

1967

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Recommended Citation

MacPherson, John; Ragsdale, Calvin E.; and Thompson, William J. (1967) "Improvement of Existing Water Rights through Unification - A Case Study on the Consolidation of Appropriations," *Land & Water Law Review*. Vol. 2 : Iss. 2 , pp. 327 - 364.

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COMMENT

IMPROVEMENT OF EXISTING WATER RIGHTS THROUGH UNIFICATION—A CASE STUDY ON THE CONSOLIDATION OF APPROPRIATIONS

I. INTRODUCTION AND SUMMARY OF EXISTING APPROPRIATIONS

The North Platte River is a non-navigable stream¹ located in the arid region of the Great Plains, an area which is heavily dependent on the waters of the river for its development and prosperity. The need for large scale irrigation to develop the region was recognized, and the doctrine of prior appropriation seemed most suited to the area.² Hundreds of rights to the water of the North Platte exist today with different priorities and sources. These include appropriative rights to the use of the direct flow, to the storage of the direct flow, and to the use of the storage water, as well as contract rights to the use of the storage water. In addition, in *Nebraska v. Wyoming*,³ the United States Supreme Court apportioned the water of the North Platte among Wyoming, Nebraska, and Colorado. "In Wyoming, the stream is a thread upon which reservoirs are strung like beads. The Court decreed an intrastate priority among the reservoirs (which had protected Nebraska since the earliest reservoir stored water for Nebraska lands); an interstate priority between the reservoirs in Wyoming and earlier diversion canals in Nebraska; and a percentage division of the natural flow designed to give effect to the priorities of the users in the latter two states."⁴

The objective of this study will be to determine the legal possibilities, first, of consolidating capacities and water right priorities of the North Platte and Kendrick Projects, and second, of integrating the storage capacities and water right priorities of the consolidated projects with the water right priorities of the individual direct flow appropriators. For the purposes of this study, it will be assumed that the owners of the water rights will receive economic benefits derived from the consolidations suggested above which will justify the integration of the rights on the North Platte River.⁵

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

2. TRELEASE, BLOOMENTHAL & GERAUD, CASES AND MATERIALS ON NATURAL RESOURCES 2 (1965).

3. 325 U.S. 589 (1945), modified, 345 U.S. 981 (1953).

4. Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation*, (1963 Sup. Ct. Rev. 158, 170).

5. A study of this point is presently being conducted by the Department of Agricultural Economics, College of Agriculture, University of Wyoming, Laramie, Wyoming.

A. Water Right Doctrines As Applied in Wyoming and Nebraska

The State of Wyoming applies the doctrine of prior appropriation exclusively. The Constitution of Wyoming,⁶ adopted in 1890, and the Wyoming Statutes⁷ provide for this type of water right. In *Moyer v. Preston*,⁸ Wyoming adopted the "Colorado doctrine"⁹ and held that the doctrine of riparian rights never did exist in Wyoming and that prior appropriation existed before there was any legislation on the subject. Thus, there are no riparian rights in Wyoming.

The State of Nebraska has a dual system of water law. Originally Nebraska followed the doctrine of riparian rights. Even after the legislature had adopted an irrigation code based on the principle of prior appropriation, the Supreme Court, in *Meng v. Coffee*,¹⁰ affirmed the existence of riparian rights in Nebraska.¹¹ In 1895, the legislature adopted an irrigation code modeled on the Wyoming irrigation code.¹² The Act of 1895 forms the basis of the Nebraska water statutes today. In 1920, the Constitution of Nebraska¹³ recognized the doctrine of prior appropriation. Until 1966, the riparian rights in Nebraska were considered inferior to rights of appropriators since a violation of riparian rights by appropriators would not be enjoined, only compensation being awarded.¹⁴ It was thought that, "A riparian who desired to protect his existing uses of the water that antedated appropriations was forced to comply with the irrigation laws and claim as an appropriator, for otherwise his only right against a later appropriator would be the collection of money damages, and he would have no protection for his water at

6. WYO. CONST. art. 8, § 3.

7. WYO. STAT. §§ 41-2, -211, -212 (1957).

8. 6 Wyo. 308, 44 Pac. 845 (1896).

9. The "Colorado doctrine" as announced in *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882) is that riparian law is not suited to the climate and geography of the state and that prior appropriation has been the sole basis of the right to the use of water from the date of the earliest appropriations of water within the boundaries of the state.

10. 67 Neb. 500, 93 N.W. 713 (1903).

11. Doyle, *Water Rights in Nebraska*, 29 NEB. L. REV. 385 (1950).

12. *Id.* at 387.

13. NEB. CONST. art. 15, § 6.

14. *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N.W. 781 (1903); *McCook Irrigation & Water Power Co. v. Crews*, 70 Neb. 115, 102 N.W. 249 (1905); *Cline v. Stock*, 71 Neb. 70, 102 N.W. 265 (1905).

all."¹⁵ But in the 1966 decision of *Wasserburger v. Coffee*,¹⁶ the Supreme Court of Nebraska overruled *Crawford Company v. Hathaway*¹⁷ and granted to riparian owners an injunction enjoining upper irrigators against exhausting a stream by diversions pursuant to appropriation permits from the state. The full impact of this decision has not yet been determined. However, any solutions offered later in regard to appropriative rights in Nebraska would apply equally well to existing riparian rights.

The procedures by which appropriative rights are obtained in Wyoming¹⁸ and in Nebraska¹⁹ are very similar. An application for a permit is filed with the proper state agency.²⁰ When the requirements are met and the permit issued, the date of priority for the water right relates back to the date on which the application was made.²¹ No appropriation is denied except when such denial is demanded by the public interests.²²

B. Development of Water Rights of the North Platte River

The first attempts to bring water to the land surrounding the North Platte River were made by individuals and by private companies which operated canals and other irrigation works. In 1902, the private development of water resources was supplemented by the Reclamation Act²³ which provided for federal "construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands . . ."²⁴ Section 8 of the act provides that it is not intended in any way to interfere with the laws of any state relating to the control or distribution of water, and that the Secretary of Interior shall proceed in conformity with the state laws in carrying out the provisions of the act.²⁵ Until recently, this section

15. Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEXAS L. REV. 24, 61 (1954).

16. 180 Neb. 149, 141 N.W.2d 738 (1966).

17. 67 Neb. 325, 93 N.W. 781 (1903).

18. WYO. STAT. §§ 41-26, -27, -201 to -216 (1957).

19. NEB. REV. STAT. §§ 46-233 to -243 (Reissue 1960).

20. WYO. STAT. §§ 41-26, -201 (1957); NEB. REV. STAT. §§ 46-233, -241, -242 (Reissue 1960).

21. WYO. STAT. § 41-212 (1957); NEB. REV. STAT. § 46-235 (Reissue 1960).

22. WYO. CONST. art. 8, § 3; NEB. CONST. art. 15, § 6.

23. 32 Stat. 388 (1902), as amended, 43 U.S.C. §§ 371-616 (1964).

24. *Id.* § 391.

25. *Id.* § 388.

was interpreted to mean that a Reclamation water right must be obtained through an application for a permit to appropriate just as any private appropriator is required to do. Thus viewed, national policy was deliberately subjected to the possibility of state control and even state veto.²⁶ In accordance with this interpretation of Section 8, the Bureau of Reclamation made application and received state storage permits for all of its projects on the North Platte River. Since that time, the United States Supreme Court has held that, "... § 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 Rather, the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made,"²⁷ and that there is no room for state laws inconsistent with the undertakings of federal projects.²⁸

The North Platte Project was the first application of the Reclamation Act²⁹ to the waters of the North Platte River. Pathfinder Reservoir, with a priority date of December 6, 1904, is the principal storage facility for the project. Pathfinder has a storage capacity of just over 1,000,000 acre feet and is located on the North Platte River southwest of Casper, Wyoming. Guernsey Reservoir, a much smaller unit used to supplement Pathfinder and to regulate the water, has a priority date of April 20, 1923. The reservoir is located upstream from Guernsey, Wyoming and has a storage capacity of about 50,000 acre feet. The North Platte Project's ratio of storage capacity to acres irrigated is approximately 3.4 to 1. Even though the storage capacity of the North Platte Project is located in Wyoming, most of the land benefited by the project is in Nebraska. The law of prior appropriation requires that the project observe the priority of all senior appropriators located below its storage facilities on the North Platte River. These senior appropriators include thirty-two canals in Wyoming in addition to the State Line Canals in Nebraska. The North Platte Project can only store water that is in

26. Trelease, *Reclamation Water Rights*, 32 ROCKY MT. L. REV. 464, 467 (1960).

27. *City of Fresno v. California*, 372 U.S. 627, 630 (1963).

28. *Arizona v. California*, 373 U.S. 546 (1963). See part IV *infra* p. 359 for further discussion of § 8.

29. 32 Stat. 388 (1902).

excess of the demand made on the water by the senior appropriators.³⁰

In 1931, the Bureau of Reclamation started the Kendrick Project for the irrigation of land in central Wyoming. The principal storage facility for the project is Seminoe Reservoir which has a priority date of December 1, 1931. The reservoir is located above Pathfinder and has a storage capacity of just over 1,000,000 acre feet. Alcova Reservoir, with a priority date of April 25, 1936, gives the project additional storage and serves as the point of diversion for the project's main canal. Alcova has a storage capacity of almost 200,000 acre feet and is located below Pathfinder. The Kendrick Project's ratio of storage capacity to acres irrigated is approximately 52 to 1. With minor exceptions, all of the appropriations from the North Platte River are senior to the appropriations held by the Kendrick Project.³¹

It should be noted that, although the storage capacities of the two projects are approximately the same, the North Platte Project provides for about fourteen times as much land as does the Kendrick Project. The combined storage capacity of the two projects is 175 percent of the long-time average annual run-off of the North Platte River at Pathfinder.

