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LEGAL PROBLEMS IN CHANGING USES OR COORDINATING USES OF KEYHOLE RESERVOIR*

I. BACKGROUND

Keyhole Dam and Reservoir is located on the Belle Fourche River in Crook County, Wyoming. This particular reservoir is authorized as a multiple-purpose development, providing supplemental irrigation water for the existing Belle Fourche project and flood protection along the Belle Fourche River in Wyoming and South Dakota. In addition, the Keyhole unit provides a possible source of water for the city of Belle Fourche, South Dakota; silt control; fish and wildlife conservation; and recreational opportunities.¹

Keyhole Reservoir was built by the Bureau of Reclamation between June 29, 1950 and October 25, 1952. Storage of water began in March of 1952 and water was to be made available for irrigation in 1953.² The reservoir capacity is approximately 200,000 acre-feet, of which 130,000 acre-feet are allocated to irrigation and 70,000 acre-feet to silt accumulation. In addition the reservoir provides 140,000 acre-feet of exclusive flood control storage.³ The total cost of the Keyhole unit was \$4,721,870. The total reimbursable cost is \$3,709,100, of which \$3,703,300 is allocated to irrigation and \$5,800 to recreation. The total nonreimbursable cost is \$1,012,770, which is allocated to flood control and navigation (\$654,800) and fish and wildlife conservation (\$357,970).⁴

The Belle Fourche River is an interstate stream crossing from Wyoming into South Dakota. The division of interstate streams is usually determined by agreements between the concerned states. The agreement in this instance is the Belle Fourche River Compact between Wyoming and South

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1. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, RECLAMATION PROJECT DATA 469 (1961) (hereinafter cited as RECLAMATION PROJECT DATA).
2. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, REPAYMENT OF RECLAMATION PROJECTS 296 (1972) (hereinafter cited as REPAYMENT OF RECLAMATION PROJECTS).
3. RECLAMATION PROJECT DATA, *supra* note 1.
4. REPAYMENT OF RECLAMATION PROJECTS, *supra* note 2, at 297.

Dakota.⁵ This 1944 Compact basically provides for the allocation of 90% of all unappropriated waters of the Belle Fourche River (at the time of the Compact) to South Dakota and 10% to Wyoming. Wyoming has the privilege of purchasing up to 10% of the storage capacity of any reservoir constructed in Wyoming for irrigation of lands in South Dakota and South Dakota has the privilege of purchasing the remaining 90%. Wyoming is also allowed unrestricted domestic and stock use of reservoirs which do not exceed 20 acre-feet in capacity.⁶

The Keyhole unit was originally authorized as a supplemental irrigation project aimed at stabilizing the water supply for the Belle Fourche project.⁷ Since its completion, however, the unit has not been used for that purpose. Water users in South Dakota have not taken advantage of the water supply. They probably have not executed water contracts because they do not wish to pay the fractional costs of the project allocated to irrigation. Only one repayment contract has been executed. On January 2, 1963, the Belle Fourche Irrigation District contracted for the repayment of \$60,000 construction charges at the rate of \$1,500 annually for 40 years, and for 7.7% of the annual operating and maintenance expense. Additional water may be purchased at a cost of \$1.25 per acre-foot at the dam outlet or \$2 per acre-foot at the Wyoming-South Dakota state line.⁸ Thus only a very small amount of the reimbursable costs have been repaid.

Keyhole Reservoir is the largest body of water in northeastern Wyoming. Since the early 1960's, the Keyhole unit has been used extensively for picnicking, camping, swimming, boating, fishing and other recreational uses. The reservoir has been stocked with pike and perch. The Wyoming Recreation Commission invested \$155,393 between 1965 and 1973 for the construction and maintenance of recre-

5. Act of February 26, 1944, ch. 64, 58 Stat. 94. See also WYO. STAT. §§ 41-488 to 41-502 (1957) and S. DAK. COMPILED LAWS § 46-30 (1967) (hereinafter cited as COMPACT).

6. WYO. STAT. § 41-482 (1957).

7. H. ICKES, MISSOURI RIVER BASIN, S. Doc. No. 191, 78th Cong., 2d Sess. 76 (1944) (hereinafter cited as SENATE DOCUMENT 191).

8. REPAYMENT OF RECLAMATION PROJECTS, *supra* note 2, at 296-97.

ational facilities. This development has been largely concentrated on basic sanitary facilities. The 1973-75 biennium calls for investments of over \$306,000 for an additional one hundred camping and picknicking units. About 72,000 people visited the Keyhole Reservoir area in 1973.⁹

Currently, there are plans for extensive industrial development of the northeastern part of Wyoming. The Wyoming State Engineer's Office projects a threefold increase in industrial water needs in northeastern Wyoming by 1980.¹⁰ Consequently, industrial interests are taking a serious look at the available water in Keyhole Reservoir. The Bureau of Reclamation is considering contracting the water to industrial interests.¹¹

From this factual setting described above there appears a potential user conflict. This conflict becomes clearer when the nature of recreational use is considered. Recreation is a non-consumptive use. To obtain maximum use for recreation the reservoir should be maintained at a constant maximum level. As the water level goes down, the value of the location for recreation also decreases because there is less water for boating and swimming; the lowered shoreline is unsightly and recreational facilities are left high and dry.¹² Most other uses are consumptive uses which draw down the water level during different parts of the year depending on the inflow-outflow relationship. This user conflict is particularly acute in reservoirs which have a very low inflow or rejuvenation rate. A peculiarity of the Keyhole unit is that once it is drained, it will take from eight to ten years to bring the water level back up to a recreational level.¹³ Thus there is a strik-

