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Navigability in the Missouri River Basin

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The concept of navigability can have a profound influence on the development of a particular river basin. Mr. Bielefeld begins this article by reviewing the physical characteristics which are used as the criteria in determining navigability in the Missouri River Basin, west of the 98th Meridian. The author then analyzes the incidents which arise from a finding of navigability and their related effect on specific instances of cooperation and conflict between the states and federal government. He concludes the article by examining the rights of various Indian tribes to federally reserved water in the Basin and their rights to the ownership of the underlying stream beds.

NAVIGABILITY IN THE MISSOURI RIVER BASIN†

*Alvin E. Bielefeld**

WHEN the United States Supreme Court declared the New River navigable in 1940,[1] it was felt by many that the bars were down and that in the future any stream which a small boy could not jump across must thereafter be treated as navigable. The Court held that where a river can be improved for navigation at a reasonable cost, it must be treated as navigable.[2] Justice Roberts, in his dissent, observed:

> If this criterion [of improvability] be the correct one, it is not seen how any stream can be found not to be navigable . . . .[3]

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† The views expressed herein are those of the writer and do not necessarily reflect those of the Department of the Interior or any other agency or department of the federal government.

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1. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 421 (1940). (Hereinafter referred to as the NEW RIVER CASE.)
2. *Id.* at 417-418.
3. *Id.* at 433.

This sentiment was echoed by one of our most distinguished Western courts when it was held that the Moyie River of Idaho, a stream of modest flow and of considerable gradient, must be treated as navigable.[4]

Notwithstanding, an attorney urging the navigability of a stream should not rely too confidently on Justice Roberts' views as to the compass of the *New River Case.* Waterways are still being held nonnavigable.[5] Proponents of navigability would, therefore, do well to follow the conventional, if time-consuming, course of accumulating proof (1) of historical use or development for navigation; (2) of present-day use or development for navigation; and (3) of those physical characteristics of the waterway which demonstrate that the stream could be adapted to navigation by reasonable improvements.

PHYSICAL CHARACTERISTICS OF NAVIGABILITY

The physical characteristics which were apparently considered most significant in the *New River Case* were depth,

4. United States v. Wallace, 157 F. Supp. 931, 933 (D. Idaho 1957).

5. In Utah v. United States, 304 F.2d 23, 26 (10th Cir. 1962), *cert. denied,* 371 U.S. 826 (1962), the court held the San Juan River nonnavigable; noting that the river was unstable and flowed through broad, sandy flood plains from 1,000 to 5,000 feet wide; that its flow was generally low for most of the months of the year and had, on occasion, run dry; and that it had an average slope of more than 7 feet per mile. In United States v. Ross, 74 F. Supp. 6, 7-8 (D. Mo. 1947), the waterway was held nonnavigable because it consisted of a barrow pit created by digging dirt for a levee. During dry seasons there was no water in the passage. In Iowa-Wisconsin Bridge Co. v. United States, 84 F. Supp. 852, 866 (Ct. Cl. 1949), waterways were held nonnavigable because they were little more than sloughs which the Mississippi River filled at high water. The court observed that the sloughs could serve no public purpose in the interest of commerce. But the court noted that a log-floating stream in a logging community might be navigable although actual boating was impossible and that the same was true of shallow streams used to carry the produce of the country to market. The court also stated: "In States where fishing and hunting are of importance, streams habitually used by the public for that purpose have been held public waters." *In re* Builders' Supply Co., 278 F. Supp. 254, 256 (N.D. Iowa 1968) held that Clear Lake in Iowa was nonnavigable because it was only "a small landlocked lake without any coalescing waterways, streams or other watercourse." In Day v. Armstrong, 362 P.2d 137, 147 (Wyo. 1961) the North Platte River was held to be nonnavigable, notwithstanding an average July flow of 1308 cubic feet per second and use of the waterway for pleasure craft and logging. The court observed that the waters were "unsuited for navigation in interstate or international commerce and are not of such economic value for transportation as justifies their being classified as navigable waters." In State v. Adams, 251 Minn. 521, 89 N.W.2d 661, 672 (1958), *cert. denied,* 358 U.S. 826 (1958), the waterways held nonnavigable were a ten-mile chain of six lakes of depths varying from zero to 40 feet, connected by short stretches of stream. The connecting sections of stream were variously described as "man-made," as a

volume of flow, and gradient.[6] The existence of rapids and falls,[7] high canyon walls,[8] and the extent of the iced-over period[9] may also be significant, but since these physical characteristics are not always present, their importance is more difficult to measure and compare.

If we compare the average depth, flow and gradient of the New River with like characteristics of other streams held to be navigable since the *New River* decision, it will be seen that the courts still require that a navigable stream be of some consequence. A comparison of these characteristics follows:

River	*Average Depth*	*Average Flow*	*Average Gradient*
New River, W. Va.[10]	inches to 6 ft.	3,211 c.f.s.	5 to 8 ft.
Susquehanna, Pa.[11]	substantial	33,000 c.f.s.	4 ft.
Oconee, Ga.[12]	3 ft.	3,600 c.f.s.	1 ft.
Upper Mo., Mont.[13]	1.4 to 2.5 ft.	4,015 c.f.s.	4.6 ft.
Moyie, Ida.[14]	6 in. to 7½ ft.	857 c.f.s.	17 ft.
Big Horn, Mont.[15]	4 to 10 ft.	3,850 c.f.s.	6.83 ft.

By way of contrast, it should be noted that in considering the navigability of the Genesee River above Rochester, New York, the Second Circuit Court of Appeals concluded that evidence of an average flow of 1600 cubic feet per second and a gradient

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"watery cul-de-sac" leading nowhere, a stream four feet wide and 1.1 feet deep, and as a stream capable of passing through two 18-inch culverts. In Monroe v. State, 111 Utah 1, 175 P.2d 759, 760-761 (1946), the waterway held nonnavigable was a natural lake, covering 580 acres, so located that it was "easier to go around it than to cross it." It had been referred to as a swamp and periodically went dry.