In 1911, the Warren Act³² authorized the Secretary of Interior to utilize the storage or carrying capacity of the federal facilities that is in excess of project needs by contracting with irrigation systems operating under the Carey Act,³³ and with individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. This legislation allowed non-project lands to participate in the summer irrigation made possible by the project storage facilities. Many irrigation companies in Wyoming and Nebraska take advantage of the excess project water.

The Flood Control Act of 1944³⁴ was enacted by Congress

30. United States Department of Interior, Bureau of Reclamation; *Annual Project History, North Platte Project, Wyoming-Nebraska*, Volumes 45-53 (1957-1965).

31. United States Department of Interior, Bureau of Reclamation; *Annual Project History, Kendrick Project*, Volumes 24-33 (1956-1965).

32. 36 Stat. 925 (1911), 43 U.S.C. § 523 (1964).

33. 28 Stat. 422 (1894), as amended, 43 U.S.C. § 641 (1964).

34. 58 Stat. 887 (1944), 33 U.S.C. §§ 701-709a (1964).

to construct public works on rivers and harbors for flood control and for other purposes (including irrigation). The Missouri River Basin Project³⁵ was undertaken as a part of the Flood Control Act. The first reservoir built under the project was Kortes Reservoir. It is situated between Seminoe and Pathfinder and has a storage capacity of 4,800 acre feet. In 1954, Congress passed a resolution³⁶ providing for the construction of Glendo Reservoir above Guernsey, with a capacity of 40,000 acre feet and a priority date of August 30, 1950.³⁷

The North Platte Project, with its early priority, can normally store water every year. But its low ratio of storage capacity to acres irrigated means that in normal years the project uses most of the water stored in its reservoirs. There is little or virtually no active carryover following a dry year, and this results in a water supply for practical purposes, on a year-to-year basis during dry years. The Kendrick Project situation is the opposite of that in the North Platte Project. Because of its late priority, the number of years in which Kendrick has been unable to store any water is almost equal to the number of years in which it has been able to store water. But the project's storage capacity is so great in comparison to the amount of land irrigated that it can store enough water in a good year to carry it through several dry years.³⁸

Because of these differences in the advantages and disadvantages of the two projects, a consolidation of the water rights of the North Platte and Kendrick Projects would result not only in the elimination of many of the administrative problems, but also in the more efficient and beneficial use of the river's water. In good years, the North Platte Project would be able to take advantage of the large storage capacity of the Kendrick Project to store its water. In dry years, the North Platte Project could depend on the large excess accrual in Seminoe to meet the project's needs. It is possible that after a series of dry years the large storage ca-

35. *Id.* § 10, at 897.

36. 68 Stat. 486 (1954).

37. Permit 5998 Res., State Engineer's Office, Cheyenne, Wyoming, filed Aug. 30, 1950, approved as amended, Mar. 4, 1953. See part IV, *infra* p. 359 for further discussion of the Glendo Dam.

38. Telephone interview with Mr. Pete Anker, Chief, Irrigation, North Platte Project Office, Casper, Wyoming, Mar. 31, 1967, and Apr. 14, 1967.

capacity of Seminoe would be exhausted and storage water would not be available to meet the needs of the Kendrick Project. In such years, the North Platte Project's water, with its early priority to direct flow, could be used to supply the Kendrick Project's needs. Of course, the complete integration of all of the water rights on the North Platte River would offer the most efficient administration and use of the water. Such a consolidation would include all individual direct flow and contract rights as well as the storage rights of all the Bureau of Reclamation projects. This would allow water with an early priority under an individual person's water right to be stored in the federal reservoirs. Water would be delivered to users when they need it, and no water would be wasted. The individuals with early prior appropriations would be benefited by the availability of storage water for irrigation in the summer instead of being limited to the direct flow which is very heavy in the spring and which tapers drastically during the summer.

II. SOLUTIONS UNDER EXISTING LAW

A. Wyoming Law

One way to consolidate the federal reservoirs and their supporting projects is simply to change the water rights around, in effect, changing the relationships of the various parties involved. If this were done the Bureau could store direct flow which is presently allowed to pass by. If necessary, Seminoe water could be given to North Platte Project users in years of shortage, and Pathfinder water could be given to Kendrick Project users in years of surplus. All of this could be done by transferring water rights. However, the Wyoming water right transfer restriction raises certain difficulties.

Early in the history of water law in the State of Wyoming, the right which an individual held could be transferred freely.³⁹ This was generally the law in all prior appropriation states.⁴⁰ But, in 1909, Wyoming enacted a statute

39. *Johnston v. Little Horse Creek Irrigating Co.*, 13 Wyo. 208, 79 Pac. 22 (1904).

40. Trelease & Lee, *Priority and Progress—Case Studies in the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1, 21 (1966) [hereinafter cited as Trelease & Lee].

which provided: "Water rights cannot be detached from the lands, place or purpose for which they are acquired, without loss of priority."⁴¹ Part of the history of water law in Wyoming has been the gradual legislative erosion of this statute.⁴²

For the purposes of this comment, only certain exceptions to the general rule will be considered.⁴³ One amendment to the original statute restricted its ban to "Water rights for the direct use of the natural unstored flow of any stream . . .,"⁴⁴ and companion statutes were enacted.⁴⁵ Since the statutory restriction applies only to "natural unstored flow," storage rights are not restricted in their transferability.

Storage rights such as the Bureau of Reclamation has for its dams along the Platte River are generally regulated by Sections 41-26 through 41-46 of the Wyoming Statutes. The builder of a dam obtains a primary permit.⁴⁶ Landowners who exhibit to the State Engineer an agreement between them and the reservoir owner giving "a permanent and sufficient interest in said reservoir to impound enough water for the purposes set forth . . ."⁴⁷ may apply for a secondary permit to put the water to a beneficial use.⁴⁸ This secondary permit has been described as one to "'appropriate' the stored water to particular lands."⁴⁹ It may be transferred freely since it is a right to the stored waters of the reservoir and not "for the direct use of the natural unstored flow of any stream." The Bureau of Reclamation took out secondary permits in the names of the landowners within the

41. Wyo. Laws 1909, ch. 68, § 1.

42. See Trelease & Lee for a description and discussion of this history.

43. Trelease & Lee at 11-19 list 10 exceptions to the 1909 statute as originally passed. These are: 1) Domestic and Transportation Purposes, 2) Pre-1909 Rights, 3) Rotation, 4) Reservoir Rights, 5) Amendment of Permits, 6) Agreements Between Appropriators, 7) Submerged Lands, 8) Steam Power Plants, 9) Industrial Uses, and 10) Highway Purposes. Those which apply to the problem presented in this comment, numbers 2, 4, 5 and 6, will be discussed in the body of the comment.

44. WYO. STATS. § 41-2 (1957).

45. WYO. STATS. §§ 41-34, -37 (1957).

46. WYO. STATS. § 41-26 (1957). This section sets forth the procedure for obtaining such a permit.

47. WYO. STATS. § 41-27 (1957).

48. *Ibid.*

49. Trelease & Lee at 46-47.

areas of their various projects at the time the works were completed.⁵⁰

1. *Unification Absent the Creation of New Governmental Entities.* The secondary permit appropriators present the principal problem in that they have direct claims on the reservoirs. Each of the permits names as its source a reservoir and is a claim only against water stored under that reservoir's priority.⁵¹ The holder has a property right which can be transferred at the "use" end. However, it is frozen at the "source" end of the right. As a result, the Bureau must furnish to a North Platte Project landowner water under the Pathfinder reservoir's priority in accordance with the decision in *Ickes v. Fox*.⁵²

Since these uses are not regulated by the general rule against transfers, it would seem that with the acquiescence of those who presently have secondary permits, the Bureau could at least solve the problem of having to serve them from specific reservoirs. This would conceivably be done in one of the following manners.⁵³

One solution would be to have all the secondary permit holders cancel their permits in exchange for contracts which named either of the reservoirs as a source of their right. This, however, would involve giving up property rights on the part of those with secondary permits, and it is possible that they would not want to give these up for a mere contract right.⁵⁴

50. Trelease & Lee at 47. Interview with Dean Frank J. Trelease, University of Wyoming College of Law, Laramie, Wyoming, January, 1967.

51. WYO. STATS. § 41-27 (1957).

52. 300 U.S. 82 (1936). The *Fox* case held that the landowners had a property right, not a contract right, in light of the Reclamation Act of 1902, Washington State law, and the contracts between the Secretary of the Interior (through the Bureau of Reclamation) and the Water Users Association, which distributed the water to the individual landowners. See also *Nebraska v. Wyoming*, 325 U.S. 589, 611-16 (1944) which stated, in passing, that the rights were in the landowners.

53. All of the proposed solutions would require a renegotiation of the present repayment contracts which the Bureau has with the Irrigation Districts that serve as the carriers to the landowners. See, for example, paragraphs 16 and 21 of the "Casper-Alcova Irrigation District Contract" 71 Stat. 608, September 4, 1957 and executed November 22, 1957, on file at the Office of the Bureau of Reclamation in Casper, Wyoming.

