was recognized as the priority date of the rights, which were to be carved-out of the individual apportionment for each state in which a reservation is located.<sup>22</sup>

Indian water rights thus emerge with vigor from the Colorado River litigation, although they trace their roots to the famous decision in *Winters v. United States*,<sup>23</sup> in which the Supreme Court held that the act of reserving land for specific tribes in Montana had not only set aside lands, but also

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17. See David H. Getches, *Competing Demands for the Colorado River*, 56 U. COLO. L. REV. 413 (1985).

18. Pub. L. No. 642, 45 Stat. 1057 (1928).

19. Meyers, *supra*, note 1, at 39-43, 51-53.

20. Lawrence J. MacDonnell & David H. Getches, *Colorado River Basin*, in 6 WATERS AND WATER RIGHTS 5, 18-19 (Robert E. Beck ed., 2d ed. 1991 & Supp. 1994).

21. *Id.* at 24-25.

22. *Id.*

23. 207 U.S. 564 (1908).

*impliedly* reserved a sufficient quantity of water to fulfill the purposes of the reservation — to make the reservation useful. In addition, the Court held that the implied Indian water right was superior to state-created (prior appropriation) rights so long as the date of the creation of the reservation was earlier than that of the date of first appropriation of a competing use under state law. Stated in another way, tribes could claim water that had been diverted previously by non-Indian water users under state law. Since state law did not govern, Indian rights could not be lost by mere nonuse. The effect of *Winters* is that a dual system of water rights emerge, one for Indian reservations and one for private uses on lands governed by state law.<sup>24</sup>

The *Winters* precedent means that, as a practical matter, most disputes over Indian water rights are destined to be resolved in the courts. Although Congress can settle these questions by legislation, and the states and tribes together with Congress can settle them by negotiation and compact, the principal forum has been the courts. The essential thinking behind *Winters* rights was stated by the Court in *Arizona v. California*:

Much of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable part of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation . . . [it was] unaware that most of the lands were of the desert kind — hot, scorching sands — and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.<sup>25</sup>

In summary, *Arizona v. California* establishes several key points. First, it designates that reserved water is intended to satisfy the *future as well as the present needs* of the reservation. Second, the decision requires the *quantity* of reserved water to be measured by the amount of lands within the reservation susceptible of irrigation. The Court grounded these concepts upon a finding that the purpose of Congress in setting aside the Colorado River Reservation was to support agriculture. Thus, according to the Court, lands which are suitable for irrigation can be ascertained and an amount per acre determined. The Court rejected a "per person" standard since the population might grow. Third, and perhaps most significantly, the Indian water rights were carved out of the then existing non-Indian claims under state law. The Colorado River was over-appropriated, which means that at the time of the

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24. See Michael C. Blumm, *Reserved Water Rights*, in 4 *WATERS AND WATER RIGHTS*, *supra* note 20, at 199, 200-01.

25. *Arizona v. California*, 373 U.S. 546, 598 (1963).

litigation there were more water claims filed than there was water in the river. Therefore, when the Court recognized the existence of a prior right in the reservation, that water was taken necessarily from existing water uses.<sup>26</sup>

Since then the Supreme Court, in *United States v. New Mexico*,<sup>27</sup> has emphasized that reserved water is available only to the extent it is needed to accomplish the *original* purpose of the reservation. No additional water is reserved if the government later expands the purposes for which the withdrawn land is to be administered. Finally, the Court now applies the reasoning of *Winters* to federal lands as well as Indian lands. National Forests provide the prime example, as do national monuments and military lands.

For purposes of the analysis in this paper, the Law of the River cases, together with other Indian and federal reserved rights cases, in the post-World War II era, involve the arid regions of the West, where irrigation is the larger user and prior appropriation the governing state rule. The legal precedent that has evolved is based on several key factors: (1) over-appropriation of an interstate stream; (2) states governed by the water law principle of prior appropriation; (3) underdeveloped Indian uses; (4) dominance of irrigation; and (5) the general understanding that "use" is synonymous in various ways with "diversion from the stream." New questions of both process and substance arise when consideration is given to the question of how to apply these legal principles to streams which present a different set of governing facts. For example, no case has involved the application of Indian reserved rights in a riparian jurisdiction. The variations are particularly marked in the case of the Missouri River, to which attention is now directed.

## II. The Missouri River

The Missouri River basin includes both arid and water-abundant regions, and a world of striking contrasts. This world is, first of all, diverse, encompassing ten states, several Canadian provinces, the lands of twenty-five Indian tribes, and nearly the full range of known human land uses. It includes major metropolitan areas as well as vast unpopulated expanses, and every type of land tenure arrangement known in the United States. The Missouri River runs some 2316 miles. Its basin takes in over 500,000 square miles, one-sixth of the nation's area.

