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FEDERAL AND INTERSTATE CONFLICTS IN MONTANA WATER LAW: SUPPORT FOR A STATE WATER PLAN

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I. INTRODUCTION

The water resources of the State of Montana have never been quantitatively determined. This uncertainty has posed no problems because the supply of water has been adequate to meet the needs of the state. However, as more demands are placed on the state's water resources, taking the citizens of Montana closer to the day when there will be no surplus water, it is important that the extent of Montana's water be defined and policies be established to accomplish efficient use and protection of the resource so that adequate future supplies can be assured. The Montana Water Resources Act sets out the policy considerations to be addressed in

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formulating a state water plan.[1] Those considerations seek to promote the public interest, protect the water resources and coordinate plans of the various levels of government to secure the maximum social and economic prosperity for the citizens of Montana.

The demands being placed on Montana's finite water resources come from many quarters. Paramount among potentially conflicting claims are those that may be asserted by interests outside the state. The eventual uses which Montana might make of its water resources could be foreclosed by demands of downstream states or the federal government. The state water plan must recognize these competing claims and take into account the effect they may have on development of the state's water resources.

The purpose of this article is to identify areas in which the state's water rights might be subject to attack and review the legal status of these areas of controversy. Such an analysis is intended to give a general background and develop a legal awareness of the processes involved. With such an understanding of the present legal system and the precedents established by it, a state water plan can be designed to most effectively accommodate these competing demands. It is recognized that the specifics of the water plan will most likely necessitate further research in particular areas.

Potential competing claimants for Montana's water may be broadly classified as: (1) other states, either in their own right or representing their citizens; and (2) the federal government. Part one of this article deals with the methods for resolving state-state conflicts and the factors which are determinative. Part two deals with the power the federal government may exert on Montana's water. Part three deals with the methods and tools Montana may use to protect its water resources from these external interests.

II. INTERSTATE ALLOCATION

Disputes over the waters of interstate streams[2] have been resolved by three different avenues. The first method used for interstate allocation of waters was the doctrine of equitable apportion-

1. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 85-1-101 (1979).

2. Disputes over interstate groundwater involve the same principles, though the application may be somewhat different due to hydrologic considerations. *See* Bittinger & Jones, *Management and Administration of Ground Water in Interstate Aquifers, Phase II* (Report financed by U.S. Department of the Interior, authorized under Water Resources Research Act of 1964 (1974)); Fischer, *Equitable Apportionment of Interstate Groundwaters*, 21 ROCKY MTN. MIN. L. INST. 721 (1975) [hereinafter cited as *Equitable Apportionment*]; Fischer, *Management of Interstate Ground Water*, 7 NAT. RESOURCES LAW. 521 (1974) [hereinafter cited as *Interstate Ground Water*]; Pendley, *Allocating Buried Treasure: Federal Litigation Involving Interstate Ground Water*, 11 LAND & WATER L. REV. 103 (1976).

ment. This doctrine is applied when states seek a solution to interstate allocation in court. The second method for interstate water allocation is a negotiated agreement or compact apportioning the water under the authority of the Compact Clause of the United States Constitution.[3] Only one interstate watershed in Montana, the Yellowstone River Basin, is subject to an interstate compact. The compact approach to resolving interstate water allocation problems is "by far the most effective, most sound, most flexible, and over-all most satisfactory . . . [but] [r]egrettably, . . . it is also the [least] likely."[4] The difficulty of obtaining the consent of all the party-states and the federal government limits the use of the compact. Finally, interstate waters may be allocated by congressional apportionment. The power of Congress to apportion waters of interstate streams among the states is demonstrated in the dispute over the waters of the lower Colorado River.[5]

A. *Equitable Apportionment*

A suit for equitable apportionment of interstate water is often brought by a state, under the doctrine of *parens patria,* as representative of all its citizens.[6] The portion of water allocated to the state under the proceeding will then be allocated intrastate to the state's citizens, under the state's own water law.[7] Each citizen of a party-state is bound by the decree of the court in the interstate action and each private water user may have no right in excess of that allocated to his respective state.[8]

The forum for an equitable apportionment suit is the United States Supreme Court. The United States Constitution grants federal jurisdiction to "controversies between two or more states" and original jurisdiction to the Supreme Court in cases "in which a State shall be a party."[9] Thus, the Supreme Court shall act as a trial court in controversies between states involving the allocation of interstate waters. The Court, however, has been reluctant to exercise its jurisdiction unless the matter is one of "serious magni-

3. U.S. CONST. art. I, § 10.

4. *Interstate Ground Water, supra* note 2, at 546.

5. Arizona v. California, 373 U.S. 546 (1963) (litigated the Boulder Canyon Project Act, 43 U.S.C. §§ 617 through 617t (1976)).

6. *See* 3 R. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 66-75 (1911) [hereinafter cited as HUTCHINS]. *See also* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

7. *Id.*

8. *Id.*

9. U.S. CONST. art. III, § 2.

tude."[10] In this situation the Court requires the state to bear a greater burden than an individual would in showing that the equitable powers of the Court are required.[11] The Court's reticence to adjudicate such cases may be interpreted as a preference toward the negotiated compact.

> The reason for judicial caution in adjudicating the relative rights of states in such cases is that, while we have jurisdiction of such disputes, they 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 a judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement.[12]

The Court's reluctance to deal with these issues is demonstrated by the fact that only three of the suits for equitable apportionment brought before the Supreme Court have actually resulted in decrees dividing the waters.[13]

There have been few cases involving equitable apportionment. The doctrine has, however, evolved enough so that certain factors and equitable principles can be deemed to be crucial to the Supreme Court. A review of three principal equitable apportionment cases illustrates the development of those factors and principles.

The first formulation of the doctrine of equitable apportionment was set out in *Kansas v. Colorado*[14] in 1907. That case involved a dispute over the waters of the Arkansas River which rises in Colorado and flows easterly into Kansas. Kansas, which recognized riparian rights,[15] asserted its right to the natural flow of the stream. Colorado, recognizing appropriative rights[16] but asserting

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10. New York v. New Jersey, 256 U.S. 296, 309 (1921); Missouri v. Illinois, 200 U.S. 496, 521 (1906).

11. Colorado v. Kansas, 320 U.S. 383, 393 (1943); Missouri v. Illinois, 200 U.S. 496, 521 (1906).

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

13. Nebraska v. Wyoming, 325 U.S. 589 (1945); New Jersey v. New York, 283 U.S. 336 (1931); Wyoming v. Colorado, 259 U.S. 419 (1922).

14. 206 U.S. 46 (1907).

15. Riparian rights: The system of law dominant in Great Britain and the eastern United States, in which owners of lands along the banks of a stream or waterbody have the right to reasonable use of the waters and a correlative right protecting against unreasonable use by others that substantially diminishes the quantity or quality of water. The right is appurtenant to the land and does not depend on prior use. 7 R. CLARK, WATER AND WATER RIGHTS § 310 (1967) [hereinafter cited as CLARK].

16. Appropriative rights: The system of water law dominant in the western United States under which (1) the right to water is acquired by diverting water and applying it to a beneficial use, and (2) a right to water is superior to a similar right acquired later in time. CLARK, *supra* note 15, at §§ 272-73.

sovereign rights, contended it had a right to appropriate all the waters of the stream for beneficial use.

Since the internal water law of each state had no common elements the Court applied equitable principles to give each state a just and reasonable share. The apportionment took the form of a division of the benefits received from the flow of the river rather than a literal division of the waters.

> We must consider the effect of what has been done upon the conditions in the respective states and so adjust the dispute upon the basis of equality of right as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream.[17]

The Court enumerated no standards for evaluating which benefits deserve the greatest protection. The case was dismissed since Kansas failed to show that Colorado's actions caused substantial injury.[18] Thus the Court made no apportionment or division.

Some language in *Kansas v. Colorado* indicates that had the substantive law of each state been similar; the Court might have applied the common elements between the states.[19] *Wyoming v. Colorado*[20] demonstrates this common-element approach to equitable apportionment. Since both were prior appropriation states, the Court held that application of the doctrine of priority between the two states would, in that event, be equitable apportionment.[21] In allocating the waters of the Laramie River between Colorado and Wyoming, the Court generally applied the rules of priority of the appropriation across state boundaries. "Here the complaining state is not seeking to impose a policy of her choosing on the other state, but to have the common policy which each enforces within her limits applied in determining their relative rights in the interstate stream."[22] Unfortunately, later equitable apportionments were not so simply concluded.

In *Nebraska v. Wyoming*[23] the party-states had similar alloca-

17. Kansas v. Colorado, 206 U.S. at 100.

18. *Id.* at 117-18. The Court dismissed the case without prejudice granting Kansas the right to again apply for relief when it appeared that the substantial interests of Kansas were being injured. However, even thirty-six years later the Court found that Kansas had failed to show that "Colorado's use has materially increased, and that the increase has worked a serious detriment to the substantial interests of Kansas." Colorado v. Kansas, 320 U.S. 383, 400 (1943).

19. Kansas v. Colorado, 206 U.S. at 104-05.

20. 259 U.S. 419 (1922).

21. *Id.* at 470.

22. *Id.* at 465.

23. 325 U.S. 589 (1945).

tion schemes. All three states involved, Colorado, Wyoming and Nebraska, applied the doctrine of prior appropriation.[24] The litigation involved allocation of the North Platte River among Colorado, Wyoming, Nebraska and the United States. Several parties urged that the doctrine of priority be applied interstate. Relying on *Wyoming v. Colorado,* the Court stated: "The cardinal rule of the doctrine is that priority of appropriation gives superiority of right."[25] The Court continued:

> Since Colorado, Wyoming and Nebraska are appropriation states, that principle would seem to be equally applicable here. That does not mean that there must be a literal application of the priority rule . . . . If an allocation between appropriation states is to be just and equitable, strict adherence to the priority rule may not be possible.[26]

The Court found priority to be a guiding principle but refused to be bound by it if application of the principle would lead to undue hardship.[27] In this case, the Court sought to protect "established uses" which may be the basis of the economy of a region.[28] Relevant factors considered by the Court included

> physical and climatic conditions, the *consumptive use* of water in 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 downstream areas, [and] the *damage to upstream areas* as compared to the *benefits to downstream areas* if a limitation is imposed in the former.[29]

This enumeration of factors may be helpful in designing a state water plan. Quite frequently the downstream states in a river basin develop before the upper basin states. Thus, the downstream uses have the more senior right under a strict priority scheme. This list indicates that the Court is willing to consider factors in addition to strict priority dates and that the Court will not halt or curtail the economy of a region merely because it developed more slowly. Since the headwaters of several drainages lie in Montana this judicial stance is of particular importance to the state.

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24. Nebraska originally was a riparian state but it later adopted the appropriation doctrine as western, more arid areas of the state were settled. Riparian rights were preserved to a certain extent, that is they were still recognized but inferior to appropriative rights. The Court considered Nebraska to be an appropriation doctrine state. 325 U.S. at 599-600.

25. *Id.* at 617-18.

26. *Id.*

27. *Id.* at 622.

28. *Id.* at 618.

29. *Id.* (emphasis added).

In *Nebraska v. Wyoming* the Court considered the degree of dependence and reliance a region places on its water supply. The Court did not place any restrictions upon water used for "ordinary and usual domestic and municipal purposes and consumption . . ." and declared that "nothing in the recommended decree is intended to or will interfere with such diversions and uses."[30] The Court was unwilling to require that the established use of water for domestic purposes be abated, even if such uses were junior to other uses according to priority of appropriation. Such a holding involving domestic water use is easy to accept. However, deciding the relative importance of other established uses is more difficult and the answer less clear.