54. Particularly in view of the difficulties encountered by the landowners in *Ickes v. Fox*, *supra* note 52, where if the right had been determined to have been the government's, the landowner's claims would have been merely contractual, and they would have encountered the "governmental immunity" doctrine and all the ensuing remedial difficulties presented thereby.

A second approach would be simply to have all the permits amended to name both reservoirs as the source of the water put to beneficial use under the permits. The Wyoming Statutes provide that the board of control can amend permits, "when in the judgment of the . . . Board it appears desirable or necessary."⁵⁵ While this statute requires that the petitioner for the amendment must be the owner of all the lands involved in the petition, it would not seem to be possible to meet the requirement. Each individual holder of a secondary permit could apply for such an amendment, and since the only lands involved in each petition would be those owned by the petitioner, the requirement would seem to be met.

Another procedure through which the Bureau could unify its projects would be to have all the holders of secondary permits transfer them to the Bureau of Reclamation. Then, the Bureau, as owner of all the rights could cancel the secondary permits, at which time, new agreements between the Bureau and the landowners could be reached and new secondary permits taken out naming both reservoirs as the source of the water.

Should the Bureau be able to effect such a change in the secondary permits, the secondary permit holders in both projects would have permits calling for water from either reservoir, and the local Director of the Bureau could meet their requirements from whichever source was best able to bear the diversion. Because the Bureau would hold all priorities, it is unlikely that the United States would raise objections against its own actions in simply thereafter treating the two reservoir rights as interchangeable. Since the water would continue to be accumulated in the reservoirs in accordance with their original priorities, there should be no objections from other appropriators.

The direct flow appropriators on the Platte present another problem, in that the Bureau must let their water go by and is unable to store it. If the Bureau were able to store the water and provide it to the landowner as he needed it, there would seem to be a more beneficial use of the water with less waste and inefficiency for all concerned. The simplest pos-

55. WYO. STAT. § 41-213 (Supp. 1965). This is one of the ten exceptions listed by Trelease & Lee. See Trelease & Lee, 13-15, 51-55 for a discussion of the exception and examples of its application.

sible solution to this problem would be to have the federal government purchase these rights.⁵⁶

Another way in which to solve this problem might be by use of the "exchange" statute⁵⁷ found in the Wyoming Statutes. This statute provides that appropriators may agree among themselves "for the delivery and use of either storage or direct flow water from another source."⁵⁸ This can be done "where either (a) the source of the appropriation is at times insufficient to fully satisfy such appropriation, or (b) a fuller conservation and utilization of the state's water resources can be resultantly accomplished."⁵⁹ Although this statute was specifically designed for a special case which arose in the Owl Creek Reclamation Project,⁶⁰ it appears to be general enough to bear this application. The only difficulty which might arise is a determination of what the words "from another source" mean. No case seems to have interpreted this particular phrase, and it appears susceptible to various meanings.⁶¹ Here, although, in one sense, the source is the same (the North Platte River), in another sense, it is different (change from direct flow right to storage right). There seems to be no good reason why the more liberal interpretation should not be accepted, particularly in light of the fact that to do so would result in a fuller conservation and utilization of the state's water resources.

Thus the problems of administering the waters in the North Platte River can be met through existing Wyoming law, simply on a person to person basis between the Bureau of Reclamation and the individual landowner.

56. This could be done under § 7 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 421 (1964), which gives the Secretary of the Interior authorization to acquire rights of property necessary to the carrying out of the provisions of the Act. Such acquisitions can be by either purchase or condemnation. For a further discussion of this power see part IV of this comment, *infra* p. 359. Since the companion decisions of *Dugan v. Rank*, 372 U.S. 609 (1963) and *City of Fresno v. California*, 372 U.S. 627 (1963), the Secretary is not bound by state laws when obtaining rights necessary to the administration of a project, there is probably an eleventh exception to be added to *Trelease & Lee's* ten exceptions to the Wyoming "no-change" statute.

57. WYO. STATS. § 41-5 (1957).

58. *Ibid.*

59. *Ibid.*

60. *Trelease & Lee* at 16.

61. For one possible meaning, see *Trelease & Lee's* discussion of the Wheatland Irrigation District's consideration of the use of this statute beginning at 1 LAND & WATER L. REV. 57 (1966). The Act providing for the creation, powers and administration of such districts is contained in sections 41-77 through 41-117 of the Wyoming Statutes.

2. *Unification Based on the Creation of New Governmental Entities.* The system created under Wyoming law absent new governmental entities would still be somewhat fragmentary and probably would not solve all the problems which exist, particularly the problems created by those who might not wish to participate. It would seem to be a better solution to the problem simply to run the entire river basin as a single entity, for the benefit of all persons having interests therein. Under existing Wyoming law, there is an approach whereby such a desired goal could be achieved.

Wyoming law provides for the establishment of conservancy districts which can be clothed with fairly extensive powers.⁶² Such a district is set up to administer the waters within the area which it serves. In effect, it can be characterized as a special district or a quasi-municipal district.

To create such a district, petition must be made to a court within the proposed district's boundaries. This petition requires signatures of:

not fewer than twenty-five percent (25%) of the owners or entrymen on having not less than twenty-five percent (25%) of the irrigated lands or lands susceptible of irrigation under the works proposed for construction, to be included in the district, but not embraced within the incorporated limits of a city or town . . . and be also signed by not fewer than five percent (5%) of non-irrigated land and/or lands embraced in the incorporated limits of a city or town, all situated in the proposed district.⁶³

The statute also requires that such tracts of land represented must have a valuation of at least one hundred dollars.⁶⁴ If the petitions are in order, the court will give notice to all the persons within the proposed district who are concerned and to all county commissioners of counties which will be within the district's boundaries.⁶⁵ Opponents may also petition the district court to prevent the district's creation.⁶⁶ If this petition has the names of those owning twenty percent of the irrigable land within the proposed district and the names

62. WYO. STATS. § 41-83 (1957).

63. *Ibid.*

64. *Ibid.*

65. WYO. STATS. § 41-85 (1957).

66. WYO. STATS. § 41-86 (1957). . .

of those owning at least five percent of the non-irrigable land embraced within the limits of an incorporated city or town within the district, the establishment of the requested district must automatically be rejected.⁶⁷

If such a district is created, included within its powers is the authority to obtain water rights within its boundaries, to build distribution facilities, and to sell water from the rights which it has obtained.⁶⁸ Were such a district established, it is possible that every water right on the Platte River

67. *Ibid.*

68. WYO. STATS. § 41-91 (1957). Section 41-89 provides for the initial appointment and later election of a Board of Directors for the district. Then, section 41-91 provides:

The board shall have power on behalf of said districts:

(b) *Purchase, etc. of property and water rights, etc.*—To take by appropriation, grant, purchase, bequest, devise or lease, and to hold and enjoy water, water works, water rights and sources of water supply; and any and all real and personal property of any kind within or without the district necessary or convenient to the full exercise of its powers; and to sell, lease, encumber, alien or otherwise dispose of water, water works, water rights and sources of water supply for use within the district, and any and all real and personal property of any kind within or without the district; also to acquire, construct or operate, control and use any and all works, facilities and means necessary or convenient to the exercise of its power, both within and without the district for the purpose of providing for the use of such water within the district and to do and perform any and all things necessary or convenient to the full exercise of the power herein granted

(c) *Eminent domain.*—To have and to exercise the power of eminent domain and in the manner provided by law for the condemnation of private property for public use to take any property necessary to the exercise of the powers herein granted.

(e) *Contracts with federal government, etc.*—To contract with the government of the United States or any agency thereof or with an agency of the State of Wyoming for the construction, preservation, operation and maintenance of water supply works, drains, pipelines, tunnels, reservoirs, regulating basins, diversion canals and works, dams, power plants and all necessary works incidental thereto, including supply canals, farm laterals, and distribution and drainage systems of all kinds, and to acquire perpetual rights to the use of water from such works, to sell and dispose of perpetual rights to the use of water from such works to persons and corporations, public and private.

(f) *Allocation of district water to irrigated lands, etc.*—To list in separate ownership the lands within the district which are susceptible of irrigation from district sources and to make an allotment of water to all such lands, . . . ; to levy assessments as hereinafter provided, against the lands within the district to which water is allotted . . . ; provided that the board may divide the district into units and fix a different value per acre-foot of water in the respective units, with due regard to land classification, and in such cases shall assess the lands within each unit upon the same basis of value per acre-foot of water allotted to land within such unit.

(g) *Fixing of water rates.*—To fix rates at which water not allotted to lands as hereinbefore provided shall be sold, leased or otherwise disposed of; provided, however, that rates shall be equitable although not necessarily equal or uniform, for like classes of service throughout the district

and its tributaries could be acquired. The district could then sell water to those who desire it.