Water concerns of the upper basin are those associated with shortage — storage, irrigation, careful allocation. The water concerns of the lower basin reflect water excess — flood control, navigation, and land drainage. This difference is reflected in the prevailing state water laws. Upper basin states rely upon some form of the principles of prior appropriation — a system that assumes periodic shortage and insists upon careful management — whereas

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26. Blumm, *supra* note 24.

27. 438 U.S. 696 (1978).

the water law of the lower basin states is rooted in riparian systems, which are more typically associated with water abundance. When the upper basin states speak of water development, they refer to irrigation, water retention and conservation; the lower basin states refer to levees, flood control dams and navigation channels.

In the upper basin the federal government is a major landowner. This ownership takes the form of Bureau of Land Management grazing land, National Forests, National Grasslands, National Parks and National Wildlife Refuges. Together, this ownership gives the federal government a claim to a share of the upper basin water rights. Add to this the fact that the United States, with the various Indian tribes of the upper basin, lay claim to a substantial *Winters* doctrine Indian water right, and it is clear that the United States and the tribes together may have a large share of the overall claim to water rights in the upper basin. Few such proprietary-style federal claims exist in the lower basin.

The continuing story of the Missouri Basin is the story of river development.<sup>28</sup> To understand the history of this river's development, one must recognize that it is the result of the constant playing-out of the tensions and conflicts inherent in the basin. Today's river is intensively developed. In the upper basin there are six massive main stem reservoirs which convert the river north from Yankton, South Dakota into one large flat-water lake. South from there the river is channeled in order to support navigation and guide the river to its mouth near St. Louis. Flows from the Missouri are, in turn, an essential component of Mississippi River navigation.

Development of the river has been at federal expense and occurred only after a tough political struggle which was defined by the contrast and conflicts among basin interests. The legal status of the river today is, in turn, defined by *change* combined with the numerous ambiguities, compromises, miscalculations, and misperceptions buried in federal development legislation and administrative interpretation. The physical, social and economic facts in the basin are changing. The players — tribes, states, public interest

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28. The story is found in numerous sources: PETER CARRELS, *UPHILL AGAINST WATER: THE GREAT DAKOTA WATER WAR* (1999); JOHN R. FERRELL, *MISSOURI RIVER DIV., U.S. ARMY CORPS OF ENGINEERS, BIG DAM ERA: A LEGISLATIVE AND INSTITUTIONAL HISTORY OF THE PICK-SLOAN MISSOURI BASIN PROGRAM* (1993) [hereinafter FERRELL, *BIG DAM ERA*]; JOHN R. FERRELL, *MISSOURI RIVER DIV., U.S. ARMY CORPS OF ENGINEERS, SOUNDINGS: 100 YEARS OF THE MISSOURI RIVER NAVIGATION PROJECT* (1997); HENRY C. HART, *THE DARK MISSOURI* (1957); MICHAEL L. LAWSON, *DAMMED INDIANS: THE PICK-SLOAN PLAN AND THE MISSOURI RIVER SIOUX, 1944-1980* (1982); MARIAN E. RIDGEWAY, *THE MISSOURI BASIN'S PICK-SLOAN PLAN: A CASE STUDY IN CONGRESSIONAL POLICY DETERMINATION* (1955); JOHN E. THORSON, *RIVER OF PROMISE, RIVER OF PERIL: THE POLITICS OF MANAGING THE MISSOURI RIVER* (1994); STANLEY VESTAL, *THE MISSOURI* (1941); NORTHERN LIGHTS INST., *BOUNDARIES CARVED IN WATER* (1989-90); John H. Davidson, *Missouri River Basin*, in 6 *WATERS AND WATER RIGHTS*, *supra* note 20, at 151; John P. Guhin, *The Law of the Missouri*, 30 S.D. L. REV. 347 (1985).



organizations — are changing. Federal water policy is changing. The needs and demands of people in surrounding water basins are changing. Technology allows us now to contemplate tasks that were not considered during the earlier development period. Nonetheless, the old legal and political compromise remains in place. Thus, unlike a basin such as the Colorado, where great political, legal and economic struggles have been the story, the Missouri seems only now to be entering its most active era of political and legal contention.

### *III. The Missouri: Indian Reserved Water Rights, and the Law of the River*

During the last several decades parties to most Missouri River controversies have taken their guidance from the Law of the River. Despite the maturity of this precedent, however, the model does not transfer readily to the Missouri.

The extensive legislative history of the Missouri River development program makes little mention, if any, of the numerous Indian tribes located along the Missouri. The truth appears to be that although Missouri River development had a direct negative effect on many tribes, their interests did not receive serious consideration at any point in the legislative process. Even in the lengthy and detailed debate over upper basin state water rights, a debate which led to the enactment of specific protection for such rights,<sup>29</sup> scarce

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29. Perhaps the principal controversy to arise during the legislative debate was whether the upstream consumptive water uses would have priority over the downstream use of water for navigation. The upstream states sought assurance that they could consume the water rather than let it flow down below Sioux City for navigation. The issue was clearly before Congress because of the parallel introduction and consideration of a second bill, which became the Rivers and Harbors Act of 1945 and authorized construction of a nine-foot channel below Sioux City, Iowa, for purposes of enhancing navigation. A nine-foot channel to sustain navigation requires a great deal of water. Unlike shipping on other rivers where ships are moved through a stable system of locks, Missouri River shipping moves on open water, relying on releases of water from upstream dams. To protect the upstream interests, the Act contains the following provision:

The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock-water, irrigation, mining, or industrial purposes.