6. *Supra* note 1, at 410-413.
7. *Supra* note 1, at 412. Here rapids or falls of 8, 9 and 11½ feet did not preclude a finding of navigability.
8. Utah v. United States, *supra* note 5, at 26. Here the encasing of the stream by rocky cliffs and steep slopes was held to be one of several conditions precluding a finding of navigability.
9. United States v. Utah, 283 U.S. 64, 84 (1931). Here periodic icing of the river was held not to preclude navigability.
10. Data taken from United States v. Appalachian Elec. Power Co., 23 F. Supp. 83, 90 (W.D. Va. 1938); 107 F.2d 769, 781 and 800 (4th Cir. 1939).
11. Data taken from Pennsylvania Water & Power Co. v. FPC, 123 F.2d 155, 161 (D.C. Cir. 1941), *cert. denied*, 315 U.S. 806 (1942).
12. Data taken from Georgia Power Co. v. FPC, 152 F.2d 908, 910-911 (5th Cir. 1946).
13. Data is for upstream portion of river area held navigable and is taken from pp. 18 and 19 of Federal Power Commission Opinion No. 170 (November 30, 1948). *In Re* Montana Power Co., Docket No. IT-5840. Navigability affirmed in Montana Power Co. v. FPC, 185 F.2d 491 (D.C. Cir. 1950); *cert. denied*, 340 U.S. 947 (1951).
14. Data taken from report of Regional Director, Bureau of Reclamation, Boise, Idaho, dated March 31, 1958. Navigability decreed in United States v. Wallace, *supra* note 4.
15. Data taken from affidavit of Bureau of Reclamation Hydrologist Phil Q. Gibbs, dated July 31, 1961 and filed in The Crow Tribe of Indians v. United States, Civil No. 214 (D. Mont. 1961), in which navigability was decreed Oct. 1, 1963.

of 3.9 feet per mile was not sufficient, by itself, to establish navigability, particularly since one 42-mile stretch of the stream had a gradient of 10.5 feet per mile.[16] The court said:

> [F]lows and gradients alone do not demonstrate the physical eligibility of a river for reasonable improvement. One also needs to know widths, depths, contours, velocities, and similar characteristics which do not appear anywhere in the evidence.[17]

In the two most contested hearings on the navigability of waters in the Missouri River Basin,[18] the courts received considerable evidence on the historical and present-day use and development of the streams for navigation, as well as abundant data on the physical characteristics of the streams.

In reviewing the evidence on the navigability of the Upper Missouri, the Court of Appeals for the District of Columbia seemed impressed by the evidence of historical use of the waterway. But the court also noted:

> The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic." Of course, improvements which might be reasonable in an urban industrial area might be out of the question in a sparsely settled region. But we do not think that factors of economic geography, such as density of population and concentration of industry, may remove an otherwise navigable stream from the reach of federal

16. Rochester Gas & Electric Corp. v. FPC, 344 F.2d 594, 598-599 (2nd Cir. 1965); *cert. denied*, 382 U.S. 832 (1965).
17. *Id.* at 599. The 42-mile stretch of the Genesee with a 10.5-foot gradient might be compared with the 6.4-mile stretch of the Wisconsin River. This 6.4-mile stretch had an 18-foot gradient but this did not prevent a finding of navigability of the Wisconsin River. Wisconsin Pub. Serv. Corp. v. FPC, 147 F.2d 743, 745 (7th Cir. 1945), *cert. denied*, 325 U.S. 880 (1945). Similarly, a 17-mile stretch of the Great Falls of the Missouri River, with a gradient of 30 feet, did not prevent a determination that the Upper Missouri River, which included it, was navigable. Montana Power Co. v. FPC, 185 F.2d 491, 493 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951). The difference between *Rochester* and the last two cases might be that in the last two cases the Federal Power Commission submitted its conventional showing of navigability, whereas in *Rochester* it relied on data attached to the Power Company's petition and on matter not in the record.
18. The Upper Missouri River's navigability was contested in the Federal Power Commission hearing confirmed in Montana Power Co. v. FPC, *supra* note 17. The Big Horn River's navigability was contested in The Crow Tribe of Indians of Montana v. United States, *supra* note 15. In Rutten v. State, 93 N.W.2d 796 (N.D. 1958), the navigability of Devils Lake in North Dakota was conceded by both parties. In Coates v. United States, 110 F. Supp. 471, 472 (Ct. Cl. 1953) the claim of the plaintiffs that the Missouri was not navigable in St. Charles County, Missouri, seems not to have been seriously pressed. The river was found navigable as a fact.

power. If the stream's flow, depth, gradient, width and capacity make it 'suitable for use' in interstate commerce, it is subject to the licensing authority of the Federal Power Commission. Even if such a stream is never actually used for transportation, there is no doubt that it may be necessary to use it for flood control, watershed development, regulation of the navigable capacity of the portions of the river actually used for transportation, etc.[19]

In reviewing the evidence on the navigability of the Big Horn River, the District Court for the Eastern Division of Montana noted a marked conflict in the evidence of historical use and in the practicablty of present-day navigation, but emphasized that the river could be made navigable. The court said:

> A qualified hydrologist, in an affidavit received in evidence, expressed his opinion that the river could, with relatively little cost and work, be made navigable both up and downstream by the removal of some 150 boulders and by building some small locks. There was further evidence of many persons who have 'shot the rapids' through the canyon in recent years, testifying to the easy passage and pleasant voyage.
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> There is no way to reconcile the opinions of the various persons whose affidavits were taken. In the opinion of oldtimers the river is treacherous and dangerous, and navigating it through the canyon is fraught with danger. Furthermore, the heavy silt content builds up sand bars so rapidly that channels change, causing further navigation problems. On the other hand, the affidavits of weekend pleasure seekers who traveled down the river in all manner of boats testify to the easy and pleasant passage which the trip allows.
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> In any event, it is clear from the evidence that the river could be made navigable. Although for certain parts of the year it might be impassable because of ice, it is well settled that this fact alone will not prevent navigability; nor will the presence of sand bars. U.S. v. Appalachian Power Co., 1940, 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243; Economy Light & Power Co. v. United States, 1921, 256 U.S. 113, 41 S.Ct. 409, 65 L.Ed. 847. Thus in the Appa-

19. Montana Power Co. v. FPC, *supra* note 17, at 491.

> lachian case it was said in 311 U.S. at 408-409: "There has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents." And in the Economy Light & Power case, in 256 U.S. at 122 the Court said: "Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water."
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> The physical characteristics of the river do not prevent its classification as navigable . . . .[20]

Many stretches of water in the Missouri River Basin, on which no definitive determinations of navigability have yet been made, have physical characteristics which compare with those of waters which have been held navigable since the *New River Case.*[21] On these, we may expect adjudications whenever the incidents of navigability become important to public or private interests.

INCIDENTS OF NAVIGABILITY

The most familiar incidents of navigability are the commerce servitude and state ownership of the bed of the waterway. The commerce servitude, of course, will mean different things to different parties and interests. To the ordinary citizen it means that the waterway subject to the servitude is a public highway[22] upon which he has a right of transit for himself and his goods; and upon which he may hunt and fish without hindrance by the riparian owner.[23] And to the boat