The problems presented by the direct flow appropriators and the secondary permit holders have been discussed. The merits of the conservancy district approach must be viewed in the light of these problems.⁶⁹

Those appropriators who have direct flow rights which predate the 1909 "no-change" statute could sell their rights to the district for consideration of a long term contract assuring them a water supply. Of course those who wished to do so could simply sell their interests outright. Under the decisions of the Wyoming Supreme Court, the district could change its purchased direct flow rights to storage rights if it was necessary for greater beneficial use.⁷⁰

Considering the language of the "no-change" statute, some question may arise as to whether a pre-1909 appropriation could be transferred. Although the question has never been presented to the Wyoming Supreme Court, the United States District Court for the District of Wyoming has held that pre-1909 rights in Wyoming are freely alienable.⁷¹ Should the question ever be presented to the Wyoming Court, it is probable that the United States Supreme Court would have the last word since the decision of the District Court was

69. *But see* Trelease, *Transfer of Water Rights—Errata and Addenda—Sales for Recreational Purposes and to Districts*, 2 LAND & WATER L. REV. 321 (1967). If the view presented in Dean Trelease's article is correct, then the "no-change" problems may not exist. This comment was written on the assumption that the law is as presented in Trelease & Lee, *Priority and Progress—Case Studies in the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1 (1966). Dean Trelease's article should be examined and the rest of this comment read in light of it, for it may well be possible that the difficulties do not exist.

70. *Holt v. City of Cheyenne*, 22 Wyo. 212, 137 Pac. 876 (1913). The *Holt* case is susceptible to this reading, although it did not say this in so many words. In *Holt*, a water user had brought an action against the City of Cheyenne to recover damages for the City's alleged unlawful use of water from Crow Creek. Among the plaintiff's many grounds for relief was that the city had built dams higher up on the creek and stopped the flow. The plaintiff urged that a change in diversion could not be made (this seemed to mean a change from a direct flow diversion below plaintiff's land to a storage diversion above the plaintiff's land). However, the court said a change in diversion was recognized by *Johnston v. Little Horse Irrigating Co.*, *supra* note 39. It was determined that plaintiff was precluded from asserting any injuries, chiefly because Cheyenne's appropriation was prior to plaintiff's and because the City was within the limits of its priority. 22 Wyo., at 229-232. Trelease & Lee also present an administrative situation where a change from a direct flow appropriation to a storage appropriation was allowed. See the case history discussion of the Industrial Use exception to the Wyoming "no-change" statute at 1 LAND & WATER L. REV. 64-66 (1966).

71. *Hughes v. Lincoln Land Co.*, 27 F. Supp. 972 (D. Wyo. 1939).

based on the due process clause of the Fourteenth Amendment to the United States Constitution. However, it seems reasonable to assume that the Wyoming Court would follow the reasoning of the Federal Court decision.⁷²

Although the question is beyond the scope of this comment, a collateral consideration is the possible problem which might arise as a result of the "160 acre limitation" of the Federal Reclamation law.⁷³

Individuals who have direct flow rights which were acquired subsequent to the passage of the 1909 statute present a slightly more complex problem. If they fit within one of the other exceptions to the 1909 statute,⁷⁴ they could then transfer their rights to the district. The most likely exceptions to be used in this context are the reservoir exception and the "exchange" statute exception.

The reservoir exception to the 1909 statute allows those who hold storage rights to transfer them freely.⁷⁵ Thus, any appropriator of this type wishing to transfer his rights to the district could do so and no problem would seem to occur.

Other direct flow appropriators could exchange their rights with the district under the procedure set out in the "exchange" statute previously mentioned.⁷⁶ In return they would receive waters from the district from whatever sources the district cared to call upon to furnish the requirement. The agreement providing for such an exchange would be on file with the state engineer's office⁷⁷ and would protect both parties. Thus, the direct flow rights of individual appropriators in the Platte Basin within the State of Wyoming could be obtained by the district and such waters could then be administered and distributed by it.

72. Trelease & Lee state that four Wyoming Attorneys General have rendered opinions which follow the *Hughes* reasoning. Trelease & Lee at 12. The authors also present case studies of where transfers of pre-1909 rights have been approved administratively by the State Engineer and Board of Control. *Id.* at 64-66.

73. Reclamation Act of 1902, § 5, 32 Stat. 389, 43 U.S.C. § 431 (1964). For a discussion of the considerations relating to the "160-acre limitation" in the Central Valley Project in California, see Graham, *The Central Valley Project: Resource Development of a Natural Basin*, 38 CALIF. L. REV. 588 at 603-619 (1950).

74. See note 43, *supra*.

75. See note 44, *supra* and accompanying text.

76. WYO. STATS. § 41-5 (1957). See also note 57, *supra* and accompanying text.

77. As required by WYO. STATS. § 41-7 (1957).

As for those appropriators within the district who have secondary permits, the district could obtain them for the consideration of a long term contract or lease to provide those individuals with their water.⁷⁸ Then, the district would own the rights and would have contract requirements to fulfill as to them. Since the district would own the right, delivery of the waters from the various reservoirs would be to the district and it would distribute them.

Thus, under present Wyoming law, a district could be created which would permit the acquisition of all water rights along the Platte within the State of Wyoming. This district would then be able to distribute such waters on a contract basis, in somewhat the same manner as a city water works distributes water to its users. As a result, water users along the Platte would be receiving their water in the same way as city water users, not caring where they obtained it, but merely being concerned with whether it showed up in their taps or their headgates, as the case may be, when they wanted it.

B. Nebraska Law

Prior to 1895, an appropriative right in Nebraska was not attached to specific land and could be transferred or assigned.⁷⁹ However, in 1895, the Nebraska legislature enacted

78. This presents some difficulties. Although the law seems fairly clear that secondary permit rights are freely transferable, the repayment contracts which the Bureau has with the irrigation districts which act as carriers between the United States and the landowners probably preclude this type of change. (See, for example, paragraph 16 of the "Casper-Alcova Irrigation District Contract," 71 Stat. 608 (1957), executed on November 22, 1957, on file at the Office of the Bureau of Reclamation in Casper, Wyoming.) However, renegotiation of the contracts and subsequent approval by Congress should not be too difficult since the solutions presented here are desirable to the Bureau of Reclamation as well as to the landowners. Indeed, a similar trade has taken place in Colorado. There "11 existing ditch systems in the project service area assigned to the [Purgatoire River Water] Conservancy District their direct flow rights for the mutual benefit of all lands in the Conservancy District." Letter from Edward J. Talbot, Chief, Repayments Branch, Bureau of Reclamation, Regional Office, Region 7, Denver, Colorado to Dean Frank J. Trelease, College of Law, University of Wyoming, Laramie, Wyoming, March 28, 1967. The letter, enclosed contract, Operating Criteria and Operating Principles indicate a plan for transferring certain storage rights from an existing dam to a proposed one, assigning the direct flow rights as indicated above, and the renegotiation of a contract between the Purgatoire River Water Conservancy District and the Bureau. Other details, in addition to those listed, were the end result of three years of "intensive effort" on the part of all concerned in solving the problems of negotiation.

79. *Farmers & Merchants Irrigation Co. v. Gothenburg Water Power & Irrigation Co.*, 73 Neb. 223, 102 N.W. 487 (1905); *Vonburg v. Farmers Irrigation Dist.*, 132 Neb. 12, 270 N.W. 835 (1937); *United States v. Tilley*, 124 F.2d 850 (8th Cir. 1941).

an irrigation code which stated: "It is hereby expressly provided that all water distributed for irrigation purposes shall attach to and follow the tract of land to which it is applied" ⁸⁰ The courts have held that this statutory provision requires that, "the water must be attached to the land," ⁸¹ and that, "all appropriations for irrigation purposes since 1895 are inseparably appurtenant to specific land, and so follow the land to which the water was intended to be and has been applied." ⁸² To accomplish the objective of the statute above, the Nebraska law requires that an application to appropriate either direct flow or stored water for beneficial use must set forth the purpose for which the water is to be applied and, "if for irrigation, a description of the land to be irrigated." ⁸³ Since the passage of the Act of 1895, an appropriator may change the place of use of water appropriated prior to 1895, but, "can only do so under the permission and subject to the administrative control of the board of irrigation." ⁸⁴ This was held to be, "a valid exercise of state police power, in safeguarding against the possibility of an unjustifiable waste of public waters and in aiding orderly administration and supervision." ⁸⁵

The method of making application for use of direct flow and of stored water is set forth in Sections 46-233 through 46-243 of Statutes of Nebraska. The application requirements for appropriating direct flow for either beneficial use or storage are very similar to those in Wyoming. However, a person in Nebraska proposing to apply to beneficial use water stored must file an application for a permit. ⁸⁶ A person in Wyoming proposing to do the same may, but is not required to, file an application for a permit. ⁸⁷ In the case of the North Platte Project, the Bureau of Reclamation holds permits from the State of Nebraska to store the water of the North Platte River in Nebraska. The beneficial users of the project

80. NEB. REV. STAT. § 46-122 (Reissue 1960).

81. *Farmers & Merchants Irrigation Co. v. Gothenburg Water Power & Irrigation Co.*, 73 Neb. 223, 102 N.W. 487, 488 (1905).

82. *United States v. Tilley*, 124 F.2d 850, 856-857 (8th Cir. 1941).

83. NEB. REV. STAT. §§ 46-233, -242 (Reissue 1960).

84. *Farmers & Merchants Irrigation Co. v. Gothenburg Water Power & Irrigation Co.*, 73 Neb. 223, 102 N.W. 487, 488 (1905).

85. *United States v. Tilley*, 124 F.2d 850, 857 (8th Cir. 1941).

