Land & Water Law Review

Volume 13 | Issue 3 Article 3

1978

Federal Reserved Rights and the Interstate Allocation of Water

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COMMENTS

FEDERAL RESERVED RIGHTS AND THE INTERSTATE ALLOCATION OF WATER*

I. INTRODUCTION

The existence of federal reserved water rights has been recognized since 1908 when *Winters v. United States*[1] was decided, but an appreciation of the multiplicity and magnitude of these rights is of more recent origin and concern. Likewise, interstate allocation problems have surfaced from time-to-time, but the frequency and seriousness of these allocation problems is certain to increase as water development accelerates. Each of these concepts has been widely studied and written on individually, but the relationship between the two has not been extensively examined.

This Comment investigates the relationship between federal reserved rights and the interstate allocation of water. The basic question is, "How can the burden of federal reserved rights be allocated among the several states of an interstate river basin?" In some instances, the particular interstate compact will provide for certain reserved rights to be charged against a particular state's allocation; in others, the interstate compact is silent about the allocation of water for federal reserved rights. Even if the compact does address the manner in which federal reserved rights are to be satisfied, the compact may have been formed long before the nature and extent of the reserved rights were understood. Similarly, apportionment decrees may or may not address the satisfaction of reserved water rights. Of course, if a river basin is subject neither to an apportionment decree nor a compact, there is nothing which speaks to the issue of which states are to bear the burden created by the federal reserved water rights.

In examining the relationship between federal reserved rights and interstate allocation of water and how the burden is to be allocated, additional questions are raised. These include: By approving an interstate compact, has Congress limited or compromised in any way the reserved rights the Unit-

*This Comment was funded in part by a grant from the Office of Water Research and Technology, U.S. Department of the Interior, under Public Law 88-379, the Water Resources Research Act of 1964, acting through the Wyoming Water Resource Research Institute.

1. 207 U.S. 564 (1908).

ed states would otherwise have had? When a compact speaks to the issue of reserved rights, to what extent is the compact applicable to claims which were not apparent at the time it was entered into? If water rights junior to a reserved right must be eliminated to satisfy the reserved rights and these junior water rights are located in several states, how will the uses to be terminated be determined? How should future compacts deal with the problem of reserved water rights and the allocation of this burden among the compacting states?

The legal underpinnings of reserved rights and interstate allocation will be scrutinized in an effort to discuss these issues and to delineate how the problems of interstate allocation and reserved water rights interact. Special attention will be given to Indian reserved rights because these are likely to require large amounts of water and to cause significant interstate water problems.

II. BACKGROUND OF RESERVED RIGHTS AND INTERSTATE ALLOCATION

A brief discussion of the legal problems and concepts underlying federal reserved rights and interstate allocation of water is helpful to a complete understanding of an examination of the relationship between the two.

A. Federal Reserved Water Rights

The beginning of the federal reserved rights doctrine can be traced to *United States v. Rio Grande Dam & Irrigation Company*.[2] The Supreme Court in *Rio Grande* allowed the United States to take water for federal lands without compensating those from whom the water was taken.[3] The federal reserved rights doctrine was first applied in *Winters v. United States*.[4]

Winters arose from a dispute between the Indians on the Fort Belknap Reservation and the non-Indian appropriators of waters of the Milk River. The Fort Belknap Indian Reser-

2. 174 U.S. (1899).
3. *Id.* at 703: "First . . . in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property."
4. Winters v. United States, *supra* note 1.

vation had been established by treaty in 1888. After the treaty, but before the Indians had initiated appropriations from the Milk River, non-Indians settled upstream from the reservation lands and began diverting and applying the waters of the Milk River to beneficial use. The United States Supreme Court construed the treaty with the Indian tribe, which was silent on the subject of water, and held the reservation of land carried an implicit reservation, in favor of the Indians, of the right to take sufficient water from the Milk River to fulfill the purposes of the reservation of land.[5] The priority date of the Indians' water right was the date of the reservation's creation. Accordingly, the Indians had an earlier priority date and a superior water right in relation to non-Indian water users who had been making beneficial use of the water.

For many years, the reserved rights doctrine was thought to be unique to Indian reservations; however, in *Federal Power Commission v. Oregon*,[6] the Supreme Court hinted reserved rights attached to other federal reservations as well. In *Arizona v. California*,[7] a case dealing with the dispute between California, Nevada and Arizona over the proper allocation of the Colorado River, the Supreme Court found reserved rights to attach not only to Indian lands but also to federal reservations such as national parks, forests and wildlife refuges. Recently, the reserved rights doctrine was applied to groundwater.[8]

The present attitude toward reserved rights can be seen by reference to legal writings and the court decisions rendered subsequent to *Arizona v. California*. A majority of the commentators have been critical of the reservation doctrine and have urged its restriction.[9] However, one commentator, William H. Veeder, very forcefully represents the opposing view in the context of Indian reserved rights.[10] Mr. Veeder espouses

5. BLACK'S LAW DICTIONARY 1472 (rev. 4th ed. 1968) defines "reservation" as a tract of land that has been withdrawn from the operation of the public land laws (sale or settlement) by public authority and is appropriated to specific public uses such as parks, Indian lands, etc.
6. 349 U.S. 435 (1955).
7. 373 U.S. 546 (1963).
8. Cappaert v. United States, 426 U.S. 128 (1976).
9. *See* Bloom, *Indian "Paramount" Rights to Water Use*, 16 ROCKY MTN. MIN. L. INST. 669 (1971); Trelease, *Water Resources on the Public Lands: PLLRC's Solution to the Reservation Doctrine*, 6 LAND & WATER L. REV. 89 (1970); Hillhouse, *The Public Land Law Review Commission Report: Icebreaking in Reserved Waters?*, 4 NAT. RESOURCES LAW. 368 (1971).
10. *See* Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MTN. MIN. L. INST. 631 (1971); *Indian Prior and Paramount Rights Versus State Rights*, 51 N.D. L. REV. 107 (1974).