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9. J. Davidson and C. Phillips, Unpublished State Park Study, Water Resource Research Institute, University of Wyoming (1974).
 10. WATER PLANNING PROGRAM, WYOMING STATE ENGINEER'S OFFICE, THE WYOMING FRAMEWORK WATER PLAN—A SUMMARY 16 (May 1973) (hereinafter cited as WYOMING FRAMEWORK WATER PLAN).
 11. Letter from H. E. Aldrich, Regional Director of Region 6, Bureau of Reclamation, to Ken Holum and Associates, March 2, 1973, on file with the Bureau of Reclamation, Billings, Montana (refer to letter 440-840) (hereinafter cited as Aldrich Letter).
 12. A. GOLZE, RECLAMATION IN THE UNITED STATES 165 (1961) (hereinafter cited as GOLZE').
 13. Study on Keyhole Reservoir Inflow (1969) on file with the Bureau of Reclamation, P.O. Box 2553, Billings, Montana. The Study shows an estimated average annual inflow of 31,800 acre-feet for the years 1913 to 1967. The estimated average annual inflow between 1951 and 1967 was 23,600 acre-feet.

ing conflict between recreational use and other consumptive uses.

The scope of this article is to examine the possible solutions to this user conflict and the legal problems involved in changing the use of the Keyhole Reservoir. Included in the study is an examination of the authorizing legislation; the rights, if any, which have vested in the individual interest groups; general powers of the Bureau of Reclamation to administer its projects; and, the procedural devices through which such a change in use can be accomplished.

II. AUTHORIZING LEGISLATION

The Reclamation Act of 1902¹⁴ is the foundation of modern reclamation in the United States. There have been numerous modifications of the original Act dealing mostly with repayment requirements.¹⁵ One of the more important modifications is the Reclamation Project Act of 1939.¹⁶ Prior to this Act, all reclamation costs were reimbursable by law. Section 9(a) allows the Secretary of Interior¹⁷ to classify certain costs allocated to flood control and navigation as nonreimbursable. Consequently, only the reimbursable costs must be shown to be recoverable in the feasibility study.¹⁸

Acts subsequent to the Reclamation Project Act of 1939 authorized the Secretary to declare certain costs allocated to other purposes as nonreimbursable. Recreation and fish-wildlife enhancement have been granted partial nonreimbursability.¹⁹ The Federal Water Project Recreation Act²⁰ declares that the federal government will bear one-half the separable costs²¹ allocated to these purposes if certain requirements are met before authorization. The requirements are that a non-federal public body must agree in writing that it will administer the recreation and fish-wildlife part of the

14. 43 U.S.C. § 391 (1970).

15. GOLZE', *supra* note 12, at 104-109.

16. 43 U.S.C. § 485 (1970).

17. Hereinafter cited as Secretary.

18. GOLZE', *supra* note 12, at 106.

19. 16 U.S.C. § 460L-13 to -14 (1970).

20. 16 U.S.C. § 460L-12 (1970).

21. Separable costs are those which can be specifically attributed to one individual purpose.

project, pay one-half the separable costs allocated to these purposes, and pay all costs of operation, maintenance and replacement. If this agreement is effected, these purposes will be included in the cost-benefit analysis and will share equally in the advantages of multiple-purpose construction. The only other way recreation or fish-wildlife enhancement costs can be nonreimbursable is if the facilities serve other project purposes and are thereby justified, or if they are minimum facilities which are required for the public health and safety and are located at access points already in existence.²²

If the project was authorized without the required agreement, the Act allows a ten year period in which the agreement can be executed. This will have the same consequences as a pre-authorization agreement except it cannot be the basis of any reallocation of costs to recreation or fish-wildlife enhancement.²³ Projects or reservoirs already in existence for ten years are also covered by the Act. If an agreement, as described above, is executed by a non-federal public body, the Secretary of Interior can investigate, plan, construct, operate and maintain outdoor recreation and fish-wildlife enhancement facilities. The only restrictions are that the Secretary is limited to \$100,000 for any one reservoir and the subsequent development cannot be the basis for any reallocation of costs.²⁴

The Keyhole unit was authorized by Section 9 of the Flood Control Act of 1944²⁵ which approved the Pick-Sloan Plan²⁶ for development of the Missouri River Basin. The only specific purpose of the Keyhole unit mentioned in the Pick-Sloan Plan is supplemental irrigation.²⁷ By 1944, however, the concept of multiple-purpose projects was in full bloom. It was realized that where a body of water is collected for one purpose, other purposes and uses quickly arise. Thus Congressional policy changed from single purpose projects

22. 16 U.S.C. § 460L-14 (1970).

23. 16 U.S.C. § 460L-14 (1970).

24. 16 U.S.C. § 460L-18 (1970).

25. Act of December 22, 1944, ch. 665, § 9, 58 Stat. 887.

26. The Pick-Sloan Plan is set forth in H. Doc. No. 475, 78th Cong., 2d Sess. (1944) and S. Doc. No. 191, 78th Cong., 2d Sess. (1944). This plan was revised and coordinated by S. Doc. No. 247, 78th Cong., 2d Sess. (1944).