86. NEB. REV. STAT. § 46-242 (Reissue 1960).

87. WYO. STAT. § 41-27 (1957).

water must then obtain permits from Nebraska to make use of the stored water.⁸⁸

1. *Unification Absent the Creation of New Governmental Entities.* A solution to the problem as it concerns the users of the storage water of the North Platte Project would require a change in the permit so that the right to stored water could be supplied by Seminoe water with its later priority as well as Pathfinder water. However, the water law of Nebraska will not allow the necessary change in the permit. Unlike Wyoming,⁸⁹ the Nebraska statute which prohibits the transfer of appropriative rights applies to stored water as well as natural flow.⁹⁰ Therefore, the right to stored water from Pathfinder is inseparably appurtenant to the specific land and cannot be transferred in order to acquire new rights to stored water from both Pathfinder and Seminoe.⁹¹ Also, unlike Wyoming,⁹² the Nebraska statutes do not provide for the amendment of water permits. Therefore, this method of changing the permit is not open to Nebraska water users. A solution to the problem as it concerns the direct flow appropriators is also most difficult. In Wyoming, the exchange statute⁹³ might be used to overcome the statutory restrictions on the transfer of appropriative rights to direct flow. But Nebraska has no such statute available to direct flow appropriators.

The restriction on the transfer of water rights which ties the water to the land in Nebraska is the roadblock to the solution of the problem, and the restrictive statute should be repealed. An advantage of the appropriative doctrine over the riparian doctrine is that it avoids the freezing of the use of water to particular lands. This advantage is negated by the Nebraska restriction on the transfer of water rights, and such restrictions have been severely criticized as obstacles to the most efficient and beneficial use of our water resources. It is maintained that, "If the West is to continue to gain and is to consolidate its past gains, its water law must allow and

88. NEB. REV. STAT. §§ 46-241, -242 (Reissue 1960).

Telephone interview with Department of Water Resources of the State of Nebraska, Lincoln, Nebraska, April 3, 1967.

89. WYO. STAT. § 41-2 (1957).

90. NEB. REV. STAT. § 46-122 (Reissue 1960).

91. *Farmers & Merchants Irrigation Co. v. Gothenburg Water Power & Irrigation Co.*, 73 Neb. 223, 102 N.W. 487 (1905); *United States v. Tilley*, 124 F.2d 850 (8th Cir. 1941).

92. WYO. STAT. § 41-213 (1957).

93. WYO. STAT. §§ 41-5 to -8 (1957).

encourage water to be shifted to more efficient uses, and to be used more efficiently in present uses."⁹⁴

It appears that the only method by which the problems of administering the North Platte River can be met on a person to person basis under existing Nebraska law is to have the federal government purchase the rights of both the direct flow appropriators and the beneficial use appropriators of the stored waters in a manner similar to that recommended above regarding direct flow appropriators in Wyoming.⁹⁵

2. *Unification Based on the Creation of New Governmental Entities.* It is possible under existing Nebraska law to create a reclamation district to integrate the river. This solution not only circumvents the restriction on the transfer of appropriative rights in Nebraska, but also eliminates the necessity of the federal government exercising its power to purchase all of the water rights along the North Platte River in Nebraska. The reclamation district appears to be the best solution for the most efficient and beneficial use of the river under Nebraska law.

In 1947, the legislature of Nebraska passed the Reclamation Act,⁹⁶ which is substantially the same as the Water Conservancy Act in Wyoming.⁹⁷ The purpose of the reclamation districts is to conserve and control water resources of the state for the prosperity and welfare of the people of Nebraska.⁹⁸ Part of the policy of the State of Nebraska, which is expressly stated in the Reclamation Act, is to:

(2) obtain from water of the state the highest benefit for domestic uses and irrigation of lands in Nebraska, (3) cooperate with the United States under the federal reclamation laws now or hereinafter enacted and other agencies of the United States government in the construction and financing of works in the State of Nebraska as herein defined and for the operation and maintenance thereof⁹⁹

To create a reclamation district a petition must be filed in the office of the Department of Water Resources, signed by the owners of:

94. Trelease & Lee at 3.

95. See note 56 *supra* and accompanying text.

96. NEB. REV. STAT. §§ 46-501 to -584 (Reissue 1960).

97. WYO. STAT. §§ 41-77 to -117 (1957).

98. NEB. REV. STAT. § 46-501 (Reissue 1960).

99. NEB. REV. STAT. § 46-502 (Reissue 1960).

not less than thirty percent of the acreage of lands to be included in the district, exclusive of land in cities and villages No district shall be formed . . . unless the assessed valuation of land, together with improvements thereon, within the proposed district, exclusive of land and improvements thereon in cities and villages, is two million dollars or more.¹⁰⁰

A like petition signed by persons opposed to the district who have not signed the petition for creating the district¹⁰¹ requires the dismissal of the first petition.¹⁰² The Department of Water Resources, after the proper steps have been completed, enters orders either creating a district or dismissing the petition therefor.¹⁰³ Appeal from the final orders of the department establishing a district is provided for.¹⁰⁴

The district, run by an elected board of directors,¹⁰⁵ has the power:

(2) To take by appropriation, grant, purchase, bequest, devise, or lease, and to hold and enjoy water rights . . . ; to enter into contracts for furnishing water service for use within the district . . . ; (3) To have and to exercise the power of eminent domain . . . ; (5) To contract with the government of the United States or any agency thereof for the construction, preservation, operation, and maintenance of tunnels, reservoirs, regulating or reregulating basins, diversion works and canals, dams, power plants, drains, and all necessary works incident thereto, and to acquire rights to the use of water from such works; enter into contracts for the use of water from such works to persons and corporations, public and private¹⁰⁶

In addition the district has: "power and authority to levy and collect taxes and special assessments for maintaining and operating such works and pay the obligations as indebtedness of the district" ¹⁰⁷ In 1950, the Supreme Court of Nebraska upheld the constitutionality of the Reclamation Act.¹⁰⁸

100. NEB. REV. STAT. § 46-516 (Reissue 1960).

101. NEB. REV. STAT. § 46-519 (Reissue 1960).

102. NEB. REV. STAT. § 46-522 (Reissue 1960).

103. NEB. REV. STAT. § 46-525 (Reissue 1960).

104. NEB. REV. STAT. § 46-528 (Reissue 1960).

105. NEB. REV. STAT. § 46-530 (Reissue 1960).

106. NEB. REV. STAT. § 46-541 (Reissue 1960).

107. NEB. REV. STAT. § 46-542 (Reissue 1960).

108. Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

Under the terms of the Reclamation Act, the reclamation district could acquire all of the rights to Nebraska's share of the North Platte River as determined by the case of *Nebraska v. Wyoming*.¹⁰⁹ The district would then enter into contracts to furnish water to beneficial users within the district. This water requirement could be met from any source the district chose. A contract would be entered into by the district with the Bureau of Reclamation for the use of its storage facilities and for the delivery of the specific amount of water needed to meet the water requirements of users within the district. The water users within the district would, in this manner, receive their water when they wanted it, and water could be stored when not needed. At the same time, the Bureau of Reclamation could take into account the amount of water stored in its reservoirs and the amount of direct flow in the particular year before determining from which source it wished to make the water delivery. If for any reason a person did not want his water right to participate in the district, the district could acquire it through the power of eminent domain.¹¹⁰

One other benefit will be realized by the creation of one large reclamation district. The bar to the improvement of the beneficial use of the water that was created by attaching appropriative rights to the land would be circumvented. The Reclamation Act gives the board of directors the power: "(4) To provide for and grant the right, upon terms, to transfer water service from lands to which water service has been furnished to other lands within the district . . ."¹¹¹ Thus, if a person wished to acquire water, he could purchase a water contract from another to whom the water was less valuable and condition his purchase on the approval of the transfer by the district board. The result would be that economic considerations would play a much more dominant role in determining the uses to which the water resources would be put.

III. UNIFICATION THROUGH THE USE OF AN INTERSTATE COMPACT

109. 325 U.S. 589 (1944), *modified*, by 345 U.S. 981 (1953).

110. The possibility of an action and a decision like *United States v. Tilley*, 124 F.2d 850 (8th Cir. 1941) would be eliminated in this way.

111. NEB. REV. STAT. § 46-560 (Reissue 1960).

be essentially the same — in terms of powers, duties, and responsibilities, the structure for such a district seems to be readily available. The essential difficulties which need to be solved are those involving the integration of the administration (*i.e.*, such questions as who is represented, how they are represented, and how such representatives are selected) and the general difficulties inherent in the creation of any interstate agreement.

A. History of the Interstate Compact

The interstate compact has been used as a tool for solving and curing problems which are essentially interstate in character. Its history can be divided into two distinct phases: pre-1925 and post-1925.¹¹⁴

Prior to 1925, the interstate compact found its greatest application and use in boundary disputes between states. In fact, it has been stated that only one such compact prior to the 1920's did not concern boundary matters in the narrow sense.¹¹⁵

However, beginning in the 1920's and continuing to the present time, the interstate compact has been more and more accepted as a technique for the solution of problems which transcend state lines and which are not susceptible of solution on an individual state by state basis. The earliest examples of these were the Colorado River Compact¹¹⁶ and the New York Port Authority Compact.¹¹⁷ Since these landwark efforts, the compact has been used to meet problems of education,¹¹⁸ parole administration,¹¹⁹ sanitation,¹²⁰ oil regulation,¹²¹ fire protection¹²² and planning.¹²³

114. For pre-1925 use of the compact, the principal work is Frankfurter & Landis, *The Compact Clause of the Constitution*, 34 YALE L.J. 691 (1925). The principal work for post-1925 history is ZIMMERMAN & WENDELL, *THE INTERSTATE COMPACT SINCE 1925* (1951) [hereinafter cited as ZIMMERMAN & WENDELL]. The bulk of the information in this entire section is derived from ZIMMERMAN & WENDELL.