20. Crow Tribe of Indians of Montana v. United States, *supra* note 15, Opinion of Judge W. J. Jameson, dated October 1, 1963, at pp. 35 and 36.
21. The navigability of the upper reaches of the Yellowstone River, which at one time had considerable traffic, had not been adjudicated or Congressionally designated as either navigable or nonnavigable. *See* 33 U.S.C.A. §§ 1 to 59a. The same is true of the upper reaches of the Big Horn River. The Jefferson, the Madison, the Big Hole, the Clarks Fork of the Yellowstone, the Wind, the Shoshone and the Niobrara Rivers each have average annual flows approximating one million acre-feet; however, none of the latter have rates of flow exceeding 2200 cubic feet per second.
22. Section 12 of the Act of March 3, 1811, (33 U.S.C.A., § 10, 2 Stat. 662, 666) provided that all navigable rivers and waters of the Louisiana Purchase "shall be and forever remain public highways."
23. Historically, all citizens have had the right to fish in navigable waters. Grimes Packing Co. v. Hynes, 67 F. Supp. 43 (D.C. Alas. 1946); *aff'd* 165 F.2d 323 (9th Cir. 1947); Ne-Bo-Shone Ass'n v. Hogarth, 81 F.2d 70 (6th Cir. 1936). However, in Day v. Armstrong, *supra* note 5, the Wyoming Supreme Court held that navigability was not essential to assure a public right to float a waterway for fishing purposes. And *see* State v. Red

owner it may mean a limitation on liability for boating accidents, but also the need to observe the admiralty and maritime rules of navigation.[24] To the riparian owner and the enterpriser it may mean much more. It may mean that benefits created by proximity to the stream can be denied the riparian owner without compensation.[25] It may mean that the enterpriser requiring the flow of the stream or a particular water elevation may be denied his needs or required to operate under a federal license.[26]

To the State, ownership of the bed of the waterway may provide a new source of revenue,[27] or a resource that can be pledged in joint state and federal development.[28] At the same

River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945). The public dilemma, where floatable waterways are held to be nonnavigable, is nicely pointed up by Robert I. Reis in *Policy and Planning for Recreational Use of Inland Waters*, 40 Temp. L. Q. 155 (1967).

24. Loc-Wood Boat & Motors v. Rockwell, 245 F.2d 306 (8th Cir. 1957); *In re* Builders' Supply Co., *supra* note 5; *In re* River Queen, 275 F. Supp. 403 (W.D. Ark. 1967); Madole v. Johnson, 241 F. Supp. 379 (W.D. La. 1965).
25. Values of the fast lands for power site purposes may be taken for commerce purposes without compensation. United States v. Twin City Power Co., 350 U.S. 222 (1956). The average level of the waterway may be raised and maintained, at least to high water mark, without entitling the riparian owner to compensation for consequent loss. United States v. Willow River Power Co., 324 U.S. 499 (1945); Borough of Ford City v. United States, 345 F.2d 645 (3rd Cir.), *cert. denied*, 352 U.S. 903 (1965). The riparian owner's access to the waterway may be cut off without compensation. United States v. Commodore Park, 324 U.S. 386 (1945); Sherrill v. United States, 381 F.2d 744 (Ct. Cl. 1967).
26. In recent years, some of the most serious contests on navigability have involved a Federal Power Commission order directing the actual or prospective water user to secure or comply with a federal license. United States v. Appalachian Elec. Power Co., *supra* note 1; Pennsylvania Water & Power Co. v. FPC, *supra* note 11; Georgia Power Co. v. FPC, *supra* note 12; Montana Power Co. v. FPC, *supra* note 13; Rochester Gas & Elec. Corp. v. FPC, *supra* note 16; Wisconsin Pub. Serv. Corp. v. FPC, *supra* note 17; Arkansas Power & Light Co. v. FPC, 125 F.2d 982 (8th Cir. 1942); Wisconsin v. FPC, 214 F.2d 334 (7th Cir.), *cert. denied*, 348 U.S. 883 (1954); Citizens' Util. Co. v. FPC, 279 F.2d 1 (2nd Cir.), *cert. denied*, 364 U.S. 893 (1960). The bridge builder will also require an Army license. General Bridges Act of 1946 (33 U.S.C. § 525 *et seq.* (1964)). And the riparian owner who wishes to fill in waterfront land may be required to secure a determination as to navigability and a license from the Army before proceeding. Tatum v. Blackstock, 319 F.2d 397 (5th Cir. 1963).
27. Renewed oil and gas activity within the Missouri River Basin has multiplied the occasions on which determinations as to the ownership of river and lake beds must be made. While the States' ownership of the beds of navigable waterways is generally conceded, the meandering of the Missouri River and its tributaries permits continuing challenge as to what land lies within a waterway's bed.
28. Under the Federal Water Project Recreation Act, Pub. L. No. 89-70, 79 Stat. 213 (1965), state and local agencies are obliged to contribute with property and funds to any large-scale recreational development initiated by federal agencies. State ownership of the beds of critical waterway sites permits a contribution and participation that will assure important recreational development. Typical of this situation is the planned donation of state lands within the flowage area of the navigable Devils Lake complex for the gigantic federal and state program for the restoration of Devils Lake which was authorized by the Garrison Unit Act of August 5, 1965, Pub. L. No. 89-108, 79 Stat. 433.

time, the State may find that imposition of the navigation servitude limits state control over the use of the affected waters.[29]

THE SPECIAL CLIMATE OF THE MISSOURI RIVER BASIN

In the Missouri River Basin, the consequences of navigability will not be quite the same as in other major drainage areas. This is not only because of geography[30] but because of the applicable laws.

In the Missouri River Basin, the principal authorization for water resource development continues to be Section 9 of the Flood Control Act of December 22, 1944.[31] Section 9 authorized the Pick-Sloan plan for the integrated uses of the water resources of the Missouri River Basin.[32] Under the Pick-Sloan plan, the Corps was to be responsible for constructing the mainstem reservoirs on the Missouri River;[33] and was also to have responsibility for all flood control and navigation operations in the Basin. The Bureau of Reclamation was to be responsible for constructing the tributary reservoirs, except those to be used primarily for flood control, and also to have responsibility for all reclamation and power developments in the Basin.[34] The Bureau's prosecution of

29. *See* Trelease, *Water Rights of Various Levels of Government—States' Rights v. National Powers*, 19 Wyo. L.J. 189 (1965). Dean Trelease has nicely pointed up the areas where conflicts and injustices could occur. One purpose of this article is to consider whether such areas have been or can be delimited in the Missouri River Basin.

30. The Missouri River is the longest continuous waterway in the world. Space and topography are also critical resources. The insulation of plains and mountains makes the Missouri River Basin the national redoubt in which, in the event of atomic holocaust, the Nation's resources can be re-marshaled. This circumstance offers special reason for the most prudent development of the Basin's water resources.

31. 58 Stat. 887.

32. Colonel Lewis A. Pick authored the Corps of Engineers' plan for water resource development in the Missouri River Basin. This plan is found in H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944). W. G. Sloan authored the Bureau of Reclamation's plan for water resource development in the Missouri River Basin. This plan is found in S. Doc. No. 191, 78th Cong., 2d Sess. (1944). The two plans were integrated into one plan by agreements between the two federal agencies which were set out in S. Doc. No. 247, 78th Cong., 2d Sess. (1944) and which we identify as "The Pick-Sloan Plan." An excellent history of the plan is provided in Marian E. Ridgeway's, THE MISSOURI RIVER BASIN'S PICK-SLOAN PLAN (Univ. Ill. Press, 1955).