First, what constitutes an "established use"? The Court has not defined established uses with any specificity. The Court does, however, specifically address the economy of a region as a factor to be considered: "The economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them."[31] Montana, for example, whose economy is largely based on agriculture made possible only through irrigation, would not necessarily, by virtue of its more junior water rights, have its water supply terminated because of more senior downstream out-of-state appropriators. This treatment by the Court actually results in a softening of the appropriative scheme of water rights where the water supply crosses a state line.

It must be remembered that interstate water rights are not adjudicated on an individual basis. A share would be allocated to each state and that state would administer its portion under its own state water law. In Montana that law is based on strict priority of appropriation. Thus, the more junior rights holders mentioned above who were able to win against a more senior out-of-state appropriator could have their water cut off by a more senior upstream in-state appropriator.

A state water plan that mirrors the factors enumerated by the Court provides the greatest opportunity to protect the state waters from out-of-state interests in an action for equitable apportionment. A state policy therefore should favor those uses on which local or regional economies depend. Established uses should be encouraged. Those uses would certainly encompass agriculture in an

30. *Id.* at 656.
31. *Id.* at 618.

agrarian economy, and might also include in-stream reservations in an area dependent on recreation, fishing and hunting.

It is dubious if prospective uses designated in a state water plan could be considered as established uses. However, since an action for equitable apportionment is an action in equity the Court may consider all relevant factors. The list set out in *Nebraska v. Wyoming* was intended by the Court to be merely illustrative, "not an exhaustive catalog."[32] Thus, it seems likely that the Court would give consideration to prospective uses included in a state water plan, but the weight to be given to those uses is uncertain.

B. *Interstate Compacts*

1. *Formation and Effect*

The Supreme Court and Congress have both expressed a preference for interstate compacts as the vehicle for resolving interstate water allocation problems.[33] The use of a compact is superior to the equitable apportionment process in several ways. First, a compact provides certainty and a framework for dealing with the complicated questions of interstate allocation of water. Increased certainty stimulates development because it lowers the risk that water on which an enterprise is dependent might be lost. Second, a compact provides increased flexibility. It can provide for the possibility of future change of conditions. Judicial resolutions are limited to the controversy at hand. The court cannot issue a judgment regarding prospective uses nor can it formulate a plan to deal with future changes. Any change in a judicial decree requires the time and expense of further adjudications. Third, a compact can provide for expert administration. The judiciary is ill-equipped to deal with the technical issues involved in interstate water management. The negotiators of a compact usually are persons with knowledge and expertise in the physical management of water. They can better design a fair and efficient program for apportioning interstate waters.

The Compact Clause of the United States Constitution provides: "No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State . . . ."[34] This provision has been interpreted to apply to any agreement between states "directed to the formation of any combination of states

32. *Id.*

33. Colorado v. Kansas, 320 U.S. 383, 392 (1943); Boulder Canyon Project Act, 43 U.S.C. § 617c (1976).

34. U.S. CONST. art. I, § 10.

tending to increase political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[35] This language has not provided an avenue to avoid congressional consent for compacts allocating waters between western states. All compacts entered to date have required the consent of Congress.

The federal role in compacts may extend beyond the approval required by Congress. Often, Congress gives consent to negotiate though it is not required. Since ultimate federal approval is required, keeping Congress apprised of the developments during the negotiation helps to speed approval when the compact is submitted to Congress. Usually the federal government sends a negotiator to participate in formulation of the compact.

A federal representative may also be involved in the administration of the compact. Under the Yellowstone River Compact a federal official is appointed to the Yellowstone River Compact Commission by the United States Geological Survey (USGS). The official, however, votes only if the other members of the Commission are unable to decide.[36] During the ratification of the Yellowstone River Compact some objection was raised concerning the authority of the USGS rather than the president to appoint the federal representative.[37] However, since an additional function of that official is to assist with technical data, it seems appropriate that the official be appointed by the USGS. After a compact has been negotiated it is sent to the state legislatures for ratification. The consent of Congress is sought after the respective state legislatures have ratified the compact. The compact then usually becomes a statute of each state and also federal law.

The status of the interstate compact as law is unusual. It is as equally binding as any adjudication, equitable apportionment or decree by the Supreme Court. Its validity does not depend on an enforcing judicial order. A compact is essentially a treaty between two sovereigns. The consent of Congress removes the constitutional restriction on the sovereignty of the states and restores them to the status of sovereign powers capable of enacting a treaty.[38]

This restoration of sovereign power raises questions as to the legal status of the compact in relation to state law. Some commen-

35. Virginia v. Tennessee, 148 U.S. 503, 519 (1893). *See also* Engdahl, *Characterization of Interstate Agreements; When is a Compact Not a Compact*, 64 MICH. L. REV. 63 (1965).

36. MCA § 85-20-101 (1979) (Yellowstone River Compact, art. III).

37. H.R. Doc. No. 319, 90th Cong., 2d Sess. 370 (1968).

38. Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 883, 894 (1838); Poole v. Fleeger, 12 U.S. (11 Pet.) 185 (1837).

tators contend that the vehicle of the interstate compact permits the states to exercise powers in excess of those normally available to them. It might then follow that the compact, as quasi-treaty, would be supreme to state law. Indeed, in some instances this proves to be the case.[39] The same result occurs if the compact is considered a federal statute, by virtue of the consent of Congress, thus prevailing over state law by the Supremacy Clause.[40] Similarly, the compact, also a state act, repeals by implication the conflicting older state law.

The extent to which a compact might override a provision of a state constitution has been the subject of several cases.[41] While none of the cases actually hold that an interstate compact is superior to the state constitutional provisions, the cases indicate that if no other grounds for the decision were feasible, the Supreme Court could find that such provisions must fall.[42]

In *Dyer v. Sims*[43] a compact to control pollution on the Ohio River entered into by West Virginia and eight other states was at issue. The auditor for West Virginia refused to pay out the monies necessary to run the compact commission because he felt that the compact violated a debt limitation provision in the West Virginia Constitution. The West Virginia Supreme Court supported the auditor's position, but the United States Supreme Court reversed. The ground for reversal was not the supremacy of the compact over the state constitution. Instead the Court held that the two instruments were not in conflict thus departing from the traditional rule that the state supreme court is the final interpreter of the state constitution. Apparently where an interstate compact was involved, the United States Supreme Court was not willing to let the state supreme court's interpretation of the state constitution invalidate the compact:

> It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a

39. Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823). The Supreme Court declared a state law unconstitutional on the ground that it impaired the obligation of a compact between different states of the Union.

40. U.S. CONST. art. VI, § 2.

41. Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959); Dyer v. Sims, 341 U.S. 22 (1951); Delaware River Comm'n v. Colburn, 310 U.S. 419 (1939); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

42. *See Interstate Ground Water, supra* note 2, at 535.

43. 341 U.S. 22 (1951).

controversy with a sister State.[44]

The same result was obtained in Hinderlider v. La Plata River & Cherry Creek Ditch Co.,[45] a similar case involving Colorado and New Mexico. The La Plata River Compact apportioned interstate waters between Colorado and New Mexico. The ditch company had an adjudicated water right to 39½ cfs from the stream. When the stream flow became low, the state engineers from the respective states established a formula for the most efficient use of the water which called for rotating the whole supply of water between Colorado and New Mexico users on a ten-day cycle. Colorado's constitution provides, "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."[46] The ditch company had claimed that it was being deprived of its vested property rights guaranteed by the Colorado Constitution. The Colorado Supreme Court upheld that position.[47] The United States Supreme Court, not surprisingly, reversed. Again, clearly the effect of the ruling was that the provisions of the interstate compact would override the state constitution. The Court found, however, that no property right was taken. The ditch company's right was valid in Colorado, but only to the extent of Colorado's share of the water. "[T]he Colorado decree could not confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream; and its share was only an equitable portion thereof."[48] Thus, barring any "vitiating infirmity" in execution of the compact, "[t]he Compact [could] not have taken from the Ditch Company any vested right."[49]

The same case also illustrates the way a compact may affect previously established private rights. In spite of the ruling of the Court, the water right that the ditch company held by an 1898 Colorado court decree was diminished by the La Plata Compact of 1925. Even though the Court held that no vested property right was taken, private rights were in fact adversely affected by the compact. One suggestion to deal with this problem is that a state consider compensating owners for the water rights which will be impaired by the compact.[50]

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44. *Id.* at 28.

45. 304 U.S. 92, 102 (1938).

46. COLO. CONST. art. XVI, § 5.

47. La Plata River & Cherry Creek Ditch Co. v. Hinderlider, 93 Colo. 128, 25 P.2d 187 (1933).

48. Hinderlider, 304 U.S. at 102.

49. *Id.* at 108.

50. HUTCHINS, *supra* note 6, at 86. The effect of such compensation would be two-fold. First, those holders of state water rights which are diminished by the terms of the compact

The effect of the cases discussed above is that the terms of a compact will be enforced in spite of state statutes or constitutional provisions. To date, however, the Supreme Court has been able to avoid a holding directly on this point.

2. *Jurisdiction to Hear Compact Disputes*

Closely associated with the question of the federal law status of a compact is the jurisdictional issue. As mentioned earlier in the section on equitable apportionment, the United States Supreme Court has original and exclusive jurisdiction in actions between two or more states.[51] The Supreme Court has original jurisdiction, though not exclusive, over actions by a state against the citizens of another state.[52] However, if a state is not a party, there must be another basis for jurisdiction if a compact dispute is to be heard in federal court.

Such jurisdiction must be established under the federal question provision, which states:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.[53]

For original federal jurisdiction to exist under section 1331, the plaintiff must show a right or immunity created by the Constitution or laws of the United States to be an essential element of the cause of action.[54] If the gravamen of the complaint requires the interpretation of a federal law, then such construction of the law forms an essential element of the cause of action.[55] Thus, if it can be established that an interstate compact is a federal law and the cause of action requires construction of the compact, then original federal jurisdiction will be established.

A line of cases following *Delaware River Commission v. Colburn*[56] makes it clear that the construction of an interstate compact is a federal question. In *Colburn,* the Supreme Court found that "by the sanction of Congress, [the compact] has become a law

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would be compensated for their loss. Second, the added cost to the state of such compensation would cause the state to seek offsetting benefits in the terms of the compact, and thus figure prominently in the negotiation of the compact.

51. U.S. CONST. art. III, § 2.

52. *Id.*

53. Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369 (amending 28 U.S.C. § 1331(a) (1976); eliminates requirement that amount in controversy exceed $10,000).

54. Gully v. First National Bank, 299 U.S. 109, 112 (1936).

55. League to Save Lake Tahoe v. Tahoe Reg. Plan. Agency, 507 F.2d 517, 519 (9th Cir. 1974).

56. 310 U.S. 419 (1940).

of the Union."[57] In *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*[58] the Ninth Circuit held that a case involving the construction of an interstate compact which requires a judicial determination of the nature and scope of obligations set forth therein "arises" under the laws of the United States within the meaning of section 1331(a). Thus, federal district courts will have original jurisdiction over matters involving the interpretation of interstate compacts.

The original jurisdiction of the federal district court in interstate compact matters is not necessarily exclusive of state authority to hear the question. Some compacts provide by their terms that all questions are to be resolved in federal court.[59] However, where the compact contains no such special provision federal jurisdiction will be found concurrent with that of the state.[60]

In all cases involving interstate compacts the United States Supreme Court remains the final arbiter. As discussed earlier, the Supreme Court has original jurisdiction when one of the parties is a state. When the controversy involves private litigants the Supreme Court will have certiorari jurisdiction. Review may be sought "(3) by writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of a commission held under, the United States."[61] Certiorari jurisdiction does not require that the federal question form an essential element of the complaint. However, the record in the state court must establish that a federal question exists.[62]

3. *Cancellation or Amendment*

A typical provision written into the text of many interstate compacts reserves the right of the United States to alter, amend or replace the compact. The Yellowstone River Compact contains such language.[63] However, that provision also states, "This reservation shall not be construed to prevent the vesting of rights to the use of water pursuant to applicable law and no alteration, amend-

57. *Id.* at 427.