115. ZIMMERMAN & WENDELL at 3-4.

116. 45 Stat. 1057 (1928).

117. Port of New York Authority Act, 42 Stat. 174 (1921) and amendments thereto.

118. *E.g.*, Southern Regional Education Compact. For text, see ARK. STATS. §§ 80-3701 to -3708 (1947).

119. Interstate (Crime) Compact Act, 48 Stat. 909 (1934).

120. *E.g.*, Ohio River Valley Water Sanitation Compact, 54 Stat. 752 (1940).

121. *E.g.*, Oil and Gas Compact Act, 49 Stat. 939 (1935).

122. *E.g.*, Northeastern Interstate Forest Fire Protection Compact, 63 Stat. 271 (1949).

123. *E.g.*, Missouri-Illinois Bi-State Development District Compact, 64 Stat. 568 (1950) and amendments thereto.

Indeed, so many compacts have been negotiated since 1925 that a leading text in the field has broken them down into functional areas for descriptive and analytical purposes.¹²⁴ The authors list five classifications of compacts: boundary-jurisdictional, boundary-administrative, regional-administrative, administrative-exploratory-recommendary, and administrative-regulatory.¹²⁵ None of these classifications is an exclusive one; and many compacts have the attributes of more than one of the classifications.

The classification into which the present problem and proposed solution probably most readily fit is that of the boundary-administrative compact; although, of course, it has the possibilities of being somewhat regulatory in nature. This section will consider some specific examples of the boundary-administrative compact.¹²⁶

B. Problems Inherent in Compacts

The interstate compact is provided for by the Constitution of the United States in the following language: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . ." ¹²⁷ It has been stated that "the compact clause is the only provision of the United States Constitution that furnishes a mechanism for positive cooperation among the states of the Union. It had emerged, in fact, even before adoption of the Constitution and was incorporated in it in consequence of established practice." ¹²⁸

Through the years of the use of compacts, certain common procedures have developed for the creation of such a document,¹²⁹ which would be applied in consolidating the administration of the Platte River in Wyoming and Nebraska. The problem transcends state boundaries and is not susceptible of solution without the joint action of both federal and state governments. These parties would appoint a commissioner or

124. ZIMMERMAN & WENDELL at 8-29.

125. *Id.* at 8.

126. See note 163, *infra* and text thereafter.

127. U.S. CONST. art. I, § 10.

128. ZIMMERMAN & WENDELL at 1.

129. See generally, ZIMMERMAN & WENDELL, Chapter VI.

commissioners to negotiate an agreement to be submitted for the consideration of the Legislatures of Nebraska and Wyoming. If the proposed compact were adopted, it would then be submitted to Congress and then to the President for approval. If approved, it would be binding on the respective signatory states.

Problems and differences, however, can arise throughout the general procedure outlined above. At any stage of the proceedings, the parties may deviate from the general outline. Such difficulties could involve questions as to whether the commissioners have power to bind their respective legislatures; as to whether the compact has been entered into when state legislatures pass acts with different wording; as to whether Congress may amend the compact presented to it; as to whether, if Congress has power to amend, the states are then bound by that compact; as to whether the state legislatures exceeded their authority (under state constitutions) in entering into the particular compact and as to whether a state has any method whereby it can withdraw from a compact. Each of these questions involves sub-problems in itself. Since this is not a comment on interstate compacts as such only the most general (and frequently occurring) problems will be considered.¹³⁰

One of the most general problems faced by those who would use an interstate compact is the problem of getting the states to agree. That problem is a political one and will not be considered here; however, it is perhaps sufficient to point out that the benefits to be derived from the joint administration of the Platte Basin are of such a nature that this problem should not present a serious obstacle.¹³¹

Another consideration with which this comment is not concerned is the determination of whether or not the compact is one which has to be consented to by Congress and the various intricacies involved in that question.¹³² Some compacts

130. See ZIMMERMAN & WENDELL, where these questions and their various intricacies and ramifications are examined at length.

131. As the past governor of Nebraska, the Honorable Frank B. Morris, stated: "There is no time left, states should stop quibbling with each other and enter into water compacts which are an essential part of this entire program. That is something to which we should all be dedicated." 30 Reclamation News, No. 1 (Jan. 1966).

132. ZIMMERMAN & WENDELL, Chapter II.

have to be approved and others do not. Under the tests, the one here proposed does.¹³³

The two principal considerations which Nebraska and Wyoming should analyze in any attempt to negotiate an interstate compact are: (1) state constitutional limitations and (2) Congressional consent. Generally, these seem to be the recurring problems which face states attempting to create an interstate compact.

The primary example of the difficulties which can occur as a result of state constitutional limitations is found in *State ex rel Dyer v. Sims*.¹³⁴ In that case, the State of West Virginia had entered into the Ohio River Valley Sanitation Compact.¹³⁵ Under the terms of the compact, each state was to contribute a share of the expenses. Sims, the state auditor, refused to honor the warrant to distribute the funds under the legislative appropriation. As a result, an action for a writ of mandamus was brought against him. The West Virginia Supreme Court refused to grant the writ on two state constitutional grounds: (1) that the state constitution forbade the appropriation of money by the legislature except to meet the casual debts of the state, and (2) that the state had improperly delegated police power to an agency outside the state and beyond its control.

This was stated to be (as of 1951) the only example of a state being blocked from participation in a compact by constitutional difficulties.¹³⁶ To this, two qualifications should be made. First, the West Virginia Supreme Court decision was reversed by the United States Supreme Court.¹³⁷ Second, while unsuccessful, the cases based on constitutional objections have been frequent.

As for the *Dyer* case, Mr. Justice Frankfurter, in the opinion of the Court, maintained that the United States Supreme Court was the arbiter for the federal system and that it must make the final decision as to the obligations of the parties to an interstate compact. He then went on to say that the Supreme Court's interpretation of the West Virginia Con-

133. *Id.* at 122-24.

134. 134 W.Va. 278, 58 S.E.2d 766 (1950).

135. 54 Stat. 752 (1940).

136. ZIMMERMAN & WENDELL, at 96.

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

stitution was not the same as that of the West Virginia Court and that the State Constitution did not prohibit adherence to the compact. An implication in the decision was that the Supreme Court would, however, enforce constitutional provisions which obviously prohibited a state's joining in a compact.

Mr. Justice Reed, in a concurring opinion¹³⁸ suggested that the correct reason for the Court's holding was that the compact interpretation by the Supreme Court was superior to state court interpretations of their own constitutions by reason of the supremacy clause of the United States Constitution. This has left some confusion as to his position, since it could either mean that the interpretation was the Supreme Court's work because of the supremacy clause, or that, because of the approval by Congress, the compact was a federal law and therefore superior to the state constitutional law by reason of the supremacy clause. The Court has not reconsidered the question and it has been suggested that it will take the more moderate view of Mr. Justice Frankfurter in the future.¹³⁹ Should this be the case, the applicability of state constitutions and the difficulties inherent therein still apply.

Less frequently mentioned areas of state constitutional objections to interstate compacts, which should be examined in light of the Wyoming and Nebraska Constitutions, are:

(1) appropriations for the agency did not have a public purpose; (2) the compact was a special law granting corporate powers; (3) future legislatures were bound by the compact; (4) officials were serving in violation of election provisions; (5) officials were serving in violation of provisions against dual office holding; (6) expenditures of tax money to out-of-state agencies amounted to loaning credit; and (7) the interstate agency was not a constitutionally authorized political unit.¹⁴⁰

The principal objection remains that the state police power cannot be delegated to an interstate agency.¹⁴¹ These difficulties emphasize the necessity for careful drafting of the document.

138. *Id.* at 32.

139. Tobin, *The Interstate Metropolitan District and Cooperative Federalism*, 36 TUL. L. REV. 67, at 79 (1961).

140. *Id.* at 80 (author's footnotes omitted). In the footnotes, Mr. Tobin lists several illustrative cases relating to these constitutional objections.

141. *Ibid.*

The other principal area of difficulty, particularly in more recent years, has been the necessity for approval by Congress. Congress can express its approval at one of two points in the procedure. It can pass consent-in-advance legislation, in a form which is chosen to persuade the states to enter into such compacts;¹⁴² or it can approve after the states have agreed. The first method mentioned has not been common, and in recent years, it has been seen only rarely. The federal government, through Congress, has taken a keener interest in its position vis-a-vis the interstate compact.

Two examples of Congressional interest in the compact and its influence on the agency are Missouri-Illinois Bi-State Development Agency¹⁴³ and the reopening of consideration of the New York Port Authority.¹⁴⁴

In the case of the Bi-State Development Agency,¹⁴⁵ Congress refused to grant consent unless the bonds of the Agency were denied the tax-free status which other state and local governmental bonds have.¹⁴⁶ It might be mentioned in passing that the Bi-State Agency, which perhaps has the broadest powers of any interstate agency, has not lived up to the early expectations of those persons interested in the field. One problem has been insufficient financing.¹⁴⁷

In the case of the New York Port Authority, the situation was one involving the continuing nature of congressional consent. It is generally conceded that the consent power of Congress is not only present at the time of the establishment of a compact, but also is of a continuing nature.¹⁴⁸ Congress, which can consent, can also withdraw its consent. With such power, it follows politically that it can exact a greater or

142. As, for example, Interstate (Crime) Compact Act, 48 Stat. 909 (1934).

143. 64 Stat. 568 (1950).