Flood Control Act of 1944, ch. 665, 58 Stat. 887, 33 U.S.C. § 701-1 (1994). Senator O'Mahoney summarized the meaning of this provision in the following language:

I may say for the benefit of all those who have cooperated in the preparation of the amendment . . . that the purpose has at all times been to protect the historic and traditional rights of the people of the West to use the waters rising in the West in the manner which has been recognized by law and by court decision for almost 100 years.

90 CONG. REC. 8420 (1944). This amendment, bolstered as it is by considerable legislative history, thus states that when there is a conflict between irrigation or other historic upstream

mention was made of tribal water rights. This may be explained by the Congressional policy of assimilation of Indians which prevailed at the time. Nonetheless, Indian tribes own substantial amounts of land in the upper basin, and the majority of it is associated with the Missouri and its principal tributaries. Thus, they may be presumed to be legitimate claimants to reserved rights.

Because most Indian reserved rights in the upper basin are as yet unexercised, upper basin states typically view the resulting uncertainty as discouraging to economic development, and therefore hope to "quantify" Indian water rights — to reduce the rights to a specific quantity that can be drawn into account when state water appropriations are managed. Tribes tend to be wary of such efforts by states, often interpreting them as attempts to minimize Indian rights and to take advantage of the undeveloped condition of Indian water. At the least tribes consider quantification to be premature.

Pursuing the model provided by the Law of the River the State of South Dakota sought to quantify Indian water rights within the state by way of a general basin-wide adjudication. By legislation the United States waives sovereign immunity and consents to federal joinder in state court adjudications if *all* water rights on a stream are being adjudicated simultaneously.<sup>30</sup> In other words, Congress did not consent to state court adjudication of *only* Indian or other federal water rights. However, if a state initiates a bona fide adjudication of *all* rights in a watershed, the United States will consent to state court jurisdiction in order to facilitate the process.<sup>31</sup>

The problem for South Dakota was that if it wanted to quantify Indian reserved rights in state court, the relevant watershed was the entire Missouri River drainage within the state. Thus it is that the suit known as "Rippling Water" was filed in 1980, seeking to determine all rights *in the state* to the Missouri River system, which includes at least ten tributary rivers. The suit involved nearly two-thirds of South Dakota geography, and approximately 60,000 landowners were named as defendants. The litigation focused, as it was intended, on the defendant tribes.<sup>32</sup>

*Rippling Water* (as the litigation is informally captioned) proved to be too grand an undertaking for the state's budget, and was dismissed on the motion of the State, without prejudice.<sup>33</sup> The case indicates, however, the extent to

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consumptive uses, and downstream navigation, the upstream interests shall be entitled to a preference. Did Congress really intend this? The answer must be "yes" followed by a quick qualifier. The more accurate answer is that Congress hoped that, by authorizing and constructing a system with immense storage capacity, both uses could be satisfied and a decision on priorities deferred. In today's world, this requires that the river be *managed* in order to avoid the direct conflict to which the O'Mahoney-Milliken Amendment seems to provide but one answer.

30. 43 U.S.C. § 666 (1994).

31. *United States v. District Court in and for Eagle County*, 401 U.S. 520 (1971).

32. The United States and the tribes removed the case to federal district court and the state motion to remand was granted.

33. *In re General Adjudication of all Rights to Use Water and Water Rights on the Missouri*

which states will consider going in order to avoid having federal reserved rights quantified in federal rather than state courts. It also indicates the great difficulty faced by an upper basin state that seeks to adjudicate water rights in the main course of the river. It is one thing to litigate rights in a relatively small and discrete headwater, such as the Big Horn River in Wyoming, but quite another to adjudicate the rights of the Sioux, whose lands are adjacent to the main water body.

Montana has also sought to apply the Law of the River to the Missouri. In 1979 it created a Montana Reserved Water Rights Commission solely for the purpose of negotiating and settling Indian water claims.<sup>34</sup> As with the *Rippling Water* adjudication, however, the focus is on quantification.

The original development plan for the water stored behind the five great dams on the main stem of the Missouri called for diversion from the stream to irrigate between four and five million acres of private land, mostly in the Eastern Dakotas. Reality has set in, and it is now generally accepted that the proposed irrigation is not feasible.<sup>35</sup> Thus, from the perspective of the upper-basin states, the promised payoff from Missouri River development is unfulfilled, and they continue to search for an alternative bonanza. The failure of irrigation in the upper basin presents the question of what, if any thing, to do with the water behind the dams which was originally intended for irrigation. Here again, policymakers reverted, albeit indirectly, to the Law of the River for guidance.