33. S. Doc. No. 191, 78th Cong., 2d Sess. 4 & 7 (1944) and S. Doc. No. 247, 78th Cong., 2d Sess. 1 (1944). The mainstem reservoirs included Fort Peck in Montana, which was nearing completion in 1944, Garrison in North Dakota, and Oahe, Big Bend, Fort Randall and Gavins Point in South Dakota.

34. *Id.* Section 9(c) of the Flood Control Act of December 22, 1944, 58 Stat. 887-891, reads as follows:

> (c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by

the reclamation and power development in the Missouri River Basin was to be governed by the Reclamation laws.[35] This means that Section 8 of the Reclamation Act of June 17, 1902[36] was for application and that state laws and regulations respecting the acquisition of water rights would be followed to the extent that the laws and regulations did not frustrate the Congressionally endorsed plans for project development.[37] Accordingly, and pursuant to precedent,[38] the Bureau of Reclamation has complied with state laws on the appropria-

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water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

Thus, with respect to the Missouri River Basin Project, authority for the control and disposition of water and power, is exclusively provided by Section 9 of the Flood Control Act of December 22, 1944, *supra*, and no reliance need or can be had on Sections 5, 6, 7 & 8 of that Act. This unique circumstance of having specific authorizations for one project, while general authorizations were provided for other projects covered by the same legislation, was occasioned by the Pick-Sloan "marriage" (note 32). The Sloan plan for the Missouri River Basin Project was originally proposed for authorization in a one-project bill, S. 1915, 78th Cong., 2d Sess. (1944), which would normally have been reported out by the Senate Committee on Irrigation and Reclamation. When the "marriage" was effected, S. 1915 with some madification, was incorporated by the House Committee on Flood Control as a special provision (Sec. 9) in H.R. 4485, 78th Cong., 2d Sess. (1944) which became the Flood Control Act of December 22, 1944, *supra*. Repeated Congressional recognition of the fact that Section 5 of the Flood Control Act of December 22, 1944, *supra*, was not applicable to the Missouri River Basin Project was noted in the statement of Assistant Solicitor Edward Weinberg in the *Joint Hearings on Missouri Basin Water Problems Before the Senate Committee on Interior and Insular Affairs and the Committee on Public Works*, 85th Cong., 1st Sess. 347-352 (1957).

35. *Id.*

36. 43 U.S.C.A. 383, 32 Stat. 388, 390, Section 8 reads:

> That 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 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 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.

37. Turner v. Kings River Conservation Dist., 360 F.2d 184, 198 (9th Cir. 1966). Justice Browning's caveat was, " 'reason precludes an interpretation of the general provisions of Section 8 of the Reclamation Act [of 1902] . . . which would impute to Congress an intention to frustrate its plans for this project by subjecting it to the risk that it might never be used for some of the authorized purposes, should a state permit not be forthcoming.' "

38. Justice Douglas' separate opinion in United States v. Gerlach Live Stock Co., 339 U.S. 725, 760 (1950), notes the Commissioner of the Bureau of Reclamation's statement "taht it has been the almost invariable practice of the Bureau to file notices of appropriations under state law without regard to whether the stream involved was navigable or nonnavigable."

tion of water[39] or has relied on state laws which recognized the creation of a water right by the diversion or impoundment of water and the application of the same to beneficial use,[40] or by the construction of works.[41] This circumstance appears to have removed one of the principal occasions for conflict between state and federal authorities in the use and control of navigable waters in the Basin.

Too, the northern portion of the Missouri River Basin has been blessed by the fact that the most substantial federal impoundments and diversions have occurred where there was a surplus of water,[42] or an absence of use for other than navigation purposes.[43] The federal impoundments and diversions thus did not limit or impair the exercise of vested water rights.

Possible areas of conflict between navigation uses and upstream uses for irrigation and other consumptive uses have also been fairly well contained by the O'Mahoney-Millikin Amendment set out in Section 1(b) of the Flood Control Act

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39. In North Dakota the United States filed and had approved a water right application for 3,145,000 acre-feet of the waters of the Missouri, Souris, Sheyenne and James Rivers for use in connection with the Garrison Diversion Unit of the Missouri River Basin Project. This is believed to be the largest water right application in Basin history. In other Basin states where statutes prescribe exclusive procedures for making water right appropriations, such procedures have been followed by the Bureau of Reclamation.

40. In Montana a water right may be perfected by following the statutory procedures set out in MONT. REV. CODE §§ 89-808 to 812 (1947); or by the construction of diversion or impoundment works, followed by the application of the captured water to beneficial use. Bailey v. Tintinger, 45 Mont. 154, 122 P. 575, 581 (1912). The statutory procedure has been followed by the Bureau of Reclamation on all of its projects except the Canyon Ferry Unit. On the Canyon Ferry Unit and on the Fort Peck Project of the Corps of Engineers, the alternate procedure recorgnized by *Bailey* was followed.

41. In South Dakota, Section 61.0106 of the South Dakota Code, as amended in 1955, validates all vested rights which are defined in Section 61.0102(7)(c) as "The right to take and use water for beneficial purposes where a riparian owner is engaged in the construction of works for the actual application of water to a beneficial use at the time of the passage of this chapter [March 2, 1955], provided such works shall be completed and water is actually applied for such use within a reasonable time thereafter." On March 2, 1955, the United States was a principal riparian owner on the Missouri River and the mainstem reservoirs of the Missouri River Basin Project, with their appurtenant power generating facilities, were under construction, so that the government's right to the use of the Missouri River waters now enjoys state validation.

42. The Fort Peck, Yellowtail and Canyon Ferry reservoirs in Montana were happily located where high water was little used and rarely welcomed.

43. The mainstem reservoirs were constructed in North and South Dakota when irrigation or municipal and industrial uses of Missouri River water were almost nonexistent. Such uses are still minimal, although full development of the million-acre Garrison Diversion Unit in North Dakota and the half million-acre Oahe Unit in South Dakota should eventually produce substantial demands on Missouri River water.

of December 22, 1944.[44] This amendment stipulated that west of the 98th Meridian the uses of water for navigation would be subordinate to beneficial consumptive uses for domestic, municipal, stock watering, irrigation, mining or industrial purposes.[45] One question that has arisen in connection with this amendment has been whether the use of water for power generation can be treated as a consumptive use entitled to preference over uses for navigation. An affirmative answer to the question has been urged on behalf of the Upper Missouri Basin power users.[46] A negative answer has been urged on behalf of the Mississippi Valley Association.[47] Final resolution of the question has been obviated by wet weather. The increased stream flows in the last few years have permitted an adequate hydro-electric generating schedule, without reduction in the late summer releases on which the downstream shippers rely. In the future, electrical interties now under construction, as well as the increasing development of steam generation in the Basin, should permit even more flexible generating schedules so that waters needed for navigation need not be untimely released for the making of electric energy.