144. 42 Stat. 174 (1921).

145. 64 Stat. 568 (1950) and amendments thereto. See also note 167 *infra* and accompanying text.

146. *Id.* at 571.

147. Tobin, *supra* note 139, at 75.

148. ZIMMERMAN & WENDELL at 64. It has also been stated that Congress can not unilaterally change a compact, but that it can legislate inconsistently with the provisions of the compact. Letter from Mr. Northcutt Ely, Esq., Washington, D.C., to the Honorable Wayne N. Aspinall, Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C., September 14, 1965. (The letter was in reference to the Colorado River Compact.) This would seem to indicate that Congress could legislate inconsistently, thereby superceding the inconsistent provisions, but leaving the rest of the compact intact, which would be another type of control.

lesser amount of control over such agencies, depending on its feeling at the time.

In 1960, complaints as to the Port Authority's operation reached the United States House of Representatives Committee on the Judiciary.¹⁴⁹ The Committee determined to investigate the charges and a sub-committee was set up for that purpose. The Port Authority's Executive Director refused to submit the certain records of the Authority to the Committee. The Committee filed an action against the director for contempt. Hearings were held, which were not favorable to the authority. The matter of contempt was litigated in *U. S. v. Tobin*,¹⁵⁰ and the director lost. He appealed and the conviction for contempt was reversed,¹⁵¹ the court determining that the resolution creating the sub-committee had not granted it the authority to investigate the documents which the director had refused to submit.¹⁵²

In the interests of solving the problem presently faced by the Bureau of Reclamation, Congress should readily grant the necessary approval for the proposed North Platte Compact. Inclusion of representatives of the federal government in the negotiation of the compact and its representation in the administration of the interstate district would assure the protection of federal interests in the Basin and would probably prevent results such as those which were involved in the Bi-State and New York Port Authority situations.

A final point relates to the parties and enforcement of the compact. Nothing prohibits the federal government from being a party to the compact;¹⁵³ and in recent years, compacts have occurred where the United States was a party.¹⁵⁴ Enforcement has been stated to be on the basis of contract.¹⁵⁵ The compact has also been viewed as a treaty between quasi-

149. The description of events in this paragraph is from Celler, *Congress, Compacts, and Interstate Authorities*, 26 L. & CONTEMP. PROB. 682, 692-702 (1961).

150. 195 F. Supp. 588 (D.D.C. 1961).

151. *United States v. Tobin*, 306 F.2d 270 (D.C. Cir. 1962), cert. denied, 371 U.S. 902 (1962), reversing 195 F. Supp. 588 (D.D.C. 1961).

152. *Id.* 306 F.2d at 275-276.

153. ZIMMERMAN & WENDELL at 59; *Tobin*, supra note 139, at 90.

154. E.g., Upper Colorado River Basin Compact, 63 Stat. 31 (1949).

155. This is as between states. Federal government participation raises other problems. See ZIMMERMAN & WENDELL at 47, 64. As to enforcement generally, see ZIMMERMAN & WENDELL, Chapter III.

sovereign entities, but it has been suggested that such an approach has conceptual gaps.¹⁵⁶

Generally . . . the Compact Clause itself provides a sufficient basis for judicial enforcement, but the Contract Clause also may be used for this purpose. In the leading case of *Green v. Biddle*,¹⁵⁷ Chief Justice Marshall struck down a state statute because it was in conflict with a compact, but he did not even mention the Compact Clause as a basis for his holding. Instead, he considered the compact to be a contract between states, and so within the constitutional prohibition of impairment of the obligations of contract by a state.¹⁵⁸

A leading work in the field states that extra-judicial enforcement of compacts is 'desirable'.¹⁵⁹ Such techniques as are usually contained in a private contract should be used and the Snake River Compact of 1950¹⁶⁰ is cited as an example of such a provision.¹⁶¹ There, what may be regarded as an arbitration provision was written into the compact.

Other possible difficulties, which are present in nearly every compact, but which seldom occur, are encountered in state restraints on the intergovernmental agency established. These restrictions are commonly placed in the compact, but are rarely enforced. The restrictive powers remain; the lack of enforcement is simply default by the state. It has been urged that most such restrictions should be eliminated from the compacts.¹⁶²

C. Specific Examples

For the purposes of drafting the North Platte Interstate District, two examples are presented here as illustrations of how other states have met problems which are similar to those presented here, in that their problems, too, transcend state boundaries. A third illustration is included showing how Wyoming has solved a similar problem, although it did not approach the complexities of the problems which are pre-

156. ZIMMERMAN & WENDELL at 31-32.

157. 8 Wheat. 1 (1823).

158. ZIMMERMAN & WENDELL at 47. Authors' footnotes omitted or renumbered.

159. *Id.* at 48-49.

160. 64 Stat. 29 (1950).

161. ZIMMERMAN & WENDELL at 48.

162. Tobin, *supra* note 139, at 83.

sently found in the Platte Basin. Nevertheless, the example does show that states can, when necessary, jointly administer water use on interstate streams.

The New York Port Authority. Perhaps the most famous of the interstate agencies is the New York Port Authority.¹⁶³ This interstate agency was created by acts of the New York¹⁶⁴ and New Jersey¹⁶⁵ legislatures and the United States Congress.¹⁶⁶ Essentially, it is an agency for the administration of most transportation facilities in the metropolitan New York City area.

The compact provides for a board consisting of six members, three from each state. Of these, four (two from each state) must be from within the district. They are to be chosen according to the laws of their respective states. They can be removed; and either state is permitted to adopt legislation providing for the governor's veto of board action.

The Authority, in broad language, is given power to administer transportation facilities of importance within the district (*e.g.*, trucking, terminals, bridges). The power to amend or alter the compact is given the states, with proper Congressional approval, and the federal government retains the same right.

*The Missouri-Illinois Bi-State Development Agency.*¹⁶⁷ This agency has to be one of the most interesting, in terms of powers granted it, of the recent attempts to establish a district involving an interstate metropolitan area. The physical area of the district consists of six counties, three in Missouri and three in Illinois, serving the St. Louis, Missouri, metropolitan area.

Originally, the powers of the Bi-State Agency were similar, although broader, than those given the New York Port Authority. The principal distinguishing feature of the Bi-State Agency was the broad planning powers given it. These powers were later expanded, principally in the area of financing;¹⁶⁸ the addition also gave the Agency powers to acquire

163. 42 Stat. 174 (1921) and amendments thereto.

164. N.Y. Sess. Laws 1921, ch. 154, at 492.

165. N.J. Laws 1921, ch. 151, at 412.

166. *Supra* note 163.

167. 64 Stat. 568 (1950) and amendments thereto.

168. 73 Stat. 582 (1959).

property, by purchase or eminent domain, "necessary for the purposes of the Bi-State Development Agency" ¹⁶⁹

However, Congress placed certain restrictions on the compact.¹⁷⁰ None of these significantly restricted powers of the district. The principal Congressional limitation was in the area of finance, where Congress provided that "any obligation issued and outstanding, including the income therefrom . . . shall be subject to tax laws of the United States" ¹⁷¹ This distinguishes the treatment of the Agency's bonds from the typical treatment of similar obligations.¹⁷²

The administrative structure of the district is as follows: each state appoints five commissioners (appointed by the governor in each case, by and with the consent of the senate of the respective state). This total of ten commissioners then makes up the board of the agency. For business, it is necessary to have three members from each state present and at least two members from each state must vote for a proposal to make it valid.

Upper Colorado River Basin Compact. Wyoming is a member of the Upper Colorado River Basin Compact,¹⁷³ as well as of the Colorado River Compact.¹⁷⁴ Although the Upper Basin Compact has been feted as a remarkable example of what an administrative compact should be,¹⁷⁵ there is a particular part of that compact which merits special consideration by Wyoming and Nebraska in solving their interstate problems.

Interstate administration of the use of water is not really such a new idea. It has been provided for in a limited way

169. Mo. REV. STAT. § 70.373 (6) (1959).

170. 64 Stat. 568 (1950).

171. *Id.*, at 571.

172. Tobin, *supra* note 139, at 75, states:

Unlike the somewhat narrowly circumscribed Port of New York Authority, the Bi-State Development Agency (St. Louis-East St. Louis) has a number of functions accorded to it by compact. This agency has been given power in regard to transportation, sewerage and drainage as well as a very comprehensive planning power, thereby standing out as the interstate metropolitan district with the greatest potential for development. Unfortunately, fiscal problems have prevented the realization of this potential.

Mr. Tobin suggests that for Congress to single out interstate metropolitan districts for this kind of treatment is unfair, in that it hinders their competition in the bond market. *Id.*, at 89.

173. 63 Stat. 31 (1949).

174. 45 Stat. 1057 (1928).

175. ZIMMERMAN & WENDELL at 14-16.

in the Upper Basin Compact.¹⁷⁶ Article XII of the Compact provides: "(h) *Special water commissioner*.—The State Engineers of the two States (Wyoming and Utah) jointly shall appoint a Special Water Commissioner who shall have authority to administer the water in both states in accordance with the terms of this Article."¹⁷⁷

Thus in one limited situation, the States of Wyoming and Utah have provided for the joint administration of the use of water on a few interstate streams without regard for state boundaries.