27. S. Doc. No. 191, 78th Cong., 2d Sess. 76 (1944).

to allowing the fullest range of established and potential uses possible.²⁸ The Pick-Sloan Plan was declared to be a "comprehensive plan for the highest beneficial use of the waters of the basin."²⁹ Its general plan of usage provides for flood control, navigation, irrigation, power development, domestic and industrial water supplies, silt control, recreation, conservation of fish and wildlife, and pollution abatement.³⁰ Occasionally, Congress recognizes a particular purpose by special legislation. The Federal Water Project Recreation Act declares that:

[F]ull consideration shall be given to the opportunities, if any, which the project affords for outdoor recreation and for fish and wildlife enhancement and that, wherever any such project can reasonably serve either or both of these purposes consistently with the provisions of this Act, it shall be constructed, operated, and maintained accordingly.

. . .³¹

The Bureau of Reclamation³² has some broad guidelines to follow in the Keyhole situation, but it also has considerable administrative discretion. Senate Document 191 provides that in case of such user conflict, preference should be given to those uses "which make the greatest contribution to the well-being of the people and to the areas of greatest need. To the extent . . . uses of water are competitive, . . . domestic, agricultural, and industrial purposes should have preference."³³ The Flood Control Act of 1944 states that all such projects shall be open to public use generally for recreational purposes and access to and exit from such areas shall be maintained "when such use is determined . . . not to be contrary to the public interest."³⁴

The general public has only a conditional right to use such reservoirs for recreation. This right is dependent on certain administrative decisions. The Bureau of Reclama-

28. Flood Control Act of 1944, 33 U.S.C. § 701-1 (1970). See also § 9 of the Reclamation Project Act of 1939, 43 U.S.C. § 485h (1970).

29. S. Doc. No. 191, 78th Cong., 2d Sess. 10 (1944).

30. S. Doc. No. 191, 78th Cong., 2d Sess. 10 (1944).

31. 16 U.S.C. § 460i-12 (1970).

32. Hereinafter cited as Bureau.

33. S. Doc. No. 191, 78th Cong., 2d Sess. 10 (1944).

34. 16 U.S.C. § 460d (1970).

tion decides which use makes the greatest contribution to the well-being of the people and whether the recreational use will be contrary to the public interest. Traditionally, recreational use has only been an incidental beneficial use of a multiple-purpose project. As long as the water is in the reservoir, the public arguably has legal right to use it for recreation.³⁵ When, however, public recreation groups attempt to enjoin another authorized beneficial use, it is an entirely different matter. The only way recreational use could effectively compete with or replace another beneficial primary use is if the project is specifically authorized primarily as a recreation project or if reclamation is recognized as a national program with all costs nonreimbursable. Neither, of course, is present in the Keyhole situation.

Reviewing the authorizing legislation for the Missouri River Basin Project as a whole, it seems that Congress has recognized just about all beneficial uses for reclamation projects. It has given authority to the Bureau to operate their projects for any or as many beneficial purposes as possible. This is the concept of multiple-purpose projects. Even though the Keyhole unit's only specifically mentioned purpose is supplemental irrigation, this does not necessarily limit its authorized use to irrigation only. Keyhole is a part of the Missouri River Basin Project which as a whole was authorized for many beneficial uses. Thus to refuse a non-irrigational use of Keyhole because it was not so authorized is avoiding the issue. Where a unit of a project such as the Missouri River Basin Project has a principal anticipated purpose, any other authorized purpose of the entire Missouri River Basin Project could also be advanced if the anticipated purpose of the unit cannot be accomplished. The courts have upheld this discretionary authority and refuse to interfere.³⁶

Assuming South Dakota irrigators will continue refusing to negotiate contracts, Keyhole's anticipated purpose cannot be accomplished. Section 9 of the Reclamation Project Act of 1939 states that water cannot be furnished without

35. *Day v. Armstrong*, 362 P.2d 137, 145 (Wyo. 1961).

36. *Environmental Defense Fund v. Corps of Eng. of United States Army*, 325 F. Supp. 749, 754-55 (E.D. Ark. 1971), *aff'd* 8th Cir. *id. nom.* Nov. 28, 1972; *Sierra Club v. Froehke*, 345 F. Supp. 440, 446 (W.D. Wisc. 1972).

a contract.³⁷ As pointed out earlier, there has been only one small irrigation contract during the past twenty years. The Bureau of Reclamation therefore has discretion to use Keyhole for any of the purposes authorized for the entire Missouri River Basin Project. The most important factor in exercising this discretion undoubtedly is economics. The Bureau is given the objective of maintaining the reclamation fund,³⁸ *i.e.*, collecting all allocated reimbursable costs. This has first priority. Industrial or municipal use seems to be the best candidate. Recreation is the least favorable candidate because there is no way to pay costs unless user fees are imposed. Senate Document 191 says industrial, municipal, and agricultural uses should have priority in case of conflict. These preferred uses were not only thought to make the greatest contribution to the well-being of the people, but conveniently are the uses which can best repay the costs of the projects.³⁹

If South Dakota irrigators decide to contract for the water before the Bureau sells it for another use, the Bureau could arguably be obligated to give irrigation the preference because this is the primary authorized purpose. If the Bureau has already contracted the water for another purpose, the South Dakota irrigators could not equitably request to have the water released to them. The Bureau may have discretion to refuse them in either situation because of the extreme delay involved.⁴⁰

Assuming the Bureau of Reclamation does contract the water for another use, the Belle Fourche River Compact would seemingly still apply. Even though neither state has elected to purchase their allocated portions of Keyhole Reservoir's storage capacity, the allocated percentages of the unappropriated waters of the Belle Fourche River are still effective.⁴¹ It seems there may be a federal-state conflict⁴² between the Bureau's wishes in selling the water and the

37. 43 U.S.C. § 485h(c) (1970).