Sections 1(a) and 1(c) of the Flood Control Act of December 22, 1944[48] also permit the state agencies to have a say in the federal water resource planning. Under Sections 1(a) and 1(c) the water resource investigations and planning of the Corps of Engineers and of the Bureau of Reclamation must be conducted in such a manner as to keep the affected state or states informed as to progress. State comment and state consultations are encouraged during the preparation of the report. When the federal report is completed, it must be submitted to the affected state or states for final comment. Any state objection to the report must then be submitted to and aired before the appropriate Congressional committees prior to any further advancing of the plans. And even after

44. 33 U.S.C. 701-1 (1964), 58 Stat. 887.
45. It is recognized that the O'Mahoney-Millikin Amendment is applicable in other western river basins. However, its significance in the Missouri River Basin would appear to be more marked since here river navigation is a major industry.
46. WISE & POTAMKIN, UPPER MISSOURI BASIN WATER RIGHTS, 86th Cong., 2d Sess. (Comm. Print, 1960).
47. SMITH & GAGE, MISSOURI BASIN WATER RIGHTS, 87th Cong., 1st Sess. (Comm. Print, 1961).
48. 58 Stat. 887.

Congressional authorization, a state objection can be entertained.[49] Thus, from the time a water resource development is first thought about, Sections 1(a) and 1(c) permit and require federal-state cooperation in shaping its conception.

Additionally, in the Missouri River Basin, Congress has established a unique arrangement under which Missouri River Basin Project construction funds may be expended through or in cooperation with state agencies.[50] This arrangement has made it possible to enlist the states and their political subdivisions as partners in several important areas of project development. Typical of these partnership arrangements are settlement studies in which the best use of project soil and water resources are determined; relocation agreements affecting roads and public facilities; programs for the development and management of the littoral lands of reservoirs; and actual participation in minor construction and drainage work.[51]

Needless to say, the state's participation in both the planning and development of the Missouri River Basin Project has assured a community of interest that resolves many problems in federal-state relationships which could otherwise be troublesome.

Notwithstanding, the several devices which the Congress has provided for the accommodation of conflicting interests in the Missouri River Basin's water resource development cannot be expected wholly to remove occasions for conflict among the federal, state and other agencies.

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49. In the case of the Moorehead Unit in Montana, the objections of upstream ranchers in Wyoming were sufficient to halt construction, even though Congress, in the Act of July 31, 1947 (61 Stat. 695, 699) had already appropriated funds for commencing construction of the dam as an emergency flood control project.

50. The very first appropriation for the Missouri River Basin Project provided that the appropriation could be expended "either independently or through or in cooperation with existing Federal and State agencies." See the Interior Department Appropriation Act of 1946 (59 Stat. 318, 343). Substantially the same language has been included in all succeeding appropriation acts. The administrative provisions for the Bureau of Reclamation contained in the Public Works Act of 1969 (82 Stat. 705, 711) still provides:

> Allotments to the Missouri River Basin project from the appropriation under the head 'Construction and Rehabilitation' . . . may be expended through or in cooperation with State and other Federal agencies, and advances to such agencies are hereby authorized.

51. The Act of June 13, 1956, Pub. L. No. 84-575, 70 Stat. 274, later permitted local organizations in all of the Reclamation area to perform drainage and minor completion work for projects on which they had made a commitment to repay costs. But this authorization still lacked the breadth of the Missouri River Basin authorization.

One circumstance which can create problems is the enormous size of many of the federal impoundments and diversions in the Missouri River Basin. Thus, in South Dakota, the federal right to the use of Missouri River waters for power generation is such that in 45 out of 50 years no appropriator junior to the federal government can expect to divert water without impairment of the government right. The significance of this impairment is most appreciable upstream from the Oahe dam, where non-federal diversions are most likely because of the limited rainfall. In this area, the diversion of one acre-foot of water has the consequence of depriving the government of four acre-feet of water. This is because the one acre-foot of water, if it had not been diverted, would have activated four generating plants downstream.[52] The loss in power revenues would, of course, be affected by the extent to which the diversion reduced the hydraulic head above the generators. But the minimum loss is quite likely to approximate two dollars per acre-foot. Thus, if the diversions were substantial, the payout and financial feasibility of the Missouri River Basin Project would be reduced.[53] In this situation, federal officials are obliged to urge that junior appropriators who intrude on the federal right, and particularly those who propose to divert from the federal reservoirs themselves, contract to compensate the government for the loss which the diversion will occasion. This requirement for a diversion contract might make it appear that the federal officials, rather than state officials, control the diversion of water. And some resentment has been expressed. In actual fact, the federal officials are exercising the goverment water right in the same manner in which a private party would exercise his water right. Under the laws of most of the Upper Basin states, an impounder or diverter of water who captures water surplus to his needs is permitted and, in fact, required to sell his surplus to any party needing it for beneficial use.[54]

52. At Oahe, Big Bend, Fort Randall and Gavins Point dams.
53. Some two-thirds of the $5,838,946,000 estimated cost of the Missouri River Basin Project is reimbursable. The portion of this amount to be repaid from power revenues exceeds three billion dollars. *Hearings on H.R. 1003, H.R. 1013, and H.R. 9046 Before the Subcomm. on Irrigation and Reclamation of the Committee on Interior and Insular Affairs*, 88th Cong., 2d Sess., ser. 17, at 252 (1964).
54. S.D. CODE § 61.0121 (Supp. 1960); N.D. CENT. CODE § 61-04-23 (Supp. 1967); NEB. REV. STAT. § 46-273 (1943); MONT. REV. CODE § 89-823 (1947); WYO. STAT. § 41-39 (1957). And *see* Lake De Smet Reservoir Company v. Kaufmann, 75 Wyo. 87, 292 P.2d 482 (1956). In 2 KINNEY, IRRIGATION AND WATER RIGHTS, 1484-1485 (2d Ed. 1912), Mr. Kinney goes so far as to say:

The difference is that the federal rights, just as the federal needs, are so large in comparison to the private rights.[55]

Another area in which the size of the federal impoundment has caused some concern is that relating to the quantum of the reservoir right. Normally, and where the state statute or the water right permit itself does not otherwise provide, a reservoir right "is measured by the quantity of water it will hold at one filling."[56] Where the reservoir is small, "the quantity of water it will hold at one filling," may be an inconsiderable draft on the stream. But where the reservoir or reservoirs are sufficient to capture the entire flow of a river the size of the Missouri River, the water left for subsequent appropriators is likely to be minimal. In this situation, one state official has suggested that the quantity of water annually accruing under a reservoir right should be that quantity necessary to complete the filling of the reservoir as of a specified date, which presumably would be the opening date of the irrigation season. In other words, the reservoir right would be an annual "topping-off right," which would be measured by reservoir capacity minus holdover storage impounded as of the "measuring date." Thus, in a particular year, if the reservoir operator, on the "measuring date," were fortunate or careful enough to have a reservoir completely filled with holdover storage, he would be entitled to make no draft on the stream for that year. Under such a rule, obviously, the value of a storage facility would be minimized and

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After water has been once stored in reservoirs, it becomes personal property, and may be sold, contracted for, and disposed of as such property. It is protected in such reservoirs by the statutes of the various States, providing that the stealing of water from a canal, ditch, or other works is a criminal offense, and also providing for the punishment therefor.