The question first came up as a part of the response to the energy shortage associated with foreign oil embargoes during the 1970s. Because the upper basin states contain significant reserves of coal and other fossil fuels, numerous plans and schemes for energy development were initiated. Energy development always requires large quantities of water, and planners turned to the main stem reservoirs. In 1974, it was estimated that around three million acre-feet were available annually from supplies stored but not used for irrigation.<sup>36</sup> The upper basin states wanted to capture the value of these surplus waters. The lower basin states were more than suspicious of any plans to remove water from the reservoirs. The Corps and the Bureau of Reclamation — competing federal agencies — each were reluctant to yield control. The ultimate legal question, still unresolved, is whether the states have rights to any of the water in the reservoirs, and, if so, how they may exercise control.

The Corps and the Bureau of Reclamation sought an interim solution in a Memorandum of Understanding which, for a two-year period, established that

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River System, State of South Dakota, 294 N.W.2d 784 (S.D. 1980).

34. MONT. CODE ANN. § 85-2-701 (1999). See generally PETER W. SLY, RESERVED WATER RIGHTS SETTLEMENT MANUAL (1988).

35. CARRELS, *supra* note 28.

36. FERRELL, BIG DAM ERA, *supra* note 28, at 148.

joint marketing by the two agencies could be undertaken. The upper basin states predictably objected, and a compromise was reached which allowed the states to control pricing and selling of water that was intended originally for federal irrigation projects.

The agreement and all of the issues it raised remained unanswered and dormant until the autumn of 1981 when Energy Transportation Systems, Inc. (ETSI) announced its intent to contract with *South Dakota* to purchase 50,000 acre-feet of water per year for fifty years from the *Oahe Reservoir*, which is located on the Missouri River and within the state. ETSI intended to transport the water by pipeline westward to Wyoming where it would be used to slurry coal for transit to Arkansas. ETSI also obtained a water service contract from the Bureau of Reclamation and a pumping permit from the Corps. The contract price for the fifty years was \$1.4 billion, which South Dakota hoped to use to finance local water projects. Nonetheless, the ETSI case raised many of the hot issues. The contract was between a state and a private company for out-of-state use. Indian tribes perceived a conflict with their reserved water rights. The lower basin states were concerned with what they saw as a precedent for out-of-basin diversions to the detriment of navigation. The question was clearly raised whether an upper basin state, or any basin state for that matter, had independent rights in some of the stored reservoir water. This water right was issued, after all, by a state rather than federal agency.<sup>37</sup> In 1982, the Bureau of Reclamation gave ETSI permission via a contract allowing ETSI to withdraw up to 20,000 acre-feet of water per year from Lake Oahe for forty years.

The downstream states objected to the withdrawal of this water from the Missouri River and claimed some entitlements to its continued presence in the river. They brought suit in 1982 shortly after federal permission was granted. The District Court ruled for the plaintiffs.<sup>38</sup> The Court of Appeals affirmed.<sup>39</sup> In *ETSI Pipeline Project v. Missouri*,<sup>40</sup> the Supreme Court of the United States affirmed, holding clearly that the reservoirs are under the control of the Corps and that any permit to market surplus water must be approved by the Corps rather than the Bureau of Reclamation:

In light of these specific provisions as well as the general background to the Act, it is beyond question that the Interior Secretary does not possess the authority that is claimed in this case: to execute a contract to provide water from an Army

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37. The state water right is described at *In re Water Permit No. 179102*, 351 N.W.2d 119 (S.D. 1984).

38. *Missouri v. Andrews*, 586 F. Supp. 1268 (D. Mo. 1984), *aff'd*, 787 F.2d 270 (8th Cir. 1986), *cert. granted*, 480 U.S. 905 (1987), *aff'd*, 484 U.S. 495 (1988).

39. *Missouri v. Andrews*, 787 F.2d 270 (8th Cir. 1986), *cert. granted*, 480 U.S. 905 (1987), *aff'd*, 484 U.S. 495 (1988).

40. 484 U.S. 495 (1988).

reservoir for industrial uses without obtaining the approval of the Secretary of the Army. Nobody has disputed that Lake Oahe, one of the six main-stem reservoirs on the Missouri River, was constructed by, and has been operated and maintained by, the Army Secretary, and the District Court found this to be true as a matter of fact. The Act says explicitly that such reservoirs are "under the control of" or "under the direction of" the Army Secretary. Only two provisions of the Act provide for the Interior Secretary to exercise any authority whatsoever at Army reservoirs, and in both instances the Act clearly states that the Interior Secretary's authority is subordinate to that of the Army Secretary, who does after all "control" those reservoirs. The Interior Secretary is authorized to "transmit and dispose of" electric power and energy generated at army reservoirs but only when that energy is "in the opinion of the Secretary of [the Army] not required in the operation of such projects." The Interior Secretary is also authorized to recommend to the Army Secretary that an Army reservoir "be utilized for irrigation purposes," and to "construct, operate, and maintain . . . such additional works in connection therewith as he may deem necessary for irrigation purposes." But this authority only comes into play if the Army Secretary "determines" that "any dam or reservoir project operated under [the Secretary's] direction" may be used for such purposes. The language of the Act is plain in every respect, and the conclusion is unavoidable that if the Interior Secretary wishes to remove water from an Army reservoir for *any* purpose, the approval of the Army Secretary must be secured.