38. The Reclamation Act of 1902, 43 U.S.C. §§ 391, 393, 431, 439 (1970). *See also* subsequent amendments and revisions.

39. S. Doc. No. 191, 78th Cong., 2d Sess. 10 (1944).

40. Aldrich Letter, *supra* note 11.

41. *See* text accompanying notes 5 and 6 *supra*.

42. *See* text accompanying notes 94 through 99 *infra*.

directives of the interstate Compact. Section 2(a) of the Belle Fourche River Compact states:

(1) Any beneficial uses hereafter made by the United States, or those acting by or under its authority, within a State, of the waters allocated by such compact, shall be within the allocations made by such compact for use in that State and shall be taken into account in determining the extent of use within that State;

(2) The United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Belle Fourche River and all its tributaries shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of such compact and after consultation with all interested Federal agencies and the State officials charged with the administration of such compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.⁴³

Thus, it appears the Bureau should divide the available water between the states according to the Compact. The last part of clause (2), however, seems to give the Bureau discretion to ignore the Compact allocations in order to better utilize such waters for multiple purposes.

III. POSSIBLE SOLUTIONS

A. Mutual Water Administration

The simplest solution is mutual water administration; *i.e.*, regulation of the reservoir to accommodate both recrea-

43. Act of February 26, 1944, ch. 64, 58 Stat. 99, 100. Note that the quoted material is not only part of the originally negotiated Compact, but also a separate section added by Congress when it approved the Compact.

tion and the contracted use or uses. This seems possible in many situations because recreation is a nonconsumptive use. The critical factor for mutual regulation is the amount of draw-down of the reservoir level caused by the consumptive uses. Irrigational use and recreational use are extremely difficult to coordinate because they both have their highest demand in the summer months. An unseasonably dry month would cause heavy draw-down which in turn could ruin the recreational use for several years because of the low in-flow.

A more constant use—industrial, for example—is much more compatible with recreation, because the simultaneous peak demand can be avoided. The reservoir could be allowed to fill to about three-fourths capacity; the Bureau could then permanently contract an amount of water which matches the average in-flow. If this method were used, all interests would be benefited. The industrial user would have a relatively constant supply over a long period of time rather than a one-shot supply for a short period. The recreationists would have a relatively constant water level. In addition, the reservoir would still have a one-fourth flood control capacity and fish and wildlife would be conserved. To attain this solution both Wyoming and South Dakota would have to agree to forego their percentage of the initial three-fourths storage capacity under the Belle Fourche River Compact. Any storage accumulated in excess of the three-fourths initial storage could be contracted according to the Compact⁴⁴ on an *ad hoc* basis. At the same time, the Bureau of Reclamation would be fulfilling its obligation to maintain the reclamation fund. A prolonged dry period will admittedly cause obvious problems for this method of regulation as it would for any method.

B. Alternative Supply

Another possible solution is to provide an alternative supply of water from another reservoir. An example of this method of solving recreational user conflicts is the Jackson Lake Reservoir in northwestern Wyoming. This reservoir was built in 1907 on the Snake River and presently has a

44. See text p. 486 *supra*.

storage capacity of 847,000 acre-feet.⁴⁵ From 1916 until water was available from the Palisades project in 1957, Jackson Reservoir supplied the entire irrigation storage requirements for the irrigated land in the Upper Snake River Valley.⁴⁶ This caused heavy drafts on Jackson Lake Reservoir and wide fluctuations in its water level during the tourist season from June 15th to September 1st.⁴⁷ This is the same problem facing Keyhole Reservoir.

In 1950,⁴⁸ Congress authorized the construction of Palisades Dam and Reservoir in eastern Idaho by approving the Secretary's supplemental report and recommendations for the project.⁴⁹ One of the purposes of Palisades Reservoir was to provide replacement storage for Jackson Lake Reservoir. That is, Palisades Reservoir was built large enough to satisfy the water requirements of the Upper Snake River Valley in addition to the requirements of the Palisades project itself. By coordinating the operation of Palisades Reservoir and Jackson Lake Reservoir, the latter could be operated primarily as a hold-over reservoir. No irrigation water would be drawn from it until Palisades Reservoir had been emptied.⁵⁰ With this coordinated operation, the water level of Jackson Lake Reservoir could be maintained at a relatively stable recreational level. The reservoir could be operated at a near full capacity the year around except during the winter when flood control and reserve power output for the Palisades power plant may be needed.⁵¹ This, however, would have little effect on recreational use.