58. 507 F.2d 517, 522 (9th Cir. 1974).

59. *See* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

60. Dyer v. Sims, 341 U.S. 22 (1951); Utah Int'l v. Intake Water Co., 484 F. Supp. 36 (D. Mont. 1979).

61. 28 U.S.C. § 1257 (1976).

62. Dyer v. Sims, 341 U.S. 22 (1951); Delaware River Comm'n v. Colburn, 310 U.S. 419 (1939).

63. Yellowstone River Compact, 655 Stat. 671 (1951).

ment, or repeal . . . shall be held to affect rights so vested."[64] Amendment by signatory states or the federal government requires that any changes be made by the same procedure as approval of the original compact.

Termination of a compact requires unanimous consent of all the signatory states. Several times parties have sought to void a compact through the courts of one of the states. In *Sims*,[65] the auditor of West Virginia sought to void an interstate compact because it purportedly violated the West Virginia Constitution. The Supreme Court ruled that unilateral nullification of an interstate compact is not possible by a signatory state.[66] Thus, while a state court may interpret an interstate compact, any such decision will be subject to review in the federal courts.

4. *The Yellowstone River Compact*

The Yellowstone River Compact[67] was entered into by North Dakota, Wyoming and Montana in 1950 with the intent to promote interstate comity and remove all causes of present and future controversy between the states and their citizens with respect to the waters of the Yellowstone River and its tributaries. The compact establishes a commission to administer the compact between Wyoming and Montana.[68] No commission was deemed necessary to administer the compact between Montana and North Dakota. The Yellowstone River Compact Commission is comprised of one member from Montana and one from Wyoming, to be appointed by the respective governors, and one federal representative to be appointed by the director of the USGS.[69] The federal representative votes only if the other commissioners fail to agree.[70]

The compact recognizes all appropriate rights to the beneficial use of the waters of the Yellowstone River system existing as of January 1, 1950, and such supplemental supplies as are necessary for those rights.[71] The unused and unappropriated waters of the Yellowstone and its interstate tributaries are allocated between Montana and Wyoming on a percentage basis. The provision relating to the division of the waters between Montana and North

64. *Id.*
65. *See* text accompanying notes 43-44 *supra*.
66. Sims, 341 U.S. at 28.
67. 65 Stat. 663 (1951); MCA § 85-20-101 (1979) (Yellowstone River Compact).
68. MCA § 85-20-101 (1979) (Yellowstone River Compact, art. III, § A).
69. *Id.*
70. *Id.* (art. III, § F).
71. *Id.* (art. V).

Dakota recognizes all rights to waters of the Yellowstone below Intake, Montana, existing on January 1, 1950.[72] Those rights are unaffected by the terms of the compact. During the summer months, the waters are divided between the two states on a proportionate basis of the acreage irrigated. Tributaries wholly within one state which flow into the Yellowstone below Intake, Montana, are allocated to the respective states in which they are situated. Domestic and stockwatering uses are excluded from the compact altogether, provided that no stockwatering reservoirs have a capacity exceeding 20 acre-feet.[73]

The compact allots the percentages of each of the interstate tributaries between Wyoming and Montana. The mechanics of this allocation are not difficult. However, the provisions are slightly ambiguous as to what waters are subject to this percentage allocation. At the outset, the compact recognizes those rights in existence as of January 1, 1950, and "such quantity of that water as shall be necessary to provide *supplemental water supplies*" for those rights.[74] The compact does not define those supplemental supplies nor indicate how they are to be determined. The section which sets out which water is subject to the percentage allocations provides:

> The quantity to which the percentage factors shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:
>
> a. the total diversions, in acre-feet above the point of measurement, for irrigation, municipal and industrial uses in Wyoming and Montana *developed* after January 1, 1950, during the period from October 1 to that given date;
>
> b. the net change in storage, in acre-feet in all reservoirs in Wyoming and Montana above the point of measurement *completed* subsequent to January 1, 1950, during the period from October 1 to that given date;
>
> c. the net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes *developed* after January 1, 1950, during the period October 1 to that given date;
>
> d. the quantity of water, in acre-feet that passed the point of measurement in the stream during the period from October 1 to that given date.[75]

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72. *Id.*
73. *Id.*
74. *Id.* (emphasis added).
75. *Id.* (emphasis added).

The ambiguities lie in the words "developed" and "completed." Under Wyoming and Montana statutes it is possible that a right may have a priority date prior to January 1, 1950, but that actual use was made after that date.[76] It is uncertain whether this water should be subject to the percentage allocations because it is unclear on what date that use was "developed." The problem is much the same with the word "completed."

Federal and Indian water rights, discussed at length below, are not affected by the terms of the compact. Any water used by the federal government for projects constructed after the date of the compact are charged to the share of the state where the use is made.[77]

The Yellowstone Compact also contains a provision prohibiting trans-basin diversions without the unanimous consent of all the signatory states.[78] This provision is important in view of the coal development in southeastern Montana and northeastern Wyoming. Many of the coal deposits lie outside the Yellowstone Basin. It is unclear whether consent of the commission would be sufficient or whether consent of the state legislatures would be necessary. Montana and Wyoming both maintain that such consent requires approval of the legislatures of their respective states. North Dakota, which has no representative on the commission, would only require consent of the North Dakota State Water Commission.[79] There is no established procedure for obtaining consent for inter-basin transfers.

Similar statutes in Montana and Wyoming prohibit exportation of the state's waters outside its boundary without the consent of the legislature.[80] The relationship of this statute to the similar compact provision has not been resolved. It seems likely that the older state statute would be repealed by implication with the passage of the compact. Both the Montana statute and the compact trans-basin diversion prohibition are the subject of a pending suit.[81] The case seeks to have both provisions declared unconstitutional because they discriminate against and unreasonably burden interstate commerce. An additional objection is that the compact provision violates the 14th Amendment because it allows appropriators in basins other than the Yellowstone to make trans-basin di-

76. MCA § 85-2-401 (1979); WYO. STAT. § 41-4-512 (1977).
77. MCA § 85-20-101 (1979) (Yellowstone River Compact, art. VII, § D).
78. *Id.* (art X).
79. Yellowstone River Compact Commission 27th Annual Report, 1978.
80. MCA § 85-1-121 (1979); WYO. STAT. § 41-3-105 (1977).
81. Intake Water Co. v. Yellowstone River Compact Comm'n No. 1184, (D. Mont., filed June, 1973, amended complaint filed Oct., 1980).

version without the consent of the signatory states while appropriators in the Yellowstone Basin are prohibited from making transbasin diversions without such approval. The case has been indefinitely postponed while the matter is pursued through the Yellowstone River Compact Commission.

The Yellowstone River Compact has been in effect nearly 30 years and to date its terms have not required enforcement. It is doubtful if that state of affairs can continue for long. As enforcement becomes necessary, litigation will result. That litigation should provide the answers to the ambiguities mentioned and further define the details of the administration of the Yellowstone River Compact.

C. *Congressional Apportionment*

Prior to the decision of *Arizona v. California*[82] in 1963, there were only two methods for allocating the waters of interstate streams among the states. In that case the Supreme Court announced the third method of interstate allocation—apportionment by Congress. The Boulder Canyon Project Act,[83] which is interpreted in *Arizona v. California,* is the first and only such congressional apportionment. A bit of background on the apportioning of the Colorado River may be helpful to understanding the process.

There had been numerous attempts to formulate a compact among the seven states of the Colorado River drainage. Finally, a compromise suggested by Herbert Hoover was agreed upon. That compromise, the Colorado River Compact,[84] does not allocate the waters on a state by state basis, rather it divides the waters of the Colorado River between the Upper Basin and Lower Basin states.[85] This agreement allayed the fears of the Upper Basin states that the faster developing Lower Basin states, California in particular, might appropriate nearly all the flow of the Colorado River and thereby deprive the Upper Basin states of the water necessary for their development. The agreement divided the 15 million acre-feet annual flow of the Colorado equally between the two basins. The water was to be measured at Lee's Ferry in Northern Arizona.

The Colorado River Compact made no decision as to the share each state was to receive. At the Denver Governors' Conference in 1927, the Lower Basin states attempted unsuccessfully to agree on

82. 373 U.S. 546 (1963).

83. 43 U.S.C. §§ 617 through 617t (1976).

84. 45 Stat. 1057 (1928). Text appears at 70 CONG. REC. 324 (1928).

85. The Upper Basin States are: Colorado, New Mexico, Utah and Wyoming. The Lower Basin states are Arizona, Nevada and California.

a division. They were, however, able to come within 400,000 acre-feet of solution.[86] In the simplest terms, since the states could not agree among themselves, Congress decided on the apportionment and forced it upon the states through the Boulder Canyon Project Act.

Construction of the Boulder (now Hoover) Dam was essential for the development of the arid Southwest. The Boulder Canyon Project Act authorized construction of the dam only upon the occurrence of one of two contingencies: (1) if all seven states ratified the Colorado River Compact, or (2) if ratification had not occurred within six months of December 21, 1928, then six states including California must ratify the compact and . . . California must irrevocably and unconditionally covenant with the remaining six states and the United States to limit its use to 4.4 million acre-feet out of the 7.5 million acre-feet allocated to the Lower Basin states.[87] Arizona refused to ratify the compact because it would not protect Arizona from California priorities. However, California did pass a statute limiting its share of the water to 4.4 million acre-feet.[88] Construction was authorized under the second option.

The Boulder Canyon Project Act also authorized the Lower Basin states to enter into an agreement which would apportion the waters of the Colorado among them. Such a compact was not approved. Since there was not unanimous ratification, there was no actual Lower Basin Compact. The allocation of the water was accomplished nonetheless by a provision in the Boulder Canyon Project Act. Section 5[89] of the act authorized the Secretary of the Interior to make contracts for the storage and delivery of the water to the users in the three states. Such contracts were a prerequisite to receiving waters from the project.[90] The secretary was required to make contracts which allocated the waters in accordance with the Lower Basin Compact which was authorized but never entered into.[91]

In discussing this apportionment, the Supreme Court has stated:

> [T]he Act invited Arizona, California, and Nevada to adopt a compact dividing the waters along the identical lines that had

86. They could agree to: California 4.6 mil. acre-feet; Arizona 3.0 mil. acre-feet; Nevada 0.3 mil. acre-feet. The Colorado River Compact only made 7.5 mil. acre-feet available to the three Lower Basin states.

87. 43 U.S.C. § 617c (1976).

88. 1929 CAL. STATS. ch. 16.

89. 43 U.S.C. § 617d (1976).

90. *Id.*

91. 43 U.S.C. § 617l (1976).

> formed the basis for the Congressional discussions of the Act: 4,400,000 acre-feet to California, 300,000 to Nevada and 2,800,000 to Arizona. Section 8(b) gave the states power to agree upon some other division, which would have to be approved by Congress. Congress made sure, however, that *if the states did not agree on any compact the objects of the Act would be carried out,* for the Secretary would then proceed, by making contracts, to apportion water among the states . . . .[92]

Thus, the doctrine of congressional apportionment was created.