Notwithstanding, recent "natural flow" appropriators who propose diverting from mainstem reservoirs have vigorously challenged the government's right to charge for the water diverted. Such challenge ignored the fact that even with a prior and superior right, the "natural flow" diversions would have been infeasible without the reservoirs. The reservoirs not only reduced the required pump lifts by as much as 200 feet, but clarified and stabilized the flows.

55. However, even on one of the smaller impoundments of the Bureau of Sports Fisheries and Wildlife, the government has been obliged to protest the issuance of permits by state officials for private irrigation diversions from the federal reservoir itself.

56. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 Pac. 729, 734 (1908); N. Sterling Irrigation Dist. v. Riverside Reservoir & Land Co., 119 Colo. 50, 200 P.2d 933, 935 (1948); 1 WIEL, WATER RIGHTS, 411 (3d Ed. 1911); 2 KINNEY, IRRIGATION AND WATER RIGHTS, 1478 (2d Ed. 1912). And *see* Federal Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007, 1011-1012, where the court holds that a reservoir operator is entitled to one filling of the reservoir "up to its capacity" but was also entitled additionally to any water "that would otherwise go to waste."

the reservoir operator would have compelling reason to dispose of as much of his holdover storage as possible before the "measuring date." The consequent penalizing of careful water conservation and the encouragement of wasteful use seems plain.

A more significant consequence of any acceptance of a "topping-off rule" would be its effect on the states where the mainstem reservoirs are located. Under an interstate adjudication involving equitable apportionment, water not assigned to existing storage or natural flow rights in one state would presumably be available for use in other states of the drainage area.[57] Upstream states with a concentration of large reservoirs and even states downstream from the mainstem reservoirs would thus profit from the "topping-off rule." This circumstance should, accordingly, limit advocacy of such a rule in the mainstem reservoir states. The consequence of such a rule on the reasonable operation of a multipurpose reservoir[58] should also make federal support for the rule unlikely. Thus, insofar as quantification of a reservoir right is concerned, avoidance of any real occasion for state and federal conflict can be expected.

One other unique condition that has created interesting legal questions in the administration of navigable waters of the Missouri River Basin is the Indian interest in such waters. A little over a hundred and thirty years ago, most of the Missouri River Basin was designated as "The Indian Country."[59] Today, some fifteen Indian reservations abut on the Missouri River or on one of its tributaries.[60] The rights of the Indians on such reservations to the use of the Basin waters and to the beds of the streams are still being measured.

57. 2 CLARK, WATERS AND WATER RIGHTS, § 132.4 (1967).
58. The deep drawdown which would be dictated by the inability to replace storage water would work havoc on irrigation pumping from the reservoir, on power generation which depends on an adequate head, and on recreation which cannot tolerate a violent fluctuation in the shoreline.
59. Act of June 30, 1834, § 1 (4 Stat. 729). Only the State of Missouri was excluded.
60. The Blackfeet Reservation (Marias R.); the Fort Belknap Reservation (Milk R.); the Wind River Reservation (Wind R.); the Crow Reservation (Big Horn R.); the Northern Cheyenne Reservation (Tongue R.); the Fort Peck Reservation (Missouri R.); the Fort Berthold Reservation (Missouri R.); the Standing Rock Reservation (Missouri R.); the Cheyenne River Reservation (Cheyenne and Missouri R.); the Pine Ridge Reservation (Cheyenne R.); the Crow Creek Reservation (Missouri R.); the Rosebud Reservation (Missouri R.); the Yankton Reservation (Missouri R.); the Ponca Reservation (Missouri R.); and the Santee-Sioux Reservation (Missouri R.).

Sixty years ago, in *Winters v. United States,*[61] the Supreme Court of the United States held that the Indians of the Fort Belknap Reservation of Montana had a reserved right to use as much water of the Milk River of the Missouri River Basin as was necessary to serve the irrigable lands of the reservation. This reserved right, even though unexercised, was to enjoy a continuing priority as of the date the reservation was established. This "Winters' doctrine" came to be recognized as applicable to substantially all of the Indian reservations.[62] The doctrine played an important part in the evolution of the federal reserved water doctrine.[63]

While the federal reserved water doctrine may seem formidable today,[64] the application of the Winters' doctrine in the Missouri River Basin appears not to have appreciably impeded water resource development. This was not because Indian irrigation projects were not energetically advanced, but because the availability of water, particularly where the supply was enhanced by adequate storage,[65] was sufficient for all irrigation needs, whether Indian or non-Indian.

However, with the emergence of the petro-chemical and other water-using industries and their accelerating interest in the mineral resources of the Missouri River Basin,[66] it became apparent that the demand for water was going to increase markedly. The enlarged demand for water, and its more sophisticated use, meant that a higher price could be exacted for its use.[67] In this situation, representatives of the

61. 207 U.S. 564 (1908).
62. *See supra* note 57, ch. 10.
63. Veeder, *The Pelton Decision: A symbol—A Guaranty that the Development and Conservation of our Nation's Resources Will Keep Pace With our National Demands,* 27 MONT. L. REV. 27, 29 (1965). And *see* Arizona v. California, 373 U.S. 546, 601 (1963).
64. Comment, *The Federal Reserved Water Doctrine—Application to the Problem of Water for Oil Shale Development,* 3 LAND & WATER L. REV. 75 (1968).
65. Heretofore, representatives of the Indian interests appeared to recognize that Winters' Decree rights did not extend to "developed waters" which non-Indian interests had made available by the construction of storage or pumping works and which would not be available for use without such works.
66. The last great coal and lignite reserves are concentrated in North Dakota, Montana and Wyoming. These happily coexist with adequate water supplies. Apart from surface run-off, there are several billion acre-feet of ground water underlying the Missouri River Basin states. *See,* Remarks by J. Cordell Moore, Assistant Secretary Mineral Resources, Department of the Interior, before the Missouri Basin Field Committee, Glacier National Park, August 21, 1968, on file Interior Missouri Basin Field Committee, Billings, Montana.
67. In S. Doc. No. 191, *supra* note 33, an appropriate price for domestic and industrial water was estimated to be 10 cents per thousand gallons which would result in a charge of $32.58 per acre-foot.

Indian Tribes began increasingly to insist that Indian rights be considered in any federal or state authorization of the use of water from streams which traversed or abutted Indian reservations. From a relative absence of concern at non-Indian use of these waters, some tribal representatives have proceeded to the point of insisting that the waters could not be used without tribal consent. At this point, conflict was bound to develop.