The total reimbursable cost of Jackson Lake Reservoir was \$1,415,327. The total amount reimbursed by 1957 was \$1,254,433.⁵² Thus, by the time the coordinated operations

45. H. Doc. No. 720, 81st Cong., 2d Sess. 49 (1950).

46. H. Doc. No. 720, 81st Cong., 2d Sess. 16 (1950).

47. H. Doc. No. 720, 81st Cong., 2d Sess. 49 (1950).

48. Act of September 30, 1950, ch. 1114, 64 Stat. 1083.

49. The original report (H. Doc. No. 457, 77th Cong., 1st Sess. 1941) recognized only irrigation, flood control, and hydroelectric power as benefits. The supplemental report (H. Doc. No. 720, 81st Cong., 2d Sess. 1950) modified the original report to include replacement storage for Jackson Lake Reservoir and other functions.

50. H. Doc. No. 720, 81st Cong., 2d Sess. 8 (1950).

51. H. Doc. No. 720, 81st Cong., 2d Sess. 49 (1950).

52. REPAYMENT OF RECLAMATION PROJECTS, *supra* note 2, at 256.

began, the costs of Jackson Lake Reservoir were mostly repaid. The Bureau's main objective was achieved. The primary source of supply for Jackson Lake Reservoir water users was switched to Palisades Reservoir leaving Jackson Lake Reservoir as a backup reservoir used mostly for recreation. The recreational benefits from Jackson Lake Reservoir were included in the Palisades project and were valued at \$6,000,000.⁵³

Keyhole presents a different situation because most of its reimbursable costs have not been repaid yet. Perhaps these unpaid costs could be assigned to the facility providing the replacement water as well as the benefits gained. Some extra costs (beyond the transferred costs) may be charged to Keyhole for the incremental costs for providing the excess storage capacity in the replacement facility. In large projects these incremental costs for adding 150,000 to 200,000 acre-feet of replacement capacity should not be too great—depending, of course, on the situation. These costs could either be charged to the direct users of the replacement water or shared equally by all users who are charged with reimbursable costs.

As mentioned earlier, Keyhole Reservoir alone could not possibly supply all the water needs for the projected industrial development of northeastern Wyoming. The Belle Fourche River Compact reduces the water available to Wyoming industry to an even smaller amount. In March of 1973, 6,500 acre-feet constituted Wyoming's 10% share of storage.⁵⁴ According to the Wyoming State Engineer's Office, the industrial water needs of northeastern Wyoming in the year 2000 will be approximately 220,000 acre-feet.⁵⁵ Obviously, another source of water, an interbasin diversion for example, will have to be utilized to fulfill this need. If and when this other source is being planned, perhaps an alternative supply could be included for the Keyhole Reservoir.

53. H. Doc. No. 720, 81st Cong., 2d Sess. 16-20 (1950).

54. Aldrich Letter, *supra* note 11.

55. WYOMING FRAMEWORK WATER PLAN, *supra* note 10.

C. Purchase By State

A third alternative is for Wyoming to purchase the storage. The state of Wyoming recently purchased 60,000 acre-feet of storage capacity of the Fontenelle Reservoir in southwestern Wyoming⁵⁶ to be added to 60,000 acre-feet already purchased in 1962.⁵⁷ Wyoming also has first option to buy the remaining 65,000 acre-feet of storage when available.⁵⁸ Presumably, it can sell the water for any use it wishes. The Bureau is collecting the reimbursable costs regardless of the use employed; therefore, any use of the multiple-purpose project can be advanced.

Purchase of Keyhole Reservoir storage may be extremely difficult to achieve because of the existence of the Belle Fourche River Compact. At most, Wyoming could only purchase 10% of Keyhole Reservoir. If Wyoming wanted to use it exclusively for recreation, the problem would arise as to whether Wyoming purchased the top 10% or bottom 10%. For Wyoming to purchase the remaining 90% of Keyhole it arguably would have to pay two amounts. First, Wyoming must purchase South Dakota's right to 90% of storage under the Belle Fourche River Compact, and secondly, it must purchase that storage from the Bureau of Reclamation.

D. Change In Legislation

Another method of solving conflicts in uses of reservoirs is by changing the authorizing legislation. That is, change the authorized use of the reservoir through legislation rather than through the Director's administrative discretion. The legislative approach may be used in two different ways. It may be used to force the Director to change the uses of a reservoir where the Bureau refuses to advance the wanted use. On the other hand, where the Bureau has already conditionally agreed to advance a certain desired use, a change

56. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, DRAFT ENVIRONMENTAL STATEMENT—PROPOSED CONTRACT FOR SALE OF MUNICIPAL AND INDUSTRIAL WATER FROM FONTENELLE RESERVOIR SEEDSKADEE PROJECT, WYOMING Appendix I, at 8 (1973) (hereinafter cited as PROPOSED CONTRACT).

57. REPAYMENT OF RECLAMATION PROJECTS, *supra* note 2, at 430.

58. PROPOSED CONTRACT, *supra* note 56, at 14.

in legislation would have the effect of preventing the Bureau from later refusing such use under the condition. In both instances the amended legislation reduces the Director's administrative discretion by that amount.