The Supreme Court did not explain the basis for this new form of apportionment. In announcing the new doctrine the Court stated:

> In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the compact. Where Congress has so exercised its *constitutional power* over waters, courts have no power to substitute their own notions of an "equitable apportionment" for the apportionment chosen by Congress.[93]

There is no elaboration of which constitutional power is the source of congressional apportionment. Presumably it is based on the broad federal power over navigable waters.[94] This power is derived through an expanding and "highly fictional" construction of the Commerce Clause, which gives Congress the power "to regulate commerce . . . among the several states."[95] The special master in *Arizona v. California* also had no doubt about the source of authority:

> Clearly the United States may construct a dam and impound the water of the Colorado River, a navigable stream. . . . Clearly, also, once the United States impounds the water and thereby obtains physical custody of it, the United States may control the allocation and use of unappropriated waters so impounded.[96]

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92. 373 U.S. 546, 579 (1963) (emphasis added).

93. *Id.* at 546 (emphasis added).

94. However, in an earlier case involving the same dispute the Court stated: "As the river is navigable and the means which the Act provides are not unrelated to the control of navigation, the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress." Arizona v. California, 283 U.S. 423, 455-56 (1930) (citations omitted).

95. United States v. Gerlach Livestock Co., 339 U.S. 725, 737 (1950).

96. Arizona v. California, 373 U.S. 546 (1963). *See also* Report of Special Master Rifkind at 160 (1960). The report of the Special Master, Simon H. Rifkind, in Arizona v. California is dated December 5, 1960, and was received by the Supreme Court on January 16, 1961. 364 U.S. 940 (1961).

Indeed, the navigation power is broadly construed. It will be discussed further in the section on federal-state authority.

Whether the power of Congress to allocate interstate waters is limited to navigable waters is unclear. Most likely it is not. The navigation power has been found to extend upstream from navigable streams to non-navigable tributaries.[97] In addition, congressional apportionment of non-navigable waters may be justified under the Property Clause.

A final source of power for congressional apportionment involving the Colorado River, an international river, is the Treaty Power. The United States and Mexico signed a treaty in 1944[98] guaranteeing a 1.5 million acre-feet flow of the Colorado River at the border. Congress has the power to do those acts necessary to honor the treaty.

D. *Interstate Allocation and the Montana State Water Plan*

The three methods of allocating the waters of interstate streams set out above—equitable apportionment, interstate compact and congressional apportionment—establish the legal framework upon which a state water plan may be designed for Montana. A state water plan should develop policies which would result in favorable treatment for Montana and its residents when a conflict is to be resolved by one of these avenues. Unfortunately, the standards used to resolve interstate conflicts are often vague and hard to quantify.

Equitable apportionment has been referred to as an attempt to allocate interstate water in the most inefficient manner. While inefficiency is not necessarily the result of an equitable apportionment suit, the judicial process does not decide interstate water cases on the basis of economic maximization of benefits. Instead it deals with "equality of right" to benefits of the flow of the stream. The factors to be considered in evaluating the right to the benefits are quite vague but include: physical and climatic conditions, consumptive use in each section of river, return flows, storage capabilities and the extent of established uses. In short, nearly everything relevant to the situation becomes a factor in the decision. It is difficult to incorporate such an all-inclusive list of factors into a state water plan. The one factor that seems to be most important to the Court is "established uses." However, the Montana Water Use Act

97. Oklahoma v. Atkinson, 313 U.S. 508 (1941).
98. 59 Stat. 1219 (1945).

of 1973 already emphasizes the importance of "existing uses."[99] It is doubtful that a water plan could do much more.

Equitable apportionment overall is a poor way for a state to resolve its interstate water conflicts. The court cannot effectively digest the mountains of technical data which such a proceeding generates. A decree from the court can only deal with those conflicts which have already arisen. It may not be prospective or provide relief in situations that will result in conflicts in the future. In addition, resolution of interstate water disputes in court takes many years. During that time water rights are poorly defined. Equitable apportionment is usually a last resort as a result of continued inaction of the states involved to reach a negotiated settlement.

To date, there have only been three actions for equitable apportionment which resulted in decrees actually apportioning interstate waters. Perhaps this brings out the greatest value of equitable apportionment, which is that it poses a threat which may provide the states involved with increased incentive to reach a better solution.

Such a solution might be an interstate compact. The compacting process has several advantages over a judicial solution. First, the compact may be prospective in nature. It can deal with problems that have yet to arise. Unlike a judicial order, it may apportion unappropriated waters. Second, a compact is worked out by the states themselves rather than by a third party. However, the most significant impediment to the compact process is the difficulty in securing agreement among the parties. The process also may be time consuming.

In a compact negotiation, Montana's bargaining position appears strong. For most of the river systems in the state, Montana is the upstream state. This means that the burden of bringing a suit for equitable apportionment would be on the other or downstream party. Even when such a suit is brought, the Supreme Court has shown reluctance to exercise its power unless the harm suffered is of serious magnitude and must be shown by clear and convincing evidence.[100] When the Court refuses to hear a suit, the upstream state is allowed to continue the use which the downstream state sought to enjoin, hence, the system favors the upstream state. Since Montana enjoys the advantage of being the upstream state and is less developed with fewer established uses and more un-

99. MCA § 85-1-101(5) (1979).
100. Connecticut v. Massachusetts, 282 U.S. 660 (1931).

appropriated water than downstream states, the preferable method for resolving interstate water allocation problems is through interstate compacts. Such agreements could secure the greatest benefits for the state for present and future water uses.

Congressional apportionment has been used to allocate interstate waters only once — the Boulder Canyon Project Act discussed earlier. One commentator attempts to demonstrate that congressional apportionment is the best method by arguing that congressional apportionment is in fact a form of compact likely to obtain as satisfactory a division as an actual compact or adjudication.[101] That may be true from a federal standpoint. However, from a state's perspective it seems less desirable. Congressional apportionment bypasses the state legislatures thus depriving them of their veto power and denying them input into the allocational process. The most important role of congressional apportionment, in view of the fact that the power has been singularly exercised, is the threat that it may be exercised. During the debate in Congress over the Boulder Canyon Project Act, one senator summed up the act by saying that, if the states do not agree on a formula, Congress will provide them with one. This may be a powerful incentive for states to agree upon the terms of a compact.

There is a situation developing that could lead to the exercise of congressional power to apportion interstate waters including possibly Montana. Congress has authorized the Secretary of Commerce to "study the depletion of the natural resources of those regions of the States of Colorado, Kansas, New Mexico, Oklahoma, Texas and Nebraska presently utilizing the declining water resources of the Ogallala aquifer, and to develop a plan to increase water supplies in the area. . . ."[102] One of the methods being examined is exportation of water from other states to recharge the Ogallala aquifer. The secretary is to formulate a plan and make recommendations for further congressional action. The High Plains Study Council has issued a resolution reassuring states such as Montana which may be the source of the water, that present uses and future needs of the exporting states will be considered as having prior rights to any waters involved. Only those waters in excess of the present and future requirements are to be considered available for exportation. The resolution also promises to recognize existing compacts and contracts as well as instream flow requirements. In fact, the resolution tries to convey to potential exporting

101. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 46-58 (1966).
102. 42 U.S.C. § 1962d-18 (1976).

states that all their requirements, present and future, will be satisfied before any water is exported. It is hard to believe that exportation of Montana's waters would not at some point limit the future uses of that water in Montana.

III. Conflicts With Federal Power

Federal rights in water pose a potentially serious conflict in the management of Montana's water. While Montana may deal with other states on an equal footing, its bargaining position when dealing with the federal government is not as strong. The bases for states' claims to the waters within their boundaries are several congressional acts and admission to the Union. The history of the development of western water law has shown a "consistent thread of purposeful and continued deference to state water law by Congress."[103] However, the power of the federal government over the states' water remains enormous. Many cases involving a clash between state and federal rights over waters are matters of deciding the *intent* of Congress rather than its *power*.[104]

This section of the article discusses the basic origins of the power of the states and the federal government over waters and streams, then analyzes several specific areas of importance to Montana. These areas are: (1) federal and Indian reserved rights; (2) federal water projects and reclamation law; and (3) non-reserved rights.

The federal government exerts most of its power over water through the Commerce Clause which provides Congress with the power "to regulate commerce . . . among the several states."[105] In an early construction of this clause the Court found navigation to be included in commerce.[106] This gave rise to the power to regulate navigation.[107] Interpretation of the Commerce Clause continued to be flexible and encompassed a widening sphere. Dean Frank Trelease has said:

> Although the Supreme Court itself has termed its constructions "strained" and "highly fictional," commerce has been held to include transportation, which in turn includes navigation; the power to regulate navigation comprehends the control of navigable waters for the purposes of improving navigation; this power to control includes the power to destroy the navigable capacity by

103. California v. United States, 438 U.S. 645 (1978).
104. United States v. New Mexico, 438 U.S. 696 (1978).
105. U.S. Const. art. I, § 8.
106. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
107. Gilman v. City of Philadelphia, 70 U.S. (3 Wall.) 713 (1865).

> damming the waters to protect adjacent lands from flood. The power to obstruct leads to the power to generate electric energy from the dammed water. Congress can protect the navigable capacity of water by preventing diversions or obstructions, and the power to prevent obstruction leads on to powers to license obstructions.[108]

Federal power under the Commerce Clause is not limited by the navigability of a stream. The federal government may control nonnavigable streams to assure proper supplies of water to maintain navigability farther downstream or to prevent flooding.[109] The federal power under the Commerce Clause has become so broad there are few areas it does not reach.

In exercising its navigation power, Congress does not need to compensate private persons for an interest in navigable waters.[110] Such interests are held subject to the power of Congress under the Commerce Clause. All land affected by navigable waters is subject to this navigation servitude.

If the federal government cannot maintain its authority under the navigation power it may do so under the Property Clause. "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[111] The power established under the Property Clause has been found to be sufficient to override the objections of state officials and inconsistent state law.[112]

Congress may also exercise control over water resources under the spending power,[113] the war power,[114] and the treaty power.[115] These sources of power form the basis for the federal government's power over water. That power is plenary. In fact, most cases do not involve the power of Congress to pass the legislation in question,

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108. Trelease, *Arizona v. California: Allocation of Water Resources to People, States and Nation*, 1963 SUP. CT. REV. 158, 177.

109. Oklahoma v. Atkinson, 313 U.S. 508 (1941).

110. United States v. Willow River Co., 324 U.S. 499 (1954). In the Rivers and Harbors Flood Control Act of 1970 (33 U.S.C. § 595a (1976)), Congress has provided that compensation be paid for real property taken above the normal high water mark. This property shall be valued by its best and highest use. The statute addresses only real property not water rights.

111. U.S. CONST. art. IV, § 3.

112. Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955); First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946).

113. U.S. CONST. art. I, § 8; United States v. Gerlach Livestock Co., 339 U.S. 725, 737 (1950). *See also* 2 CLARK, *supra* note 15, at § 103.

114. Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936). *See* 2 CLARK, *supra* note 15, at § 104.

115. *See* Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925); 2 CLARK, *supra* note 15, at § 105. *See also* Arizona v. California, 373 U.S. 546 (1963).

but rather they are concerned with the *intent* of Congress in enacting the law.[116]

A. *Federal Reserved Rights: The Winters Doctrine*

The development in the pattern of land ownership in the West set the stage for the *Winters* doctrine. Settlers and miners, encouraged by the land acts, were pouring into the West in the latter part of the nineteenth century. The system which evolved for allocation of water grew out of local customs and practices. The appropriation doctrine granted water rights to the first person to put the water to beneficial use.