The precise authority claimed by the Interior Secretary in this case is to enter into a contract, without the approval of the Army, to remove from Lake Oahe water that is claimed to be available for irrigation, and to allow that water to be devoted to industrial use. Nowhere does the Act provide any support for this claimed authority, and in fact it is directly inconsistent with §§ 6 and 8 of the Act, which show that only the Army Secretary has that independent authority in this instance.<sup>41</sup>

The ETSI project never materialized and the company's water delivery contract with South Dakota was rescinded according to its terms.<sup>42</sup>

The *ETSI* case retains a singular importance because of the light it casts on the division between the upper and lower basin. On the surface the issue did not seem so important. It was whether Congress intended Oahe Reservoir

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41. *Id.* at 505 (citations omitted).

42. Guhin, *supra* note 28, at 383.

(located in the upper basin) to be a "reclamation" facility subject to the water marketing authority of the Secretary of the Interior. The reason that upper basin states fought strenuously for Interior (Bureau of Reclamation) jurisdiction is found in section 8 of the Reclamation Act of 1902, which provides:

Nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.<sup>43</sup>

Section 8 requires that all actions of the Bureau of Reclamation conform to state water law in the delivery of main stem water, a constraint that is perceived as basic by the upper basin states, which fear that local control may be subordinated to the Corps' traditional preference for managing rivers for flood control and navigation. Thus, the decision was viewed as a serious setback in the upper basin.

The State of South Dakota was so concerned over the potential effect of the Supreme Court opinion in *ETSI Pipeline Project v. Missouri* on its ability to allocate the water of the river within the state that it filed an original action for equitable apportionment against the downstream states with the Supreme Court of the United States.<sup>44</sup> The Supreme Court delayed action on the lawsuit until it considered and decided the ETSI case.

In *South Dakota v. Nebraska, Iowa & Missouri*,<sup>45</sup> South Dakota argued that Congress accomplished a partial apportionment of the waters in the Missouri River when it enacted the Flood Control Act of 1944. According to South Dakota, the Act identifies a significant amount of water to be stored in the main stem reservoirs in South Dakota for various reclamation purposes, but principally irrigation. Those projects may eventually consume a very-substantial amount of water, and South Dakota asserts that until the irrigation projects are built, it has the authority to administer these waters free from the interference of the three downstream states. In other words, the plaintiff state's argument is that if the Bureau of Reclamation irrigation projects had been built, they would be operating under the federal reclamation laws, which require that the Bureau acquire and operate with state water rights, pursuant to state water law. In that event the three lower basin states would be powerless to object to the diversions under state law. Now, although the same

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43. 43 U.S.C. § 383 (1994).

44. *South Dakota v. Nebraska*, 485 U.S. 902 (1998) (memoranda decision); *South Dakota v. Nebraska*, 475 U.S. 1093 (1986) (same).

45. *Id.*

water is surplus pending future irrigation development, the state should be free to control its use without interference from the three named defendant states.<sup>46</sup>

Thus, South Dakota's case was *not* a petition to the Supreme Court for an equitable apportionment of the river. It was directed only to the specific controversy with the defendant states who had objected to the ETSI diversion. South Dakota's petition was ultimately denied, and the underlying issues simmer.<sup>47</sup> The plaintiff's case was a clear attempt to transfer to the Missouri the holding in *Arizona v. California*, and in that it failed.

*ETSI Pipeline Project v. Missouri*, along with the related attempts at litigation, represent but one stage in a controversy that began with the O'Mahoney-Milliken debate.<sup>48</sup> The debate — focused on whether upper basin states will control the river's supplies — will surface and resurface. A more recent skirmish found the upper basin states in a position they had always sought to avoid: dealing directly with the Corps of Engineers in a debate over how the river should be managed.

In the late 1980s drought placed more stress on the main stem reservoirs since any time after they had been filled.<sup>49</sup> This drought "compounded the enmity between upstream and downstream interests, [and] amplified the imbalance between realized and unrealized lower and upper basin Pick-Sloan program benefits."<sup>50</sup> Again, focus was upon issues that had not been dealt with seriously in the Flood Control Act of 1944. This time the interest was the use of the upper basin reservoirs for recreation, an industry that has grown lucrative, particularly at Oahe Dam in South Dakota and Garrison Dam in North Dakota. When drought came, the upper basin states concluded that the Corps was drawing-down the reservoirs in order to carry downstream navigation through the barge traffic seasons. In other words, the Corps was favoring a downstream, lower-basin, interest in its management of the river. Again, the upper basin states went to court.