Non-Indian developers of water, whether public or private, were inclined to the positions (1) that a Winters' Decree right was for irrigation use, or should, at least, be so measured and (2) that absent such Indian use of the water, the next senior appropriator could use the water without the necessity of paying toll to the Indian interests. Indian representatives categorically denied the first postulate. In their view Winters' Decree water could be used for any purpose and not just for irrigation. As to the second postulate, at least two groups of tribal attorneys took the position that whether the Indians had use for the water or not, they were entitled to control its disposition.

The non-Indian position that a Winters' Decree right must be limited to a right of use for irrigation purposes appears, at least initially, to have been premised on the fact that in all cases involving the application of the Winters' doctrine, the principal issue and decision related to the right to use water for irrigation.[68] However, a more substantial premise for their position was provided with the development of the federal reserved water doctrine and its most recent enunciation in *Arizona v. California*.[69] Under the principles there provided, the character and magnitude of the reserved water right would be determined in accordance with the purpose for which the reservation of lands was made. If such purpose were to enable the Indians to develop a viable agricultural economy, then the character and magnitude of the water rights would be determined by agricultural and related

68. The quantities of water required for domestic and livestock purposes were small and doubtless would not warrant extended litigation. Even in United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939) the propriety of allowing water for government power generation on the reservation was not discussed and the allowance for government power generation was lumped with the water allowed for domestic and stock-watering purposes.

69. 373 U.S. 546, at 601 (1963).

requirements for water.[70] The water right would then be quantified by determining the amount of water needed to serve the practically irrigable acreage on the reservation.[71]

But the fact that the Winters' Decree water was to be quantified in accordance with irrigation needs did not necessarily mean that such water could only be used for irrigation. The Master in *Arizona v. California* carefully emphasized that in fixing the measure of the Winters' Decree rights in accordance with irrigation needs, he did not rule on whether such rights might be used for other than irrigation purposes.[72] That a change in use would be allowed seems likely. Even under state law, a change in use may be effected under specified conditions.[73]

Accordingly, it would appear that while Winters' Decree rights may not necessarily be limited to use for irrigation purposes, the quantification of those rights will normally be geared to the amount of water needed for serving the practically irrigable lands of the Indian reservation.[74]

Of course, we still have the question, "Practically irrigable as of what date?" When most of the Indian reservations were being established, there was little acreage that could be practically irrigated by pumping water. Today, with the development of new pumping efficiencies, and with the

70. The pertinent reasoning of the Master which the Supreme Court affirmed in Arizona v. California, *supra* note 69, is set out on p. 265 of Special Master Simon H. Rifkind's Report as follows:

> The amount of water reserved for the five Reservations, and the water rights created thereby, are measured by the water needed for agricultural, stock and related domestic purposes. The reservations of water were made for the purpose of enabling 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. Indeed, the United States asks only for enough water to satisfy future agricultural and related uses. This does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses. The question of change in the character of use is not before me. 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.

71. *Supra* note 69, at 600.

72. *See supra* note 70.

73. MONT. REV. CODE § 89.803 (1947); S.D. CODE § 61.0129 (Supp. 1960); WYO. STAT. § 41.4 (1957).

74. 2 CLARK, *supra* note 57, § 141. Governmental agencies in the Missouri River Basin, in determining the amount of water available for disposition in drainageways of limited supply, appear generally to have reserved for present and future Indian needs, at least as much water as prescribed in *Arizona*.

availability of cheap pumping power,[75] there are quantities of land which, just a few years ago, were not considered irrigable, but which are considered to be practically irrigable today. And pumping efficiencies continue to increase.

If we follow the reasoning of Special Master Rifkind in *Arizona* that the measure of the right must be taken as of the date the right was reserved,[76] then the acreage for which water must be reserved would be the acreage irrigable on the date the Indian reservation was established. However, this rule was not meticulously applied in *Arizona*. Some acreage was included which could not have been practically irrigated in 1865 when the Colorado Indian reservations were established. But the time-of-irrigability issue appears not to have been raised sufficiently to require a definitive ruling. Accordingly, the question appears to be one still to be resolved.

The non-Indian position that a Winters' Decree right does not permit the owner of an Indian water right[77] to control the use of water which he himself does not use, seems more difficult to challenge or qualify.

Nothing in the decisions suggests that an Indian water right is more than a right of use, or that a claim can be made to the corpus of the water until diversion or storage has been accomplished.[78] In *United States v. Ahtanum Irrigation Dist.*,[79] the court observed:

> Until the Indians were able to make use of the waters there was no legal obstacle to the use of those waters by the white settlers. And after the Indian irrigation works were completed, there would still be the right of non-Indian appropriators to make use of any surplus available within the stream.

This view was reaffirmed in a subsequent hearing of the case.[80] Within the Missouri River Basin, the *Ahtanum* rule

75. Under the Missouri River Basin Project, Reclamation power for project irrigation has been available at 2½ mills per K.W.H.
76. *See supra* note 70, last sentence.
77. In United States v. Powers, 305 U.S. 527 (1938) it was held that the purchaser of an Indian allotment acquired the Indian water right. As a matter of interest, the trial court held that Winters' Decree rights were owned by the individual Indians and not by the Indian Tribe. *Id. nom.* 16 F. Supp. 155, 160 (D. Mont. 1936). This finding, necessary to the basic decision in the case, was not disturbed on appeal.
78. *See* Solicitor's Opinion M-36282 (Dept. Interior, May 5, 1955).
79. 236 F.2d 321, 335 (9th Cir. 1956); *cert. denied*, 352 U.S. 988 (1957).
80. United States v. Ahtanum Irrigation Dist., 330 F.2d 897, 900 (9th Cir. 1964).

was most recently applied in *Tweedy v. Texas Co.*,[81] where the United States District Court for Montana stated that "need and use are prerequisite to any water rights on Indian reservations." The Montana Court held that this rule was equally applicable to rights in underground waters.

If the appropriator next senior to the Indian water right may freely take water which the owner of the Indian water right does not choose to use, or which is otherwise surplus in the stream, it is difficult to conceive of any legal basis upon which the owner of the Indian right could control or levy toll on non-Indian use of such water. In these circumstances, the right of the next senior appropriator, particularly if such appropriator were the United States proceeding under the Commerce clause,[82] would seem to be unassailable.[83]

A final area in which interesting questions have developed in the Missouri River Basin relate to Indian claims to the ownership of the beds of navigable waters. In *United States v. Holt State Bank*,[84] it was held that the State of Minnesota, upon its admission into the Union, became the owner of the bed of a navigable waterway (Mud Lake) lying wholly within the Red Lake Indian Reservation. The Court emphasized that the Act of Admission[86] declared that navigable waters " 'shall be common highways, and forever free, ...' "[87] In

81. 286 F. Supp. 383, 385 (D. Mont. 1968).

82. *See* United States v. 531.13 Acres of Land, Etc., 366 F.2d 915, 921 (4th Cir. 1966) which again affirms the language of the *New River Case* (*supra* note 1, at 426) that "Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control."