The federal government owned nearly all the land in the West but initially did little to set up regulations for its use or disposal or for the application of the waters found on those lands. With the Act of 1866,[117] Congress recognized the system of customs and practices which had developed on the public lands prior to that date. The federal government did not establish any system of water rights but merely recognized the already existing system and the private rights created by it.[118] The Act of 1866 and its subsequent amendment in 1870[119] made it clear that the United States and its grantees would respect the private water rights acquired under local customs, state or territorial laws or court decisions.

Shortly thereafter, in 1877, Congress passed the Desert Land Act[120] which freed for appropriation all unused water on the public domain. All unappropriated water on public lands was to "remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."[121] The Desert Land Act did not address what rights, if any, were retained by the federal government.

The reserved rights doctrine is a judicial creation which has been developed over the last seventy years. It was originally announced in *Winters v. United States*[122] in 1908. The Court in *Winters* found that the government had the power to "reserve waters and exempt them from appropriation under state laws"[123] and that the government had exercised that power, by implication,

116. *See, e.g.*, United States v. New Mexico, 438 U.S. 696, 698 (1978).
117. 14 Stat. 251 (1866).
118. Jennison v. Kirk, 98 U.S. 453, 459 (1879).
119. 14 Stat. 251, *as amended* 16 Stat. 217 (1870).
120. 19 Stat. 377 (1877) (codified at 43 U.S.C. § 321 (1976)).
121. California-Oregon Power Co. v. Beaverhead Portland Cement Co., 295 U.S. 142, 160 (1935).
122. 207 U.S. 564 (1908).
123. *Id.* at 577.

to reserve water rights for the Indians on the Fort Belknap Indian Reservation in Montana.[124] In that case, the Gros Ventre and Assiniboine tribes ceded most of their land to the United States, reserving a small portion designated as the Fort Belknap Indian Reservation.[125] The treaty contemplated that the Indians would change their habits from those of a "nomadic and uncivilized people . . . to become a pastoral and civilized people."[126] Without water for irrigation, the smaller parcel of land, to which the Indians were now confined, would be valueless. The Court refused to find that the Indians intended to give up their rights to the water that was necessary to their survival on the reservation and held instead that the government had reserved the waters for Indian use.[127]

The actual basis of the reserved water right is not clear from the *Winters* case.[128] It may be argued that the Indians reserved the water when they ceded the lands.[129] This would give them a priority dating from the time they settled the lands. The theory that the Indians reserved the rights, while attractive for reservations created by treaties, might leave reservations created by executive order or statute, such as the Northern Cheyenne Reservation,[130] without reserved water rights. However, the reservation doctrine has developed to imply reservation of water rights whether the reservation is created by treaty, statute or executive order.[131] The majority of the cases since *Winters* support the view that the government reserved the water rights for the benefit of the Indians.[132] Under this reasoning, the priority date would be the date of the establishment of the reservation.

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124. *Id.*

125. 25 Stat. 113 (1888).

126. Winters, 207 U.S. at 576.

127. *Id.*

128. The constitutional basis for federal authority to reserve water rights lies in the Property Clause, Supremacy Clause and the Commerce Clause. The power of the government to reserve waters has never been doubted. Winters v. United States, 207 U.S. 564, 577 (1908); United States v. Winans, 198 U.S. 371 (1905).

129. Veeder, *Indian Prior and Paramount Rights for the Use of Water,* 16 ROCKY MTN. MIN. L. INST. 631, 645-49 (1971). The Rio Grande pueblos never were a part of the public domain nor has any treaty, statute or executive order ever designated those lands as Indian reservations. Indians of the pueblos claim "aboriginal" rights based on use and diversion before the lands were acquired by the United States. *See* State of New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), *cert. denied,* 429 U.S. 112 (1977). *See also* Morrison, *Comments on Indian Water Rights,* 41 MONT. L. REV. 40, 54-55 (1980).

130. The Northern Cheyenne Reservation was created by executive order by President Chester A. Arthur in 1884 and enlarged by an executive order in 1900.

131. Arizona v. California, 373 U.S. 546 (1963).

132. *E.g.,* Arizona v. California, 373 U.S. 546 (1963); United States v. Walker River Irr. Dist., 204 F.2d 334 (9th Cir. 1939).

The amount of water reserved under the *Winters* doctrine is enough to satisfy the present and future needs of the Indians.[133] The *Winters* doctrine reserves an open-ended amount of water in comtemplation of the Indians' increasing water needs as their agricultural skills develop.[134] It is the future reservation which wreaks havoc on the efficient use of water in the West. The appropriation system provides certainty which encourages development and investment. Water which is subject to future use on reserved lands cannot be safely relied upon by non-Indian users. The inchoate Indian rights may be asserted whenever they are needed. The resulting uncertainty discourages long-term investment and favors inefficient short-term uses which can be discontinued with minimal loss when and if the needs for the reserved water increases.

Since the water right is reserved for future uses it is a right that, unlike normal appropriative rights, cannot be lost through abandonment or adverse possession. In addition, the right has a date of priority which is the same as the date of the reservation. In most cases this yields a senior water right.

The quantity of water reserved depends on the purpose of the reservation.[135] In *Cappaert v. United States*[136] the Supreme Court held that Congress impliedly reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more."[137] In the case where reservations were created to transform the Indians into a "pastoral and civilized" people, agriculture is usually the purpose of the reservation.[138] The document creating the reservation may indicate the purpose of the reservation.[139]

In *Arizona v. California,*[140] where the purpose of the reservation was to allow the Indians to develop an agricultural economy, the quantity of water reserved was based on the number of irrigable acres in the reservation.[141] Water sufficient to irrigate that acreage was held to be reserved for the Indians. The special master addressed the purpose of the reservation:

> The reservations of water were made for the purpose of enabling

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133. Arizona v. California, 373 U.S. at 597.

134. *Id.*

135. *Id.* at 600-01.

136. 426 U.S. 128 (1976). *Cappaert* involved the reserved water rights of the Devil's Hole National Monument, a federal non-Indian reservation.

137. *Id.* at 141.

138. *Id.*

139. *See, e.g.,* Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908).

140. 373 U.S. 546 (1963).

141. *Id.*

> the Indians to develop a viable agricultural economy; other uses, such as those for industry, which might consume substantially more water than agricultural uses, were not contemplated at the time the Reservations were created . . . . I hold only that the amount of water reserved, and hence the magnitude of the water rights created, is determined by agricultural and related requirements, since when the water was reserved that was the purpose of the reservation . . . . The measurement used in defining the magnitude of the water rights is the amount of water necessary for agricultural and related purposes because this was the initial purpose of the reservations . . . .[142]

It is certain that where the purpose of the reservation was to allow the Indians to develop an agricultural economy, the amount of water reserved is determined by the number of irrigable acres and the amount of water required per acre. The treaty, executive order or legislation creating most Indian reservations recite an agricultural purpose, if they address purpose with any specificity at all.

A problem arises when a tribe wishes to make use of reserved waters for a use not contemplated when the reservation was created. There are three possible approaches to this situation. First, a strict interpretation of the *Winters* doctrine would hold that water was impliedly reserved only for the narrow primary purpose contemplated at the time the reservation was created. Second, the original purpose of the reservation may establish the quantity of water reserved, but that amount of water may then be applied to other uses not foreseen at the time the reservation was created.[143] Third, the purpose of a reservation might be more flexibly construed as permitting the Indians to establish a viable economy on the reservation based on agriculture or any other feasible use of the land. This would entitle the tribe to a reserved water right sufficient to make full use of the land including uses such as industry and natural resource extraction which were not foreseen when the reservation was created.

Recently the Supreme Court has begun to limit the expansive nature of the reserved rights doctrine. The case of *United States v. New Mexico*[144] held that, for non-Indian federal reservations, the amount of water reserved was only that quantity sufficient to fulfill the primary purpose of the reservation. The Court refused to find

142. Report of Special Master Rifkind at 232-33 (1960); Arizona v. California, 373 U.S. 546 (1963).

143. This approach was adopted in the supplemental decree to Arizona v. California, 439 U.S. 419, 422 (1979).

144. 438 U.S. 696 (1978).

that waters had been reserved for secondary or supplemental purposes.

United States v. New Mexico dealt with the implied reservation of waters in the Gila National Forest in New Mexico. The *Winters* doctrine, which initially applied to Indian reservations, had previously been expanded to apply to all federal reserved lands, including national forests, national parks, monuments and military reservations.[145] During a general adjudication of the waters of the Rio Mimbres River, the United States asserted its reserved right to waters of the Rio Mimbres for use in the Gila National Forest. The United States claimed that sufficient water had been impliedly reserved to preserve the timber in the forest, secure favorable water flows *and* for "minimum instream flows for aesthetic, recreational and fish-preservation purposes."[146]

The Gila National Forest was reserved in 1899 under provisions of the Organic Act of 1897 which "intended national forests to be reserved for only two purposes—to conserve the water flows and to furnish a continuous supply of timber for the people."[147] The United States' claim to water for instream uses for aesthetic, recreational and fish purposes was based in part on language in the Multiple Use Management Act of 1960.[148] The Multiple Use Act broadened the purposes for which national forests were to be managed to include "outdoor recreation, range, timber, watershed and wildlife and fish purposes."[149] However, the United States Supreme Court agreed with the Supreme Court of New Mexico. "The Multiple-Use Sustained Yield Act of 1960 does not have a retroactive effect nor can it broaden the purposes for which the Gila National Forest was established under the Organic Act of 1897."[150] Continuing, the Supreme Court stated, "While we conclude that the Multiple-Use Sustained Yield Act of 1960 was intended to broaden the purposes for which national forests had been previously administered, we agree that Congress did not intend to thereby expand the reserved rights of the United States."[151]

In this case, the Supreme Court restricted the reserved water rights to only those purposes set out in the legislation creating the reservation. It allowed reserved rights only for those purposes con-

145. *See* Arizona v. California, 373 U.S. 546 (1963). *See also* Randquist, *The Winters Doctrine*, 1975 B.Y.U. L. REV. 639.
146. 438 U.S. at 705.
147. *Id.* at 707.
148. 16 U.S.C. §§ 528-531 (1976).
149. *Id.*
150. 438 U.S. at 713.
151. *Id.*

templated at the time the reservation was created. While *United States v. New Mexico* deals with a non-Indian reservation, it is reasonable that this restrictive interpretation may be expanded to lands reserved for Indians. Each aspect of the *Winters* doctrine has eventually been expanded to treat similarly all federal reservations, both Indian and non-Indian.[152] If such a view of reserved rights is applied to Indian reservations it seems likely that reserved waters will not be available for coal development or other uses not contemplated when the reservation was established. While extending the logic of *New Mexico* may lead to a conclusion that Indian reserved rights be limited to the purposes originally contemplated, such a result is far from certain. More than one commentator has questioned the precedential effect of *New Mexico.*

> Throughout the West, *United States v. New Mexico* will be read, along with *California v. United States,* as a major victory for state control of western waters. On one level, this reading is right and the cases are a welcome relief from the Supreme Court's simplistic preference for federal control of water resources development. Nevertheless, advocates of state control can take little heart from *New Mexico* because the case is too flawed and hence unstable to have a long term influence. It is unlikely that the Supreme Court will reverse itself on the narrow issue of the effect of the 1891 and 1897 acts, but it is by no means certain that the broad dicta and attitudes which run through the opinion will prove a reliable guide to future reserved rights controversies.[153]

Currently pending in Montana are several related cases which deal with Indian reserved water rights for industrial and energy development. The Northern Cheyenne Tribe has filed a suit in federal court seeking adjudication of their water rights on the Tongue River.[154] In an associated case the United States filed suit in its fiduciary capacity for the Northern Cheyenne and Crow Indians, and in its own right to determine water rights in the Tongue River and Rosebud Creek.[155] In both actions the tribes and/or the United States assert priority as of the date of the treaties and executive orders establishing the reservations. The tribes claim all waters

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152. The nature of the reserved right on Indian lands differs, however. The right is held in trust by the United States. Thus a fiduciary relationship binds the United States' actions regarding Indian reserved rights.