*South Dakota v. Hazen*<sup>51</sup> was brought by the upper basin states seeking to enjoin the Corps from dropping the water level in Lake Oahe below that necessary to assure a successful walleye fish spawn by reducing releases for downstream navigation and not by lowering the levels in reservoirs. The Corps claimed it could not reduce releases under the rules in the Master Manual, the document it follows in operating the main stem reservoirs. The district court issued a preliminary injunction prohibiting the Corps from

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46. Guhin, *supra* note 28, at 478.

47. *South Dakota v. Nebraska*, 474 U.S. 941 (1985) (memoranda decision); *South Dakota v. Nebraska*, 475 U.S. 1093 (1986) (same); *South Dakota v. Nebraska*, 485 U.S. 902 (1988) (same).

48. *See supra* note 29.

49. FERRELL, *BIG DAM ERA*, *supra* note 28, at 156.

50. *Id.*

51. 914 F.2d 147 (8th Cir. 1990).

lowering the level of Lake Oahe until June 1, 1990, by which time the walleye spawn would have been complete. The district court rejected the Corps' contention that its actions were unreviewable.

On expedited appeal, the Eighth Circuit issued an order in which it stated that it had serious doubts whether the Corps' decisions regarding river management were reviewable. The Court also said that even if the Corps' decisions were reviewable, a preliminary injunction should not have been granted because the record did not support the district court's conclusion that the decisions of the Corps were arbitrary and capricious. In a subsequently rendered formal opinion, the Circuit Court declined to decide the reviewability issue, holding that the case was moot because the walleye spawn was complete.<sup>52</sup>

A second suit by the upper basin states was brought as the drought persisted and reservoir levels continued to decline. This time the plaintiff states contended that the Flood Control Act of 1944 established only two priorities: flood control and upstream beneficial consumptive uses. They argued that all other priorities have been established administratively by the Corps, that the Flood Control Act provides flexibility and requires the Corps to regularly balance the use of water storage and develop a plan of operation that reflects *contemporary* uses and needs of the basin. The plaintiffs further argued that if the Corps treated fish, wildlife, and recreational uses appropriately, more water would be left in the upstream reservoirs because the priorities for the water would be based on a realistic assessment of the benefits of lower basin navigation in relation to the benefits of upper basin recreational uses. The plaintiffs based their argument on assertions that the navigation industry that was envisioned in 1944 has never materialized and that navigation on the lower Missouri has declined in recent years. Upstream benefits from fish, wildlife, and recreation, on the other hand, were estimated at that time as \$67 million annually, "while the annual benefit of downstream navigation is estimated at less than \$14 million."<sup>53</sup> This suit did not go to trial. A settlement based upon the willingness of the Corps to draft a new Master Manual was reached. (Additionally, in 1992 and 1993, it rained.)

This most recent controversy raises the fundamental issue of identifying the purposes that the Corps is obligated to take into consideration when managing the river. Does the Flood Control Act direct the Corps to manage for "other purposes"? If so, what are they? Does the Corps have the authority to alter the purposes for which it manages the reservoirs? The Pick-Sloan documents refer almost exclusively to the purposes of flood control, navigation, irrigation, and hydroelectric power. The phrases "and other uses" or "and

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52. *Id.*; see Brian Morris, *Unanswered Prayers: The Upper Missouri River Basin States Take on the U.S. Army Corps of Engineers*, 68 N.D. L. REV. 897 (1992).

53. *Missouri River Regulation by the Corps of Engineers*, WATER L. NEWSL. (Rocky Mountain Mineral Law Found.), vol. 24, no. 1, 1991, at 1, 3.



other purposes" do appear in some places. On this basis the Corps has determined that it has authority to operate Corps projects to benefit recreation consistent with and subordinate to other purposes, including navigation.<sup>54</sup>

We thus observe that despite enormous and costly efforts to force the template of the Law of the River, the Missouri remains unallocated. The Law of the River — the set of rules which emerge from the arid regions — does not appear to solve conflicts among states, tribes, and the United States over how this river is to be used.

#### IV. *The Flow is the Resource*

The Missouri offers us what Professor Tarlock describes as the "paradox of conflict without scarcity" — the paradox of a "conflict over absolute abundance rather than scarcity."<sup>55</sup> In this the Missouri presents a situation that is distinguishable from that of those rivers where conflict led to or was governed by the Law of the River. With the Missouri, the Law of the River doesn't work. It has been tried, as we have seen, and with no significant reduction in conflict. The Law of the River *assumes physical scarcity* and assumes also that a majority of the desired water uses are consumptive, requiring some sort of diversion or removal of the water from the watercourse. It assumes that the river is simply a commodity to be used to the maximum extent possible.