A good example of the legislative approach is the Kortes unit of the Missouri River Basin Project. Kortes Dam and powerplant is located on the North Platte River about 60 miles southwest of Casper, Wyoming. It is situated about two miles below the Seminoe Dam and Powerplant and about 10 miles above the backwaters of Pathfinder Reservoir. The sole purpose of the Kortes unit was the production of hydroelectric power.⁵⁹ From its completion in 1951 until 1963, the Kortes powerplant operation had adverse effects on the trout fishing between Kortes Dam and Pathfinder Reservoir. Frequent serious fish losses occurred in 1961, 1962 and 1963. There were periods when Kortes powerplant did not have to be operated at full capacity. Consequently, only small amounts of water (as low as 8 c.f.s.) were released, which in turn caused serious detriment to the river fishery below Kortes.⁶⁰

The Bureau of Reclamation ran a series of test flows in 1962 and 1963. This was done in cooperation with the Wyoming Game and Fish Department and the U.S. Bureau of Sport Fisheries and Wildlife. The study revealed that an assured flow of never less than 500 c.f.s. would result in substantial fishery restoration.⁶¹ In 1964, the Bureau of Reclamation agreed to operate the Kortes unit in such manner to enhance downstream sport fishery, *i.e.*, maintain a minimum flow of 500 c.f.s. This operation was on a year-to-year basis and subject to commitments for water and power.⁶²

In 1971, legislation was passed directing the Secretary of Interior to permanently modify the operation of the Kortes unit to include fishery conservation.⁶³ There is an estimated \$19,000 loss annually in power revenues caused by the modi-

59. S. Doc. No. 191, 78th Cong., 2d Sess. 88-90 (1944).

60. FISH AND WILDLIFE SERVICE, U.S. DEP'T OF THE INTERIOR, FISHERY STUDY OF EXPERIMENTAL FLOWS BETWEEN KORTES DAM AND PATHFINDER RESERVOIR—SUBSTANTIATING REPORT 2, (1964).

61. *Id.* at 9.

62. S. REP. NO. 92-317, 92d Cong., 1st Sess. 2 (1971).

63. Act of October 29, 1971, Pub. L. No. 92-146, 85 Stat. 414.

fied operation.⁶⁴ Such losses are minimal because it will only extend the repayment period by a very short period of time.⁶⁵ The annual enhancement benefits are valued at \$150,000.⁶⁶ The result is the benefit-cost ratio for the Kortess unit is increased from 1.31 to 1.36.⁶⁷

IV. PROCEDURE FOR CHANGING USE

Basically, there are two methods by which an interest group could attempt to effect a change in the use of reservoirs like Keyhole. The first is by influencing the administrator's discretion. If this does not succeed, the interest group could influence legislation. The latter, of course, is much more difficult to achieve and could be very expensive.

As pointed out above, the administrator has wide discretion in administering a multiple-purpose project. It must be remembered, however, that he is assigned the primary objective of maintaining the reclamation fund and that he cannot reallocate reimbursable costs to recreation.⁶⁸ With these factors in mind, it is safe to say that the administrator will probably allow recreational use anytime or anywhere as long as the repayment of allocated costs is not affected and there is compliance with the Federal Water Project Recreation Act.⁶⁹ If the Bureau of Reclamation did not want to put up with recreation, the administrator could simply say they do not have funds to protect recreationists and therefore it is contrary to their own safety and the public interest to let recreationists in.⁷⁰ Hopefully, arousal of public sentiment and an alignment of public opinion could counteract this type of administrative decision-making.

64. S. REP. No. 92-317, 92d Cong., 1st Sess. 2 (1971).

65. H.R. REP. No. 92-555, 92d Cong., 1st Sess. (1971). According to REPAYMENT OF RECLAMATION PROJECTS, *supra* note 2, at 299, the total cost of Kortess was just under \$15,000,000. All costs were originally allocated to hydroelectric power at 3% interest over a 50-year period.

66. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, COST ALLOCATIONS REPORT ON THE KORTES UNIT, WYOMING 16, September, 1966 (unpublished report).

67. *Id.*

68. See text accompanying notes 24 and 38 *supra*.

69. 16 U.S.C. § 460l-12 (1970). See also text accompanying notes 20 through 24 *supra*.

70. See quote accompanying note 34 *supra*.

Proposed changes in use are more complicated where the repayment of allocated costs is affected. Obviously, the administrator will not completely substitute a paying use with a nonpaying use absent a legislative directive. Nor should he be expected to. He does, however, have discretion to slightly alter one use to allow coordination of another use as is evident in the history of the Kortess unit. There the administrator voluntarily coordinated the power use with fishery conservation for seven years.⁷¹ The interest group must encourage public agencies, including the Bureau, to make comparison studies of the situation; *i.e.*, conduct a cost-benefit analysis to determine if the benefits of the coordinated or changed use will exceed the costs. If benefits exceed costs, the repayment schedules are not substantially affected, and the changed use will increase the cost-benefit ratio of the entire project, the administrator should be especially receptive to the idea. If benefits do not exceed costs, perhaps that particular proposed use is improvident.

If attempts to influence the administrator's discretion have failed, the interest group could seek legislation reflecting their desires. This of course brings in additional factors indigenous to all legislation including lobbying groups, pressure groups, etc. The very basic requirements would include a favorable cost-benefit ratio and a minimal disruption of repayment schedules. Also an environmental impact statement would be required to comply with the National Environmental Policy Act of 1969.⁷² Respective legislators would have to be convinced to join the cause and introduce the legislation. It should be remembered that the legislature is also interested in recouping the costs of these water resource projects. Thus they may refuse to change the authorized use if recoupment is threatened unless the benefits outweigh lost reimbursable costs.