153. Fairfax & Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico,* 15 IDAHO L. REV. 509, 554 (1978-79).

154. Northern Cheyenne Tribe v. Tongue River Water Users Ass'n, No. CV-75-6-Blg. (D. Mont., filed Aug. 14, 1975).

155. United States v. Tongue River Water Users Ass'n, No. CV-75-20-Blg. (D. Mont., filed Aug. 1, 1975).

which were unappropriated at the time of the treaties and executive orders "which are or will become reasonably necessary for the present and future needs of the Indians in fulfillment of the purposes for which the reservation was created. Such purposes include municipal and domestic use, irrigation and stock watering and *full utilization of the reservation and its resources . . . .*"[156]

The tribes also assert an aboriginal right of the waters in, on and adjacent to the reservation.[157] Aboriginal rights stem from the tribal use of the water from time immemorial. The tribal council of the Northern Cheyenne Reservation formally adopted a resolution claiming

> the first, paramount and aboriginal right . . . to the appropriation, use and storage of all . . . waters (on or under the reservation) for the purpose of the use of said waters including, but not limited to domestic use, irrigation, manufacturing, development of natural resources and development of recreation projects and other facilities.[158]

While coal mining and power plant projects are not directly involved in these cases, it is clear that the specter of energy development prompted the suits. The results in these cases are anxiously awaited. They will be landmark decisions. Both cases have been dismissed from the federal district court and are currently on appeal to the Ninth Circuit Court of Appeals.[159]

Important to the resolution of both Indian and non-Indian reserved rights is the McCarran Amendment, passed in 1950.[160] This act waived the sovereign immunity of the United States for purposes of adjudication of federal water rights. Subsequent decisions interpreted the McCarran Amendment to allow the United States to be joined in an action, involving federal non-Indian reserved rights.[161] Before the landmark decision in *United States v. District Court for Eagle County,*[162] in 1971, the United States could only be joined if (1) there had first been a complete adjudication of the

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156. *Id.* Plaintiff's amended complaint, filed Aug. 14, 1975 (emphasis added).

157. Northern Cheyenne Tribe v. Adsit, No. CV-75-Blg. (D. Mont., filed Aug. 14, 1975); United States v. Big Horn Low Line Canal, No. CV-75-34-Blg. (D. Mont., filed Aug. 29, 1975). Both of these cases were dismissed, along with five others, on jurisdictional grounds. All are on appeal to the Ninth Circuit. Northern Cheyenne Reservation v. Tongue River Water Users Ass'n., 484 F. Supp. 31 (D. Mont. 1979).

158. Resolution No. 179 (74) of the Tribal Council of the Northern Cheyenne Reservation, Lame Deer, Montana (March 25, 1974).

159. Northern Cheyenne Tribe v. Tongue River Water Users Ass'n., 484 F. Supp. 31 (D. Mont. 1979).

160. 43 U.S.C. § 666 (1976).

161. United States v. District Court for Eagle County, 401 U.S. 520 (1971).

162. *Id.*

stream, and (2) the federal rights sought to be determined were acquired under state law. The second requirement excluded reserved rights since they are exempt from state law. The decision in *Eagle County* allowed adjudication of non-Indian federal reserved rights in state court when the state court provided a comprehensive system for adjudicating water rights. Soon after *Eagle County,* the Supreme Court held that the McCarran Amendment allowed adjudication of Indian reserved rights and that state courts had concurrent jurisdiction with the federal courts to hear such cases.[163] These developments were necessary so that federal reserved rights could be quantified.

The reserved rights doctrine is a major obstacle to formulation of a state water plan for several reasons. Reserved rights need not comply with state law. The state has been nearly powerless to regulate use of those waters. The jurisdiction gained by the state courts under the McCarran Amendment is the only control the state has over reserved rights.[164]

The priority of reserved rights also causes problems. Reserved water rights have priority dating from the date the land was reserved. Whether the water has actually been put to beneficial use is unimportant. The right cannot be lost through disuse and may be asserted at any time. Since most of the reservations were created prior to the turn of the century the reserved water rights accompanying them are senior.

The most difficult problem regarding the implications of reserved rights on a state water plan lies in quantification. The amount of water reserved with each reservation is unascertained. The process of quantification involves several steps. First, the purpose of the reservation must be determined. In the instance of Indian reservations it is especially difficult to determine the purpose. In light of *United States v. New Mexico,* the Supreme Court is apt to interpret the purpose narrowly, but it is a tenable argument that the Indian reservations were created to allow the tribes to make a reasonable living on the land, which could include energy development. Then, once the purpose has been determined the amount of water necessary to fulfill that purpose must be quantified. Where the purpose of the reservation is agricultural, the quantity of water reserved has been based on the number of irrigable acres contained on the reservation. If the purpose is non-agricultural, standards have yet to be established for quantity.

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163. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).
164. *Id.*

The most damaging aspect about the unquantified reserved rights is the uncertainty it creates. That uncertainty translates into risk for ranchers, farmers and other water users. Water which is subject to future use on reserved lands cannot be safely relied upon. The resulting uncertainty discourages long-term investment and makes it difficult to acquire capital. The uncertainty favors inefficient short-term investment so that the loss will not be so great if the reserved rights are exercised.

At present, there is no recourse. If the exercise of federal reserved rights causes any holders of state water permits to lose their water, no damages or compensation will be paid. Unless a water user has a priority more senior than the date of the reservation he loses. Numerous pieces of legislation have been proposed which would provide compensation but none have been adopted. Some legislation in this area is needed but as the general counsel to the state engineer's office in New Mexico stated:

> A legislative solution to the problem is attractive. However, I think that something is to be learned from the repeated failure of the Congress to make any progress. It may be that the courts will have to shorten the distance between the competing federal and state interests before there's a chance of passing any meaningful legislation.[165]

Montana is attempting to resolve the problem of reserved rights through negotiation rather than litigation. The state legislature in 1979 established the Reserved Water Rights Compact Commission.[166] The Compact Commission is authorized to conduct negotiations with several Indian tribes and the federal government to conclude a compact for the equitable division and apportionment of water affected by the reserved rights doctrine. Former President Carter in his water policy message of June 1978 endorsed resolution of the problem by negotiation. To date, negotiations have begun with three tribes, the Northern Cheyenne, the Confederated Salish and Kootenai Tribes and the Assiniboine and Sioux Tribes of the Fort Peck Reservation. Negotiations are also underway with the federal agencies of the Departments of Interior and Agriculture.

The state water plan should address the problems enumerated in this section. Of course, Montana cannot unilaterally design a so-

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165. Letter from Richard A. Simms, General Counsel, State Engineer Office, State of New Mexico (June 15, 1978), reproduced in Comptroller's Report on the Status of Undetermined Federal and Indian Reserved Water Rights, Appendix V. Report #CED-78-176 (1978).

166. MCA § 2-15-212 (1979).

lution for the conflict with federal reserved rights, but the state water plan should call for quantification of federal reserved rights and compensation to individuals who may lose water rights perfected under state law.

B. *Federal Water Projects: Reclamation Law*

The history of cooperation between states and the federal government has been smooth until recent times. The states have been anxious to have the federal monies to develop their water resources and therefore have been accomodating rather than assertive in their positions. In fact, it was nearly half a century after the enactment of the Reclamation Act[167] before the state-federal aspects of the law were litigated.[168] Until at least 1950, the federal government voluntarily sought water rights under the appropriate state provisions and the states automatically granted the federal permits.

Most of the present controversy focuses on the provisions of section 8 of the Reclamation Act of 1902.[169] Its general tenor and sometimes its exact language has been incorporated into nearly all legislation authorizing the construction of federal projects.[170] Section 8 defines the relationship of state and federal interests. It recognizes and preserves state authority over water. Under this section, the Secretary of the Interior is required to "proceed in conformity" with state laws in carrying out federal water projects.[171]

The first case concerning section 8 was *United States v. Gerlach Livestock Co.*[172] In that case, landowners downstream of the Friant Dam in California sought compensation for loss of a portion

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167. 43 U.S.C. § 383 (1976).

168. United States v. Gerlach Livestock Co., 339 U.S. 725 (1950).

169. 43 U.S.C. § 383 (1976).

170. *E.g.*, Federal Power Act, 16 U.S.C. § 821 (1976); Boulder Canyon Project Act, 43 U.S.C. § 617 (1976).

171. Section 8 of the Reclamation Act provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to 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 rights acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure and the limit of the right.

43 U.S.C. § 383 (1976).

172. 339 U.S. 728 (1950).

of their riparian rights. After construction of the dam their lands were no longer flooded and enriched by the spring floods. The United States defended on the basis that the dam was constructed under the navigation power and that the damage was thus non-compensable. As mentioned earlier, if a federal project bears some positive relation to navigation then the government need not compensate owners for loss of riparian rights. The theory of this navigation servitude is that the United States holds an easement over all properties which might affect or be affected by navigation.

The rights for which the plaintiffs sought compensation were recognized under state law. The Court held that the federal government had constructed the dam mainly for reclamation, not navigation and therefore compensation must be paid for the plaintiffs' lost property interests.[173] The Court required that state law be used to define what constituted a compensable property interest and that such interests could only be taken under the power of eminent domain.[174]

In *Ivanhoe Irrigation District v. McCracken*,[175] section 5 of the Reclamation Act,[176] which limits a landowner's use of federal project waters to 160 acres, was challenged. The plaintiff argued that section 8 required state law to control distribution of the waters and that under California water law he was entitled to more water for his land. The Court held that the general provisions of section 8 did not override the specific directives of section 5.[177] The opinion contained, as dicta, language that a state could not impose conditions on federal distribution of water.[178]

More California litigation continued to erode the effect of section 8. The city of Fresno sought to enjoin the federal government from filling the Friant Dam[179] because impoundment of the water would threaten the city's water supply. Fresno claimed that section 8 required that the California state law giving priority to municipal uses be respected. The Supreme Court disagreed:

> [Section] 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. This was settled in *Ivanhoe Irrigation District v. McCracken*. . . . Rather, the effect of [section] 8 in such a case is to leave to state law the definition of the

173. *Id.* at 737.
174. *Id.* at 739.
175. 357 U.S. 275 (1958).
176. 43 U.S.C. § 431 (1976).
177. McCracken, 357 U.S. at 292.
178. *Id.* at 295.
179. City of Fresno v. California, 372 U.S. 627 (1963).

property interests, if any, for which compensation must be made.[180]

The decision in *City of Fresno v. California*[181] secured the proprietary theory, which relegates state law to the narrow role of determining whether a certain water right is a property interest.

Arizona v. California,[182] discussed above for its interstate aspects, also contributes to the definition of section 8. The Boulder Canyon Project Act incorporated section 8 by reference in section 14.[183] In addition, section 18 had similar language preserving the states' authority.[184] The federal government claimed not only the right to apportion the waters of the Colorado River among the states but also the authority to distribute the water within each state. This claim was based on section 5 which authorized the secretary to make contracts with individual water users.[185] In reasoning similar to that employed in *Ivanhoe,* the Supreme Court found that the more specific provisions of section 5 overrode the general reservation of state authority contained in sections 14 and 18. State law would be applied only as far as it was not inconsistent with the federal legislation. Again, state law was limited to defining compensable property interests.