Professor Tarlock proposes, and I think rightly, that the model that will work for the Missouri should be based upon a recognition that the primary *use* of the river will always be nonconsumptive, and that what must be shared is a *managed flow resource*.<sup>56</sup> But, what legal principles are to govern the allocation of a river where the value is not in consumptive diversions but in control over management of the flow? Generally the *flow* of a river is not something in which a property right can be asserted, except where a state prior appropriation water right has been established first, followed by state validation of an instream flow.

Property in a river's flow has not been protected under the federal no-compensation rule. While no perfect definition of the rule exists, in 1941 the Supreme Court stated:

The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private

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54. FERRELL, *BIG DAM ERA*, *supra* note 28, at 157.

55. A. Dan Tarlock, *The Missouri River: The Paradox of Conflict Without Scarcity*, 2 GREAT PLAINS NAT. RESOURCES J. 1, 1-2 (1997).

56. *Id.* at 11-12.

property right in such lands for which the United States must make compensation.<sup>57</sup>

There is, therefore, no constitutional right to compensation when the federal government interferes with a use of the flow of a navigable stream or its tributary.<sup>58</sup> In addition, where property rights exist, either in riparian land or water rights the navigation servitude recognizes that the *regulatory* power of Congress — agencies such as the Corps acting pursuant to Congressional authorization — is quite broad.<sup>59</sup> As a result the one thing of value in the Missouri River — the flow — appears to be closely controlled by the Corps of Engineers despite the serious claims of tribes and states.

#### *V. A Search for Process: The Master Manual Review*

The Law of the River enjoys the signal advantage of defined processes for conflict resolution: stream-wide adjudications, compacts, judicial precedent and Supreme Court review provide what is for the most part a predictable framework in which rules such as that of *Winters* can be applied. In sharp contrast, with the Missouri we are faced with what is at best an elusive administrative process and at its worst an absence of process:

The standard institutional accounts of the Missouri River focus appropriately on the federal-state conflicts and the failure of the states to find a mutually acceptable allocation formula or even to find a successful cooperation process. The states have preferred bitter, but tried and true, traditional sectional water politics to cooperation. The federal government has managed the river, primarily with the support of the lower basin states, but has provided little vision or leadership . . . . Due to the Great Depression, the basin states were given a series of multiple purpose mainstem reservoirs that were to be managed by the federal government for the benefit of basin water users and states. *By default, the Corps became the river master to the exclusion of the states and the Bureau of Reclamation.*<sup>60</sup>

The *ETSI* decision held that the reservoirs and their management are under the control of the Corps.<sup>61</sup> Litigation to achieve something approaching apportionment cannot be successfully initiated, and the upper basin states were willing to settle litigation in which they asserted the dominance of upper basin uses. The only process remaining is a review by the Corps of Engineers of

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57. *United States v. Chicago, M., St. P. & P.R. Co*, 312 U.S. 592, 596-97 (1941).

58. Morreale, *supra* note 9, at 43-46.

59. *Id.*

60. Tarlock, *supra* note 55, at 3 (emphasis added).

61. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 514 (1988).

what it refers to as the Missouri River Master Water Control Manual (the Master Manual). The Master Manual is "the document that presents the basic water control plan and objectives for the integrated operation of the mainstem reservoirs in conjunction with the downstream projects."<sup>62</sup> This review process provides the "only game in town." Presumably, all legitimate claimants to Missouri River water and water uses must find satisfaction from this process, or be precluded from relief for the foreseeable future. For tribes, seeking to protect and assert *Winters* rights, the new process presents a unique situation.

The process of developing a revised Master Manual is far from simple, and its consequences are both direct and immediately apparent on that ground. Once in place, the revised Master Manual governs every aspect of the river's flow, and influences every use. Those whose day-to-day economies rely on the river — such as hydropower users, recreation concessionaires, barge users, domestic and agricultural water suppliers, downstream riparian cities, and industries — are affected directly. Flow patterns have an equally direct impact on the natural river ecosystems, including those based in the riparian zone. All who live along the river or use it in any way are affected by the scope and content of the Master Manual. More importantly, because of both the administrative and practical complexity, once implemented, the Master Manual is not readily changed. While not a "permanent" solution, the Master Manual, as a practical matter, is a final rule that is likely to govern for an extended period. As a result, all whose interest are affected, such as the Missouri River Indian tribes, must treat this process with appropriate respect.

Some will likely conclude that it is excessive to suggest that the Master Manual administrative process is analogous to a judicial process leading to a final appellate court decision and order. The final Master Manual will, after all, be subject to judicial review. If particularly controversial, some sort of Congressional oversight is theoretically available. Having said that, it is indeed the suggestion here that the final Master Manual may lock in the status of specific river uses with a firmness that is every bit as solid as many Supreme Court equitable apportionments. Any given process is as important as the finality and enforceability of the final decision, be it judicial, legislative or administrative. For Missouri River water users, the Master Manual process may be as important as the litigation in *Arizona v. California* was to Colorado River water users. In other words, for the Missouri, it is the law of the river.