83. In 2 CLARK, *supra* note 57, at 394, Mr. Clyde observes:

> Since the power to control interstate commerce is vested by the Constitution in Congress as one of its sovereign, as distinguished from proprietary, powers, it is logical to hold that the rights of the Indians to the use of navigable waters are subject to the sovereign powers of Congress, and that the implied reservation by Congress of the water for the Indians does not deprive Congress of its powers over navigable waters or of any of its other sovereign powers.

It is also interesting to note that in the Missouri River Basin, under the Act of March 3, 1811, *supra* note 22, Congress dedicated the navigable waters of the Basin to public use long before any treaty, Congressional Act or Executive Order could be said to have reserved an Indian right in such waters.

84. 270 U.S. 49 (1925).

85. *Id.* at 58.

86. Act of February 26, 1857, 11 Stat. 166.

87. United States v. Holt State Bank, *supra* note 84, at 59. In Section 12 of the Act of March 3, 1811 (2 Stat. 662, 666) Congress had used much the same language with respect to all navigable waters within the Louisiana Purchase, of which the Missouri River Basin was a principal part.

denying that the earlier Indian land cession treaties served to reserve an Indian right in the beds of navigable waterways, the court said:

> There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters.

In two succeeding cases decided by the 9th Circuit Court of Appeals, the court found reason to recognize Indian title in the beds of navigable waters which were wholly or partly within the Indian reservation. In *Montana Power Co. v. Rochester,*[88] the court concluded that the bed of the south half of Flathead Lake, which lay within the boundaries of the Flathead Indian Reservation in Montana, was reserved to the Indians under the Hell Gate Treaty of 1855.[89] While the court did not refer to *Holt,* it emphasized that the south half of Flathead Lake was within the reservation set apart for the exclusive use and benefit of the tribes.[90] At least one legal scholar makes a strong showing that this conclusion is directly in conflict with *Holt.*[91] But the ruling continues unmodified and was recently cited as authority for dismissing an action in which the United States, as Trustee for the Flathead Indians, had not been named as a party.[92]

In *Moore v. United States,*[93] the court, in affirming Indian ownership in the bed of a navigable water, emphasized that the Quillayute Treaty provided for a reservation sufficient for the wants of the Indians who as early as 1889 had whaling, seal and salmon enterprises under way.[94] The court distinguished *Holt* on the ground that no evidence was there adduced as to "the use of navigable waters with reference to established industries of the Indians."[95]

While *Rochester* and *Moore* might have suggested a lessening of the impact of *Holt,* a recent decision of the Ninth

88. 127 F.2d 189 (9th Cir. 1942).
89. This treaty was with the Confederated Tribes of the Flathead, Kootenay and Upper Pend d'Oreilles Indians and was ratified by the Act of April 18, 1859 (12 Stat. 975).
90. *Supra* note 88, at 190.
91. Note, *Access and Wharfage Rights and the Territorial Extent of Indian Reservations Bordering on Navigable Water—Who Owns the Bed of Flathead Lake?* 27 MONT. L. REV. 55 (1965).
92. Seifert v. Udall, 280 F. Supp. 443 (D. Mont. 1968).
93. 157 F.2d 760 (9th Cir. 1946).
94. *Id.* at 762.
95. *Id.* at 765.

Circuit Court has served to reaffirm its principles. In *Skokomish Indian Tribe v. France,*[96] the court emphasized an absence of intent on the part of the treaty makers to include tidelands in the Skokomish Reservation. The court distinguished *Moore* by noting that the Skokomish Indians, as contrasted with the Quillayutes, had made no showing that the tidelands were essential to their livelihood.[97]

From the foregoing, it seems plain that no single rule will determine whether the bed of a navigable water within an Indian reservation belongs to the State or to the Tribe. The language and the purpose of the treaty setting up the Indian reservation, the wants and industries of the Indians and their established use of the navigable water will all have some bearing on the determination of ownership.

One thing indicated by the cited cases, and particularly *Skokomish,* is that the courts do not favor a dog-in-the-manger position. Where there are two claimants to a property, the one who can or does best use it may very possibly prevail.

Interestingly enough the question of the ownership of the beds of navigable waters within Indian reservations has most frequently been raised in connection with the fishing rights of non-Indians. Under the Act of July 12, 1960,[98] hunting or fishing on Indian tribal or allotted lands without permission is made a federal offense. If the beds of the navigable waterways are owned by an Indian tribe, it would appear that one who fishes on or over these lands should be obliged to secure a tribal fishing permit.[99] However, this conclusion appears subject to qualification. In *Tlingit and Haida Indians of Alaska v. United States,*[100] the Court of Claims reviewed the decisions on Indian fishing rights and concluded (1) that no citizen has any exclusive right to the fish in navigable waters and has no right to exclude any other citizen from an equal opportunity to exercise his right to the possession of such fish;[101] (2) that the Indians did not possess exclusive aboriginal fishing rights in navigable

96. 320 F.2d 205 (9th Cir. 1963); *cert. denied,* 376 U.S. 943 (1964).
97. *Id.* at 212.
98. 18 U.S.C. § 1165 (1964); Pub. L. No. 86-634, 74 Stat. 469.
99. On some reservations tribal fishing permits have been an important source of tribal income.
100. 389 F.2d 778 (Ct. Cl. 1968).
101. *Id.* at 785.

waters;[102] and (3) that a tribal right to exclude non-Indians from fishing in navigable waters can only be exercised if the grant of the Indian reservation included, as part of the grant, the right to fish in designated areas free from interference.[103] In such circumstances, it would appear that even where the tribe has been held to own the bed of a navigable waterway, a non-Indian might reasonably urge that he could not be obliged to secure a tribal permit to fish thereon unless the Congress had granted tribal members an exclusive right to fish thereon. Admittedly, a definitive decision on the application of the Act of July 12, 1960[104] to navigable waterways has not yet been provided. However, since the Act contains criminal sanctions which cannot be casually applied, the Act's availability to control a citizen's fishing rights on navigable waters within an Indian reservation may be open to question.[105]

THE QUO VADIMUS

This article obviously has been primarily concerned with navigability in the Missouri River Basin west of the 98th Meridian. In this area, state and federal conflicts appear to have been reasonably contained by the machinery provided in the Flood Control Act of December 22, 1944.[106] Where conflict has intermittently emerged, it seems largely to have been occasioned by the size of the federal project. Any program designed to harness and comprehensively use the largest continuous waterway in the world, must necessarily require federal activity that seems at times to pre-empt or interfere with state and local activities. In such situations, the utmost in restraint is required on both sides. Intransigence can halt a program, no matter how desirable the program may be. If the hardheadedness can be minimized, comprehensive water resource development can make the Basin a very pleasant and secure place in which to live.

With respect to Indian rights, these must be carefully guarded. But they must be adequately defined and quantified so that investment in general resource development can safely proceed.

102. *Id.* at 786.
103. *Id.* at 785.
104. *Supra* note 98.
105. *See supra* note 23.
106. 58 Stat. 887.