The most recent case, and a departure from the trend, is *California v. United States.*[186] This litigation involved the New Melones Dam in California which was authorized by the Flood Control Acts of 1944 and 1962.[187] The dam would flood 13 miles of the Stanislaus River southeast of Sacramento, including a stretch of white water important for its recreational value. The California Water Resources Control Board (CWRCB) approved the application of the Bureau of Reclamation for the unappropriated waters in the river. However, the CWRCB found that no plan for use of the waters had been developed and that the Bureau of Reclamation had no firm committments from water users. Therefore, approval was given subject to 25 conditions.[188] The most important of the conditions prohibited impounding any of the water until a specific plan for the use of the water was formulated.

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180. *Id.* at 630.
181. 372 U.S. 627 (1963).
182. 373 U.S. 546 (1963).
183. 43 U.S.C. § 617m (1976).
184. 43 U.S.C. § 617q (1976).
185. 43 U.S.C. § 617d (1976). *See* text accompanying notes 89-91, *supra.* Section 5 was the exclusive method for obtaining water from the project.
186. 438 U.S. 645 (1978).
187. 58 Stat. 901 (1944); 76 Stat. 1191 (1962).
188. California Water Resources Control Board, Dec. No. 1422 (April 1973).

The United States sought relief in federal district court.[189] The federal government argued that it need not apply for a state water permit, but if in the interest of comity the government did apply, then California was required to approve the request as long as unappropriated water was available. California maintained that it could impose any necessary conditions on the government's application as long as they were not inconsistent with congressional directives. The district court granted summary judgment in favor of the United States, holding that the federal government must make an application for a permit but as long as unappropriated water was available, California could not deny or condition the permit.[190] The Ninth Circuit Court of Appeals affirmed that decision.[191]

The Supreme Court reversed, holding that a state may impose conditions on a federal project as long as those conditions are not inconsistent with congressional directives.[192] Since the lower courts did not reach the question of whether an inconsistency existed, the case was remanded for findings on that point. The Court based its holding primarily on legislative history of the 1902 Reclamation Act. The debate in Congress made clear the intent that state law control both the appropriation of water rights in federal projects and the distribution of the water.

The holding in *California v. United States*[193] will undoubtedly give the state a more central role in the planning and operation of federal projects. It is important to remember, however, that the decision results from an interpretation of congressional intent not power. In the dissent, Justice White notes, "[O]f course, the matter is purely statutory and Congress could easily put an end to our feuding . . . ."[194] Congress could at any time choose to further exercise the power it has or to restrict or terminate the policy of deference to state law. State interests that conflict with federal purposes will not be respected. For these reasons it is important for the states to consider methods which may protect against or control the federal power rather than dealing only with the will of Congress in each individual statute.

Since the states' role in defining compensable property interests is secure, the key to protecting Montana's water interests lies

189. United States v. California, 403 F. Supp. 874 (E.D. Cal. 1975).
190. *Id.* at 901-02.
191. California v. United States, 558 F.2d 1347 (9th Cir. 1977).
192. California v. United States, 438 U.S. 654 (1978).
193. *Id.*
194. *Id.* at 695.

in this area. The state law should define property interests in water rights as broadly as possible. This cannot prevent the exercise of federal power, but it does require that compensation be paid for a taking of those interests. Broad definition of property rights in water benefits the state in two ways. First, it reduces the amount of unappropriated water available. Second, it assures that state concerns will be taken into account in federal projects because a taking of water rights defined by state law to be property rights would require compensation.

The most secure property right which a state can recognize is a duly perfected appropriative right. It cannot be taken except by legal process.[195] Montana has already extended recognition to future and instream uses through the reservation process.[196] As yet there is no case law confirming that a reservation would constitute a property right for purposes of the Fifth Amendment taking clause. As long as the process is not utilized in an indiscriminate fashion it appears that a reservation will be found to be a property right. This is discussed further below.

The reservation process allows Montana to exert a claim on the water. If such a claim is a compensable property right, the state will have great leverage in dealing with the United States. Federal projects can only be authorized where the benefits exceed the costs.[197] Thus, all proposals must undergo cost-benefit analysis. The cost of acquiring reserved water without Montana's consent may push the cost higher than the benefit, thus prohibiting the project. Even if benefits still outweigh costs and the federal government proceeds with the project, the state will have forced the federal government to pay for the full cost of the project. Indirectly, those who do benefit from the project will be forced to pay the true cost of the water through higher rates.[198] If Montana's best interests will be served by a federal project which requires the use of reservation waters, the reservation may be modified to allow the federal government to take the water cost free.[199] Thus, as long as a reservation of water can be shown to be a compensable property right, the reservation process can offer great leverage and flexibility in protecting the state's interests.

It must be noted that if the United States can justify the pro-

195. Osnes Livestock Co. v. Warren, 103 Mont. 284, 62 P.2d 206 (1936).

196. MCA § 85-2-316 (1979).

197. 32 U.S.C. § 485h (1976). A congressional directive can, of course, override this section.

198. 43 U.S.C. §§ 485 through 485h (1976) requires that charges made for project water repay the costs of the project.

199. MCA § 85-2-316(10) (1979).

ject under the navigation power, then, under the theory of the navigable servitude, property owners will not be compensated. The Court has shown a willingness to interpret this power broadly. In fact, many projects which mainly benefit irrigation have been allowed to use the no compensation rule of the navigable servitude. It seems quite clear that the navigable servitude should only apply to that portion of a multi-purpose project that actually does benefit navigation. The court has been willing to so restrict the navigable servitude only where the Bureau of Reclamation administers the project.[200] This rule should be extended to all projects regardless of the administering agency.

The history of federal water legislation clearly demonstrates a pattern of deference toward state law. However, Congress is vested with practically complete power to regulate the use of water within each state. While the tradition of congressional cooperation is comforting, the states need to take steps to assure their input should that spirit of cooperation fade. Increasing the recognition of property rights in the state's water may protect Montana's interests.

C. *Non-Reserved Federal Rights*

In response to former President Carter's 1978 water policy statement, the solicitor general formulated an opinion outlining his position on federal water rights.[201] In that opinion the theory of non-reserved rights is asserted. The opinion maintains that the federal government never granted away its right to make use of unappropriated waters on public lands and as a result the United States may vest in itself water rights in unappropriated waters independent of state law.[202] Unfortunately, in announcing this position, the opinion seems to muddle the issues of federal constitutional power and the exercise of that power and also the distinctions between reserved rights and the new non-reserved rights theory.

The opinion states that non-reserved rights do not derive from any reservation of the land, but instead are available for any "congressionally-sanctioned" purpose on federal lands. The right arises out of appropriation of the water by the United States and carries a priority date as of the date of appropriation. The right may be consumptive or non-consumptive. Its extent is limited by "[t]he

200. United States v. Gerlach Livestock Co., 339 U.S. 725 (1950). The Bureau of Reclamation has been renamed the Water and Power Resource Service (WPRS).

201. Solicitor's Opinion No. M-36914, U.S. Dept. of Interior (June 25, 1979) [hereinafter cited as Solicitor's Opinion].

202. *Id.* at 9-11.

time of its actual initiation and the purpose and quantity of use."[203]

The basis for such a theory has its origins in the nineteenth century acts briefly discussed in the reserved rights section above. A brief summary will be helpful here. The Act of 1866 and its 1870 amendment[204] recognized the appropriation doctrine as it had already developed in the mining camps of the West. The Desert Land Act of 1877[205] freed for appropriation the water on the public lands. The act provided that

> all surplus water over and above such actual appropriation and use together with the water of all lakes, rivers, and other sources of supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.[206]

The solicitor's opinion interprets the Desert Land Act to mean that only the amount of water actually appropriated after the passage of the Desert Land Act from streams on the public lands was severed from the land. He argues that the federal government retained a proprietary interest in any waters not appropriated under state law.[207] Thus, in putting those waters to use, the opinion continues, the federal government need not comply with state law.

This conclusion does not seem to square with the case law. In *California Oregon Power Co. v. Beaver Portland Cement*[208] the Supreme Court interpreted the provisions of the Desert Land Act: "If this language is to be given its natural meaning . . . it effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself."[209] This severance of the water from the land freed the water for appropriation under the laws of the state.[210] The Desert Land Act kept the United States out of the business of water regulation, leaving water law and its application to the states.[211]

The recent cases of *United States v. New Mexico*[212] and *Cali-*

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203. *Id.* at 15.
204. 14 Stat. 253 (1866), *as amended by* 16 Stat. 218 (1870), 43 U.S.C. § 661 (1976).
205. 19 Stat. 377 (1877), 43 U.S.C. §§ 321 *et. seq.* (1976).
206. *Id.* at § 321.
207. Solicitor's Opinion, *supra* note 201, at 16.
208. 295 U.S. 142 (1935).
209. *Id.* at 158.
210. Kansas v. Colorado, 206 U.S. 46, 94 (1907).
211. *See* Wyoming v. Colorado, 259 U.S. 419, 465 (1922); California v. United States, 438 U.S. 645 (1978).
212. 438 U.S. 696 (1978).

fornia v. United States[213] illustrate the proper role of the states in water regulation. In *California v. United States* the Court referred to *United States v. Rio Grande Dam & Irrigation Co.*[214] and noted that there are only two limitations to a state's exclusive control of its streams—reserved rights and the navigation servitude.[215] Except in these two instances "the state has total authority over its internal waters."[216] In *United States v. New Mexico* the Court found that the United States had reserved water for the Gila National Forest to fulfill the specific purposes of that reservation but "[w]here water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator."[217]

The solicitor does cite *United States v. New Mexico* as support for his theory, but the passage quoted notes that Congress never intended to relinquish its *authority to reserve* unappropriated water.[218] That point is indisputable, but it lends no support to a theory of non-reserved rights. The opinion seems to further confuse reserved and non-reserved rights when it quotes *Cappaert v. United States* for the proposition that "[f]ederal water rights are not dependent upon state law or state procedures . . . ."[219] *Cappaert* involved reserved rights in groundwater and the passage quoted must be read in context. It is referring to federal *reserved* rights, which *are* exempt from state law.

There can be no argument about the existence of federal power to reserve waters or to acquire water without compliance with state law. However, that power must be exercised in order to be effective. This requires a constitutionally enacted statute.[220] The solicitor appears to argue that "legislation enacted by Congress to accomplish management objectives on federal lands"[221] is such a statute. Even if that is the case, the logic of *California v.*

213. 438 U.S. 645 (1978).

214. 174 U.S. 690 (1899).

215. California v. United States, 438 U.S. at 662.

216. *Id.*

217. United States v. New Mexico, 438 U.S. at 702 (emphasis added).

218. Solicitor's Opinion, *supra* note 201, at 9.

219. Cappaert, 426 U.S. at 134 *cited in* Solicitor's Opinion, *supra* note 201, at 17.

220. The solicitor quoted the National Water Commission: "Federal Agencies [can make] some water uses that neither comply with State law nor can be justified under the reservation doctrine. The power of Federal Agencies to make such uses cannot be denied under the Supremacy Clause, if the water has been taken through the *exercise of constitutional power.*" Solicitor's Opinion, *supra* note 201, at 16 (emphasis added).

221. *Id.* at 16-17.

United States[222] dictates that state water law would be preempted only where inconsistent with the congressional directives. Insofar as the state law does not conflict with those legislative purposes the federal government must comply with state law. This seems to be at odds with the solicitor's opinion that the federal government may vest rights in itself "independent of the substantive state law." The solicitor seems to presume that, lacking a specific clause preserving states' rights, the federal government need not comply with state law. Dicta from the Supreme Court, however, seems to presume that the federal government must comply with state law except where there is expression of congressional intent otherwise.