There should be no legal difficulties in reaching an agreement for an interstate district for the joint administration of certain waters. On a limited scale, it has already been done. Now is the time to apply the underlying theory of that limited action to a problem which calls for imagination and foresight as well as joint action for its most efficient solution.

IV. UNIFICATION UNDER FEDERAL RECLAMATION LAW

Prior to 1902, development of water projects was left almost entirely to private initiative and resources. In that year, Congress passed the Reclamation Act.¹⁷⁸ To finance the projects under the Act, a revolving fund was to be established with moneys received from the sale of public lands. This fund has long been exhausted, so that present projects are built with general funds. Although the statute as originally enacted has been amended and supplemented many times, the basic concepts of the 1902 Act remain.

For the purposes of this comment, Section 8¹⁷⁹ of the original Act merits special attention. It provides:

[N]othing 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 right 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

176. 63 Stat. 31 (1949), at 40.

177. *Ibid.*

178. 32 Stat. 388 (1902), as amended, 43 U.S.C. §§ 371-616 (1964).

179. *Id.*, at § 383.

affect any right of any State or 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.¹⁸⁰

A literal reading of this section gives the impression that the water right for a reclamation project is an appropriation depending on state law for its existence, that is, the right appears to be like any other state created water right and appears to enjoy no superior federal claim. The Bureau of Reclamation's practice of filing for an appropriation permit in the state where the proposed project is to be built lends credence to this literal interpretation. In fact, many states have enacted special legislation providing procedures for the acquisition of a water right by the United States.¹⁸¹

Under Wyoming law, the State Engineer is given the power to deny an appropriation if the public interest so demands.¹⁸² One instance of this occurred when the Secretary of the Interior applied to the State Engineer for a permit to build what is now Glendo dam on the North Platte River for the irrigation of 40,000 acres of Nebraska land. The first application was denied¹⁸³ on the ground that "the proposed use threatens to prove detrimental to the public interest,"¹⁸⁴ and was later issued after negotiations resulted in a modified application calling for the irrigation of 15,000 acres in Wyoming and only 25,000 acres in Nebraska.¹⁸⁵ This has been used to substantiate the literal interpretation of Section 8, that there is, in effect, a dual control which exists between the

180. 32 Stat. 388, at 390 (1902), 43 U.S.C. §§ 372, 383 (1964).

181. For example, CAL. WATER CODE § 1252.5; ARIZ. REV. STAT. ANN. § 45-142 (1956); MONT. REV. CODES ANN. § 89-809 (1947); NEV. REV. STAT. § 7933 (1957); UTAH CODE ANN. § 73-3-2 (1953).

182. Big Horn Power Co. v. State, 23 Wyo. 271, 148 Pac. 1110 (1915).

183. Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation*, 1963 SUP. CT. REV. 158, 200.

184. WYO. STAT. § 41-203 (1957).

185. "Wyoming held the whip hand in another respect. The dam could not be constructed without modification of the decree dividing the water between the states. *Nebraska v. Wyoming* [325 U.S. 589 (1945)] . . . Without Wyoming's approval of a stipulation modifying the decree, litigation for a new division of the river might have taken years. The stipulation specifying this division of the stored water is found in *Nebraska v. Wyoming*, 345 U.S. 981 (1953)." Trelease, *Reclamation Water Rights*, 32 ROCKY MT. L. REV. 464, at 468 n.28 (1960).

state and the federal government when dealing with a Reclamation water right.¹⁸⁶

However, in 1958, the United States Supreme Court in *Ivanhoe Irrigation District v. McCracken*¹⁸⁷ provided an intimation of things to come in the interpretation of Section 8. There the Court said that:

[Section] 8 . . . requires the United States to comply with state law when in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.¹⁸⁸

Then in 1963, with shattering impact, the Supreme Court handed down a series of cases, which riddled the literal interpretation theory. The cases of *Dugan v. Rank*¹⁸⁹ and *City of Fresno v. California*¹⁹⁰ interpreted Section 8 to mean simply that if the United States infringes upon a vested water right in the administration of a Reclamation project, the owner's recourse is to sue for damages. The Court refused to enjoin interference with water rights by the United States.

These holdings were extended even further in the landmark decision of *Arizona v. California*.¹⁹¹ There the Supreme Court held that the Secretary of the Interior did not have to follow the law of prior appropriation in the administration of the Boulder Canyon Project. Although the Court based its decision on the Boulder Canyon Project Act,¹⁹² and not on the Reclamation Act,¹⁹³ the reasoning of the court lends itself to be used in interpreting Section 8.¹⁹⁴

The present effect of Section 8 is unclear. One authority is of the opinion that so long as Section 8 remains on the books, the Bureau must obtain an appropriation permit as

186. *Id.* at 468.

187. 357 U.S. 275 (1958).

188. *Id.*, at 291-92.

189. 372 U.S. 609 (1963).

190. 372 U.S. 627 (1963).

191. 373 U.S. 546 (1963).

192. 45 Stat. 1057 (1928), as amended, 43 U.S.C. §§ 617-617t (1964).

193. *Supra* note 178.

194. *Trelease, supra* note 183, at 190-191.

a condition precedent to construction of a dam for Reclamation storage purposes. However, once the project has been built, the Bureau has the power to administer the project in accordance with federal policy.¹⁹⁵

On the other hand, another authority maintains that Section 8 has no efficacy whatsoever. He suggests that the Secretary should apply for an appropriation permit, but if refused, the government can proceed to build the dam without the permit.¹⁹⁶ It follows that the Bureau can administer its projects in accordance with its own policy.

Under either view, a consolidation of appropriations could be made; the Bureau could, under existing Reclamation law, unilaterally administer its projects in the Platte Basin as a unit. The only limitation on the power seems to be that the federal government must compensate those whose property rights are damaged by the governmental action.¹⁹⁷ Thus, by acquiring the rights of appropriators, whether direct flow, secondary permit, or both, along the Platte River by condemnation or by taking the right and paying damages therefor, the Bureau of Reclamation could unify the administration of water and operate the Basin as a single project.

V. CONCLUSIONS

It appears that the unification of rights on the Platte River by consolidation is possible under existing law. In neither Nebraska nor Wyoming would new legislation be necessary. Each state presently has laws which could provide a framework for promoting a fuller utilization of the water in the North Platte Basin. However, the problem transcends the Nebraska-Wyoming border, and as a consequence, any approach by the individual state would not assure the maximum possible development of the Basin.

Nevertheless, there are two possible approaches which could assure maximum utilization of the water resources of the area. The first is through unilateral action by the Federal

195. Interview with Dean Frank J. Trelease, College of Law, University of Wyoming, Laramie, Wyoming, March 28, 1967.

196. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 64 (1966).

197. *City of Fresno v. California*, *supra* note 190.

government under existing Reclamation law. This approach will not appeal to those who are aware that the problem presented is more than simply a federal one. It has been advocated,¹⁹⁸ by a leading authority in the field of water law, that where the federal government and state governments face a mutual problem involving water, the answer lies not in subordinating one interest to the other, but instead lies in mutual planning in which all interested parties have a voice. Such an approach should assure a policy which reflects both state and federal interests to the common benefit of all concerned.

This type of consolidated effort is possible through the negotiation of a compact creating an interstate district which could administer the Platte Basin as a unit. Through representation of the States of Nebraska and Wyoming and of the Federal government at the establishment and in the actual administration of the district, the maximum utilization of water use in the public interest should be assured.

No matter what approach is adopted to encourage increased development, it must offer the water user security for his investment. However, this is not to say that such a system should be inflexible; on the contrary, it should be susceptible to modifications which future changes may require. If these principles are followed, then the ideals of any good water law, maximum development and public interest, are most likely to be achieved.¹⁹⁹

Finally, it should be restated that the proposal in this comment is not something to be forced on North Platte water users.²⁰⁰ It is rather a proposal for a more efficient use of the water which is presently available in such a way that all water users should gain by participation. In dry years, water users will have the advantages of stored waters. In wet years, water which would otherwise be wasted can be stored for the dry years. The heavy spring runoff could be evened out over the year. Predictability of available water would be improved, and planning could be more efficient for

198. Trelease, *Water Rights of Various Levels of Government—States' Rights vs. National Powers*, 19 Wyo. L.J. 189, 200 (1965).

199. See Trelease, *A Model State Water Code for River Basin Development*, 22 LAW & CONTEMP. PROB. 301 (1957) for a discussion of the requisites of an ideal water law. See also Trelease, *Policies for Water Law, Property, Rights, Economic Forces, and Public Regulations*, 5 NATURAL RESOURCES J. 1 (1965) for related considerations.

200. *Supra* note 5 and accompanying text.

all concerned. By adopting such a proposal, the wet-dry cycle, in all but the longest droughts, could be evened out for the common benefit of all users on the Platte.

Hopefully, this comment has indicated the more general problems which exist and some feasible solutions to them. There are no legal problems which cannot be solved. It is now for the water users on the Platte River to consider whether they wish to improve their utilization of the waters of the Platte. If they want to do so, they can. But, after all, in the last analysis, it is the water user toward whom water plans must be aimed for all such plans rest on the faith of the water user in them. The support of the water user is necessary for any plan to work, no matter how many rules of law and public policy can be cited as supporting a particular plan.

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