The Master Manual review process, once concluded, will have extended across more than a decade, and will have consumed an enormous amount of public resources. A first proposal accompanied by a Draft Environmental Impact Statement was published in July 1994, followed by a period of public review and comment. A revised draft proposal and environmental impact

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62. MISSOURI RIVER DIV., U.S. ARMY CORPS OF ENGINEERS, DRAFT ENVIRONMENTAL IMPACT STATEMENT, MISSOURI RIVER MASTER WATER CONTROL MANUAL 1-1 (July 1994).

statement appeared in the autumn of 1998, with a comment period to extend through March 2000. The schedule then calls for a final plan and environmental impact statement in 2000, followed by a formal Record of Decision, revision of the Master Manual, and implementation on the ground.

#### VI. *The Claims of the Missouri River Tribes*

At its essence, for tribes along the Missouri, a *Winters* doctrine claim is that they are entitled to the *economic* benefits of water, that is, to the *use* of water needed to construct some type of economy and society. In the familiar terms of the Law of the River this claim would be redeemed by adjudication of a specific quantity of available annual flows as *owned* by the tribes. These ownership rights are thereafter binding and enforceable against other claimants. In the context of the Missouri, where the resource is the abundant flow in the main channel, the *Winters* right claim is less likely to be realized in terms of a specific quantity. Rather, tribes are compelled to argue that since it is the abundant flow that is generating economic benefits, tribes must, like any other property owner, be allowed to determine how the flow is to be used, and to enjoy directly the economic benefits generated by that use.

By way of further explanation, consider the situation of a tribe with adjudicated *Winters* rights to Colorado River water. Because such a tribe is owner of a specific amount of water, it is free to generate economic return by diverting the water for its own use or by leasing the water to others. In the Colorado basin, these are the principal means of developing economic return. In contrast, on the Missouri the tribes have an acknowledged but unadjudicated *Winters* right to the waters. However, it is the *flow* that is of economic value, just as it is the *diversion* that is of economic value on the Colorado. As owners, are the tribes not then entitled to claim the economic value of that property as it is used? Are they not entitled to a share of control over the flow? If so, by what process are they to raise the claim?

Employing simple property analysis, and assuming that a portion of the waters in the flow belong to the tribes, there is cause of action for a trespass or conversion unless the property right has been in some way qualified (as by congressional action), is subsequent to other rights, or the tribe is somehow barred from seeking judicial protection of its property interest.

Apart from direct legislative intervention, which is unlikely, it appears that Missouri River tribes have available only two procedural avenues in their search for a meaningful application of their *Winters* doctrine water rights. The first, as we have seen, is the Law of the River model, which assumes scarcity as well as a current desire and ability to divert and put to use a specific amount of river water. Since there is not scarcity along the Missouri, and since any diversion by the tribes in the foreseeable future is at best speculative, this approach has little value. Second, a compact among tribes, basin states and the United States would recognize *Winters* rights. Due to the sharp division of interest among the upper and lower basin states and among

the upper basin states and the tribes, a compact is also remote. The third avenue takes the tribes into uncharted legal and policy grounds. In the absence of scarcity and proposed diversions, tribes can claim, in theory, control over the *flow* of the river in proportion to their ownership interest. However, control of the flow is in the hands of the Corps and its Master Manual process — a de facto allocation. Do the tribes, owners of *Winters* water rights in the Missouri River, have a legal right to specify the results of the Master Manual review? If not, what do the tribes own? To what extent is the Corps bound to honor tribal interests and goals? Do the tribes have procedures for relief if tribal interests are not honored?

The Flood Control Act of 1944 is the authority for the Corps' operations and it specifies that the Corps is to control the flow for a variety of purposes, all of which ignore the *Winters* claim of the Missouri River tribes. In addition the Corps is armed with extraordinary constitutional authority over the *flow* in the form of the no-compensation rule and the navigation servitude. It is fair to assume that such regulatory authority extends to *Winters* rights as readily as to property rights created by state law. In other words, the Corps comes to the review process armed with hefty constitutional authority to administer and regulate private interests, including water rights asserted by tribes and states.

For tribes, comfortable with the existing form and substance of *Winters* rights, claims and adjudications, the Master Manual review process presents the need for a new script. If the value of Missouri River water is in the flow, then the interest of the tribes become more analogous to that of riparian landowners, who seek and enjoy their water benefits on the basis of geographic location. However, the power to allocate benefits among riparians is lodged almost exclusively with the Corps, which comes to the process armed with a broad constitutional and legislative mandate. Thus, how the Corps chooses to manage the Missouri River is likely to bear on the tribes with the heavy weight of finality.