There are no cases directly on point. The solicitor correctly states that an opinion in this area must be the result of interpreting conflicting dicta.[223] Nor are there apt to be many cases involving this non-reserved federal right if the federal agencies cooperate with the states.[224] The solicitor's opinion does direct interior agencies to make applications to the state and conform with procedural law. The effect of this directive is uncertain. Federal agencies conforming only with state water law procedure would not fit into the appropriative water rights scheme. The system for administering water rights could not function effectively if federal agencies submitted applications but were not bound by permits or conditions.

The argument made by the solicitor general that the United States may make use of unappropriated waters on federal lands independent of state law is not strongly supported. The development of western water law and dicta in cases for over one hundred years have supported a state's right to control its own streams. Recently, the two Supreme Court cases, *United States v. New Mexico*[225] and *California v. United States*, [226] have both indicated that Congress has not intended to exercise its constitutional authority to preempt state water law. It seems unlikely that such a preemption could be brought about by anything less than a clear expression of congressional intent to do so.

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222. 438 U.S. 645 (1978).

223. Solicitor's Opinion, *supra* note 201, at 9.

224. Two suits were filed in March 1980 in Nevada and Wyoming. The Nevada case was subsequently withdrawn. *See* United States v. Alpine Land & Reservoir Co., Civ. No. D-183 BRT (D. Nev., filed Feb. 29, 1980, withdrawn March 20, 1980); *In re* Bighorn River, No. 4993 (5th Judicial Dist. Wyo., filed Jan. 24, 1977, still in trial).

225. 438 U.S. at 701-02.

226. 438 U.S. at 665-70.

IV. Tools of Implementation

A. *Statutory Prohibition on Exportation of Water*

Montana has already adopted several statutory tools for protecting the state's water. This section discusses those statutory tools and comments on the approach which should be developed in the state water plan.

Montana has a statutory provision which is designed to preserve the waters of the state by prohibiting exportation without consent from the legislature.[227] Although a suit has been filed which among other issues challenges the constitutionality of this provision, it is unlikely that any court decision will be forthcoming in the near future which could decide the constitutionality of the statute.[228] If the statute can be found to be a legitimate exercise of police power, then the constitutionality will be upheld. More likely, however, would be a finding that the statute interferes with interstate commerce and is thus unconstitutional.

The Supreme Court has dealt with the constitutionality of similar statutes in New Jersey[229] and Texas.[230] The New Jersey statute was held to be constitutional while the Texas statute was struck down. The more recent Texas case probably represents the current point of view. Since the New Jersey case was decided in 1908, the application of the Commerce Clause has undergone tremendous growth. This development, more than any other, explains why the New Jersey statute was upheld while the Texas statute

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227. MCA § 85-1-121 (1979) provides:

> Out-of-state use of water. None of the waters in the State of Montana shall ever be appropriated, diverted, impounded, or otherwise restrained or controlled while within the state for use outside the boundaries thereof, except pursuant to a petition to and an act of the legislature of the State of Montana permitting such action.

228. Intake Water Co. v. Yellowstone River Compact Commission, No. 1184 (D. Mont., filed June, 1973, amended complaint, Oct., 1980) (the amended complaint does not attack the anti-exportation statute directly, but argues repeal by implication by virtue of adoption of the Yellowstone River Compact).

229. Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908). The statute in this case provided: "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this State into any other State, for use therein." 1905 N.J. Laws, ch. 238 (current version of statute at N.J. Stat. Ann. § 58:3-1 (West 1966)).

230. Altus v. Carr, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam*, 385 U.S. 35 (1966). The statute in this case provided: "No one shall withdraw water from any underground source in this state for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of this state unless the same be specifically authorized by an Act of the Texas Legislature and thereafter approved by it." Tex. Rev. Civ. Stat. Ann. art. 7477b (Vernon Supp. 1965). This statute was ruled unconstitutional in Altus, 255 F. Supp. at 839-40.

was invalidated.

All western states including Montana have constitutional provisions which claim proprietary ownership to the water in the state. The Montana Constitution states: "All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."[231] In support of the anti-exportation statute it could be argued that since the state holds the water in trust for its citizens, it has a duty to preserve the resource. In addition, if the state does own the water then any rights that others obtain can only be gained by the consent of the state. Under such reasoning, the state might find that appropriation or diversion out-of-state would not be in the public interest. The flaw in this argument is that the extent of the state's power to regulate is defined not by what is claimed in the state constitution but rather by the Tenth Amendment to the United States Constitution. The Tenth Amendment does not reserve such expansive powers that would enable a state to claim exclusive right to its waters. The relationship with the rest of the Union requires that the interests of other states be considered.[232]

Individual states are allowed to regulate activities which have an effect on interstate commerce as long as that effect is only incidental and the matter regulated is primarily a matter of local concern.[233] It seems clear that water must be regarded as an article of commerce. The Court has tended to treat natural resources as commercial commodities and has found that states may not prohibit interstate transportation of those commodities.[234] Thus, it seems hard to avoid the conclusion that such a statute does affect interstate commerce or at least bear such a close and substantial relation to interstate commerce that it becomes a matter of national concern.[235]

The purpose of an anti-exportation statute is local in scope. Its intent is to preserve and protect the state's water resources. In evaluating whether the regulation of this local concern unduly burdens interstate commerce the Court may consider whether alternative means might be as effective in achieving the intended pur-

231. MONT. CONST. art. IX, § 3(3).

232. *See* Trelease, *Federal Limitations on State Water Law*, 10 BUFFALO L. REV. 399 (1961); 2 CLARK, *supra* note 15, at § 102.

233. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

234. Altus v. Carr, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam*, 385 U.S. 35 (1966); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

235. *See* NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937).

pose.[236] Montana statutes already provide substantial protection against waste and depletion of the state's water resources. Initial appropriation, change of use or diversion point, and the sale of a water right all require approval of the Department of Natural Resources.[237] Additional statutes prohibit waste and provide mechanisms for limiting withdrawals if necessary.[238] Montana law even specifically excludes slurry pipelines from being considered a beneficial use.[239] The Court would most likely find that the anti-exportation statute serves no purpose which is not also achievable by alternate means which do not place a burden on interstate commerce. The Supreme Court recently confirmed that a state may not impose the full costs of "conserving" its resources on those outside the state.[240]

It is highly probable that if the constitutionality of the Montana anti-exportation statute is tested that the law will be found to constitute an unreasonable burden on and to discriminate against interstate commerce. The statute is specifically directed at any out-of-state uses of Montana water. A more appropriate approach might be to prohibit those wasteful or inefficient uses of water whether they be in-state or out-of-state. The fact that existing statutes do take such an approach only further confirms the discriminatory character of the statute. The fact that, at least technically, the statute is not an outright prohibition does not help legitimize the statute itself.[241] The discriminatory character of the statute can be seen in the requirement of legislative approval only for out-of-state users. Since the whole basis of the statute is the out-of-state character of a proposed use rather than the type of use itself, the statute would be unlikely to pass a test of its constitutionality.

B. The Reservation Process

The reservation of waters permitted by statute[242] in Montana has been discussed at various points throughout this article. That

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236. Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

237. MCA §§ 85-2-201 through -520 (1979).

238. MCA §§ 85-2-412, -505, -507 (1979).

239. MCA § 85-2-104 (1979): "(1) The legislature finds that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of this state. (2) The use of water for the slurry transport of coal is not a beneficial use of water."

240. Hughes v. Oklahoma, 441 U.S. 322 (1979).

241. This statute prohibits exportation *without* consent of the legislature. MCA § 85-1-121 (1979).

242. MCA § 85-2-316(6) (1979).

statute allows any governmental entity to reserve waters for future beneficial uses including instream flow, when properly approved by the Board of Natural Resources. This section of the article attempts to assess the legal status of those reservations. There is no case law so an examination of the weight to be given to a reservation is conjectural.

In Montana, a reservation right is equivalent to a duly perfected permit right. The reservation receives a priority as of the date the order is adopted by the board.[243] Potential interference with reserved waters is a basis for denying a later permit just as if it were interference with a prior permit right.[244] Although a reservation of water is distinctly different from a permit right, it is accorded equal status in Montana.

Outside the state the effect of a reservation is not so clear. As discussed earlier in the section on interstate allocation, crossing the state boundary results in a softening of strict appropriative water laws. The Supreme Court has used the appropriation doctrine and accompanying priority dates as a "guilding principle" but has refused to be bound by strict priority in allocating interstate waters. In equitable apportionment the key factor becomes not priority dates but "established uses." It is important to decide whether a reservation might be considered an "established use." The answer seems to be a resounding "maybe."

The crucial factor in determining whether a reservation is an established use lies in the operation of the reservation process. In all likelihood, if it is administered judiciously, a reservation of waters will be considered an established use or at least close to it. The reservation process is a mechanism of great flexibility which can be an effective planning tool. If a reservation reflects a legitimate foreseeable need, and progress is being made toward that objective, then the reservation should be respected. However, inherent in the reservation process is also great potential for abuse. If the reservation process is used merely to stake a claim and extend Montana's rights over its waters, the reservation process is not likely to be recognized by the Court. The process must bear some rational relationship to the development of the state's water resources or it will be considered a sham, as well as becoming vulnerable to constitutional attack.

There are pressures that prevent the process from being abused. Many critics of the process claim Montana is harmed by

243. *Id.*
244. MCA §§ 85-2-311(5), -316(5) (1979).

guaranteeing flow to downstream neighbors who can then develop established uses of that water. That is one effect of the reservation process. This situation should tend to keep reservations limited to legitimate needs. The pressure to limit reservations would seem to strengthen the argument that reservations are established uses. The state would be unwilling to over-reserve, since to do so would actually benefit those states downstream. This pressure would tend to preserve the legitimacy of the reservation process since it would not be in the state's best interest to use reservations of water for improper purposes.

Reservations seem to be an even stronger tool for protecting the state's water in conflicts with the federal government. As discussed earlier, since the role of state law in defining property interests is secure, the best leverage can be gained in dealings with the federal government by defining those property interests as broadly as possible. Montana law considers a reservation to be of the same stature as a duly perfected permit right, so a reservation should be treated as a property right also, as long as the reservation process is not applied indiscriminately.

V. Conclusion

Through an examination of the relevant case law this article has examined the interstate and federal-state factors which should be addressed by a state water plan. The most obvious conclusion that can be drawn is that there is no simple way to save Montana water for Montanans. The water cannot just be dammed up at the border and retained for use within the state. There is no way to make a claim to all the state's water which would be effective against claims by other states and the federal government.

In equitable apportionment, the Supreme Court considers "established uses" and an "equality of right" to the benefits of an interstate stream. In compact negotiations the most effective bargaining tool is to have a realistic appraisal of the state's future needs and plans for developing that needed water. If interstate waters are apportioned by Congress then effective representation and strong lobbies are the state's best tools.

In dealings with the federal government there is little the state can do to counter federal power, but Congress has demonstrated a tradition of protecting state control of water. Strong political leadership can help to maintain that deference to state water law. With or without a favorable congressional attitude, the state can better its position through continued and increased recognition of property rights in water.

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The reservation process represents one of the strongest and most flexible tools that Montana may use to protect its water. Used judiciously, the process will prove invaluable in protecting Montana's water and in developing a state water plan.

None of these areas suggest a simple way to retain the state's water. Instead, they indicate that the best protection for Montana's water is a sound management plan. If the extent of the resource and the future needs of the state can be accurately ascertained, a solid plan for development can be designed. A comprehensive and realistic plan will go far toward insuring that Montana has sufficient water for its future development.