So far, this article has focused on possible methods of persuading or forcing the administrator to change or coordinate the uses of a reservoir. The focus now shifts to the situation where the administrator wants to change or coordi-

71. See *text* pp. 498-9 *supra*.

72. 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1970).

nate the uses. The Bureau must comply with the procedures and standards promulgated in the National Environmental Policy Act⁷³ (hereinafter referred to as NEPA) and by the Water Resources Council.⁷⁴ Surely there are other mandatory procedural requirements for federal agencies in general which are not directly related to changing uses of water resources.

Section 102(c) of NEPA requires an environmental impact statement for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."⁷⁵ This clearly applies to any proposed legislation attempting to change a reservoir use.

If the Bureau of Reclamation resolves the user conflict through administrative discretion, it seems certain that NEPA would apply. The two-pronged test is whether it is a "major Federal action significantly affecting the quality of the human environment."⁷⁶ The courts have given a broad interpretation to this test. An extreme case is *City of New York v. United States* where the I.C.C.'s authorization for a railroad to discontinue a run in a New York harbor was held to be within the test because of the possible increased air pollution caused by increased truck traffic.⁷⁷ Triviality of the federal action will not necessarily mean no impact statement is required. If the proposed action will have an accumulative effect, an impact statement must be prepared.⁷⁸ Even though a particular decision only affects a very small project, the possibility that it will be a precedent for other similar decisions would require an impact statement. One author has written that "basically, an impact statement will be required if an action will degrade the environment, curtail the range of beneficial uses, or have both beneficial and detrimental

73. 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1970).

74. Principles and Standards for Planning Water and Related Land Resources, 38 Fed. Reg. 24778 (1973) (hereinafter cited as Principles and Standards).

75. 42 U.S.C. § 4332(c) (1970).

76. 42 U.S.C. § 4332(c) (1970).

77. Harris, *The National Environmental Policy Act of 1969: A Step in the Right Direction*, 26 ARK. L. REV. 209, 218 n. 48 (1972). See also *City of New York v. United States*, 344 F. Supp. 929 (E.D. N.Y. 1972).

78. Seely, *The National Environmental Policy Act: A Guideline for Compliance*, 26 VAND. L. REV. 295, 302 (1973).

effects."⁷⁹ In this particular situation, a change in the use of a water project will certainly be within the test.

The courts have essentially interpreted NEPA to require the cost-benefit analysis method of choosing between alternative plans.⁸⁰ This approach applies the system of allocating resources where there is no market; *i.e.*, the value of the product is determined by what private consumers would be willing to pay.⁸¹ It has been forcefully argued, however, that the exercise of the dollar vote does not properly take environmental values into consideration, that environmental qualities cannot be assigned meaningful monetary values, and that the cost-benefit method has only the single objective of increasing the national income.⁸² As to water resource projects, these criticisms were partially answered in 1973 with a new set of principles and standards. The Water Resources Planning Act of 1965 authorized the Water Resources Council to establish principles, standards and procedures for planning and evaluating federal water and related land resource projects.⁸³ The Council first published its proposed Principles and Standards on December 21, 1971.⁸⁴ The President approved the proposal and the Principles and Standards became effective October 25, 1973.⁸⁵ These regulations replaced the prior regulations and procedures governing water resource projects.⁸⁶

The new Standards adopt two objectives: enhancement of national economic development; and, enhancement of the

79. *Id.* at 307.

80. Burmeister, *Cost-Benefit Analysis and the National Environmental Policy Act of 1969*, 24 STAN. L. REV. 1092, 1094-96 (1972) (hereinafter cited as Burmeister). See also *Environmental Defense Fund v. Corps of Eng. of United States Army*, 325 F. Supp. 749 (E.D. Ark. 1971); *Calvert Cliffs' Coord. Com. v. A.E.C.*, 449 F.2d 1109 (D.C. Cir. 1971).

81. Burmeister, *supra* note 80, at 1106-08.

82. *Id.*

83. 42 U.S.C. § 1962a-2 (1970).

84. 36 Fed. Reg. 24144 (1971).

85. 38 Fed. Reg. 24778 (1973).

86. The Policies, Standards, and Procedures in the Formulation and Review of Plans for Use and Development of Water and Related Land Resources, approved by the President on May 15, 1962, printed as S. Doc. No. 97, 87th Cong., 2d Sess. (1962), together with Supplement No. 1 of June 4, 1964 entitled "Evaluation Standards for Primary Outdoor Recreation Benefits," and the amendment of December 24, 1968, 18 C.F.R. § 704.39, "Discount Rate," were replaced by the new Principles and Standards, 38 Fed. Reg. 24778 (1973).

quality of the environment.⁸⁷ Thus both an economic study and an environmental study are required to change the use of a reservoir. This escapes the necessity of valuing the environment in monetary terms for the cost-benefit analysis. It also allows environmental factors to be analyzed by standards other than those involved with increasing the national economic output. The environmental impact statement required by NEPA (absent the environmental evaluation aspect) could serve as the economic study in most instances.

The new 1973 Principles and Standards require all alternative plans to be reviewed. For each alternative plan there must be a complete display or accounting of relevant beneficial and adverse effects on the two objectives.⁸⁸ Most effects in the environmental study will be nonmonetary and should be expressed in terms of "physical, biological, or other quantitative terms."⁸⁹ The Standards say "explicit recognition should be given to the desirability of diverting a portion of the Nation's resources from production of . . . market-oriented goods and services in order to accomplish environmental objectives."⁹⁰ Detailed instructions are given on how to evaluate (both monetary and nonmonetary) adverse and beneficial effects on both objectives.⁹¹

The new Standards also give guidelines in plan selection. A screening process is used to reduce the alternatives to those which are considered candidates for the recommended plan. The finalists should possess three characteristics: The most efficient means to achieve its component needs; significant differentiation from other plans in terms of emphasis on objectives; "justification" (without regard to priorities or weights to the component needs) in the sense that the total beneficial effects to the objectives are equal to or exceed the total adverse effects to those objectives.⁹² In general, the regulations provide:

The basis of selection will be fully reported upon indicating all considerations made in the selection

87. 38 Fed. Reg. 24781 (1973).

88. 38 Fed. Reg. 24781 (1973).

89. 38 Fed. Reg. 24797 (1973).

90. 38 Fed. Reg. 24795 (1973).

91. 38 Fed. Reg. 24791-823 (1973).

92. 38 Fed. Reg. 24832 (1973).

process. A recommended plan must have net national economic development benefits unless the deficiency in net benefits for the national economic development objective is the result of benefits foregone or additional costs incurred to serve the environmental quality objective. In such cases, a plan with less than unity benefit-cost balance may be recommended as long as the net deficit does not exceed the benefits foregone and the additional costs incurred for the environmental quality objective. A Departmental Secretary or head of an independent agency may make an exception to the net benefits role if he determines that circumstances unique to the plan formulation process warrant such exception.⁹³

These directives indicate a willingness to trade off national economic benefits for nonmonetary benefits to the environmental objective. Certainly a full reservoir coincides with the environmental objective as opposed to an empty reservoir. Thus a tradeoff in this respect may champion the causes of recreational interests.

Another problem facing the Bureau of Reclamation in attempting to change the use of Keyhole Reservoir to recreation is that of federal-state relations. The Bureau's activities may conflict with state water laws. Section 8 of the Reclamation Act of 1902⁹⁴ supposedly directs the Secretary of Interior to comply with all state laws. This means the Bureau must file for water rights from the state as an individual. This would, however, subject federal policies and functions to state law and possibly state veto.⁹⁵

The water right for the Keyhole Reservoir has a September 10, 1949, priority date. This storage right is limited to beneficial use including domestic, municipal, irrigation, stock, mining, and industrial use.⁹⁶ Thus technically, if the Bureau of Reclamation changed the use of Keyhole Reservoir to recreation, it would violate Wyoming state law.

93. 38 Fed. Reg. 24832 (1973).

94. 43 U.S.C. §§ 372, 383 (1970).

95. Trelease, *Reclamation Water Rights*, 32 ROCKY MT. L. REV. 464, 466 (1958).

96. Wyoming State Engineer's Office, Certificate of Construction of Reservoir, Certificate Record No. R-3, page 156 (1965).

Several U. S. Supreme Court cases have ruled in favor of federal supremacy on this matter. The Court stated in *Ivanhoe Irrigation District v. McCracken*:

As we read §8, it merely requires the United States to comply with state law when, in 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 operation of federal projects.⁹⁷

In *Arizona v. California*, the court said, "In choosing between users within each state . . . [the Secretary] is not bound . . . by [section 8 of the Reclamation Act] to follow state law."⁹⁸ State laws cannot prevent the United States from exercising the power of eminent domain to acquire water rights. Section 8 does leave the definition of the property interests so acquired to state law.⁹⁹ It appears from these cases that the Bureau of Reclamation could use Keyhole for recreation contrary to the state water permit by virtue of the supremacy doctrine and the right of eminent domain.

V. CONCLUSION

Given the failure of the primary authorized purpose of Keyhole Reservoir, the Bureau of Reclamation has administrative discretion to advance any other purpose or use contemplated under the Missouri River Basin Plan. As long as this administrative discretion is directed and governed by the obligation to maintain the reclamation fund, uses with a low rate of monetary return (*e.g.*, recreation) will be relegated to a low priority. Congress is just beginning to realize that water resource projects should be analyzed in terms other than reimbursable costs and increasing the national

97. 357 U.S. 275, 291 (1958).

98. 373 U.S. 546, 586 (1963). Actually the Court based its decision on Section 18 of the Boulder Canyon Project Act, 43 U.S.C. §§ 617-617t (1970); however, the reasoning applies equally to Section 8 of the Reclamation Project Act. See Comment, *Improvement of Existing Water Rights Through Unification—A Case Study on the Consolidation of Appropriations*, 2 LAND & WATER L. REV. 327, 359-362 (1967).

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

income.¹⁰⁰ Perhaps someday these projects will be viewed as entirely beneficial to the public welfare and thus nonreimbursable. Only then will the administrator be able to administer the benefits of multiple-purpose projects to various different uses without dollar signs as his guide. Until then, interest groups representing lower economic priority uses will have to continue waging battles with higher economic priority uses to gain favor with the administrative discretion. They will have to search for ways to implement their desired uses without jeopardizing the repayment schedules. They will have to continue to take as much ground as they possibly can by using the tools of the NEPA, the Administrative Procedure Act¹⁰¹ and other similar legislation. This article does not purport to give all the answers or even all the questions to this problem. Hopefully, it will provide a foundation for new and better ideas or solutions in the future.

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100. See text accompanying notes 87 through 93 *supra*.

101. 5 U.S.C. §§ 500-706 (1970).