Indian "prior and paramount rights stem[ming] from the fact that title to those rights [has] always resided in the American Indians, [and there] are no interests which could be prior in time or right."[11] Mr. Veeder takes an almost militant position in asserting Indian rights to water and the need to protect them from infringement by non-Indians and states. He also notes, with criticism, the failure of the United States to prevent violations of Indian rights.[12]

The courts have continued to recognize the validity of reserved rights, but have been somewhat sympathetic to state-initiated water right holders and have sought to protect their rights by a broad interpretation of the McCarran Amendment.[13] The Court, in *United States v. District Court in and for the County of Eagle*,[14] addressed the adjudication and quantification of federal reserved rights under the McCarran Amendment. The *Eagle County* Court determined the state courts had jurisdiction to adjudicate and quantify federal reserved rights as well as federal rights initiated under state law under the "otherwise" language of the Amendment.[15]

Eagle County spoke of Indian and non-Indian water rights without distinction.[16] *Colorado River Water Conservancy District v. United States*[17] clarified matters by finding Indian rights to be in the same category as other federal reserved rights and under the "otherwise" language of the Amendment,[18] so they, too, could be adjudicated and quantified in a state court proceeding.

11. Veeder, *Indian Prior and Paramount Rights to the Use of Water*, *supra* note 10, at 649.
12. Veeder, *Indian Prior and Paramount Rights Versus State Rights*, *supra* note 10, at 135.
13. 43 U.S.C. § 666 (1970). Congress aided the states in their quest to add security and definiteness to water rights in the West by enacting the McCarran Amendment. This enactment allows a state to quantify not only the United State's state-initiated water rights, but also the federal reserved water rights. This comprehensive adjudication power is consistent with the purpose of the Amendment—to reduce uncertainty about rights by allowing quantification of *all* rights in a stream, not just state rights.

    The McCarran Amendment provides: "Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such right, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States . . . shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances."
14. 401 U.S. 520 (1971).
15. *Id.* at 524.
16. *Id.*
17. 424 U.S. 800 (1976).
18. *Id.* at 810.

Reserved water rights have several characteristics which set them apart from state-initiated water rights. The priority date of the reserved water right is the date of the land reservation rather than the date the water is applied to a beneficial use. A reserved water right is not subject to state laws regulating appropriations and use of water (diversion, permits, beneficial use). Unlike other water rights, which must be applied to beneficial use or be lost after a statutorily designated period, a reserved water right endures even if it is not exercised. A reserved water right is for the amount of water necessary to fulfill the purposes of the reservation, including future as well as present needs.[19] The reserved right may be for a quantified amount but usually is not.

From these characteristics stem many of the criticisms of the doctrine—the most common of which are the indefiniteness of amount required to satisfy the reserved rights and the uncertainty the reserved rights create. This uncertainty relates to the unknown time when previously dormant reserved rights will be asserted to the detriment of state water users.[20] Dean Trelease has summarized the criticisms of federal reserved rights as follows:

19. Arizona v. California, *supra* note 7, at 601.

20. Indian and federal reserved rights could require vast amounts of water because they are implied to be of a sufficient amount to satisfy the purposes for which the land was reserved. To date, there has been no uniform agreement on the method to be used to quantify these rights. In addition, the uncertainty created by reserved rights hinders the development of waters which might be subject to reserved rights. Potential water users do not know what quantity of water at what priority date is available for new projects and uses and are reluctant to make investments under these conditions.

In Arizona v. California, *supra* note 7, at 601, the Supreme Court directly addressed the allocation of Indian water rights in making its decree. The Court found "[A]ll uses of mainstream water within a State are to be charged against that State's apportionment, which of course includes uses by the United States." Admirably, the Court not only determined which states were to bear the burden of reserved rights, but also quantified the Indian reserved rights. The Court followed the Master's conclusion that the amount of water the Indians were entitled to was an amount to satisfy future as well as the present needs. The amount reserved at the date of the creation of the reservation was found to be enough water to irrigate all "practicably irrigable acreages" on the reservation. *Id.* at 596. This standard of "practicably irrigable acreage" is a precedent for quantifying the amount of water reserved for Indian reservations in the future.

It is interesting to note the concern for the water rights of junior appropriators expressed in the Master's Report in Arizona v. California. SPECIAL MASTER'S REPORT, Arizona v. California 254-66 (1960) [hereinafter referred to as SPECIAL MASTER'S REPORT]. The Master's Report evidences an intent to prevent uncertainty and to assist water development in the Lower Basin States by quantifying Indian reserved rights that had previously kept non-Indian users in doubt as to what and how much water was available for their use. *Id.* at 256. The Master preferred to quantify the water reserved to the Indians by use of the "practicably irrigable acreage" standard rather than an open-ended decree because the limitless claim of being legally entitled to take any water they wanted whenever needed would jeopardize the junior water rights. By establishing the magnitude and prior-

> Rights created by the reservation doctrine . . . are wild cards that may be played at anytime, blank checks that may be filled in for any amount, or that may never be cashed. They deter other uses, and cause losses of benefits, and they encourage or permit federal uses that are financially possible with the money at hand but economically undesirable because more is lost than gained.[21]

The reserved rights doctrine can be justified, at least partially, as an exercise of federal power over land and water. It has also been explained by one authority as being a financial doctrine.[22] The reserved rights doctrine has the effect of allowing the federal government to take water without compensating junior water users who have been relying upon and applying it to beneficial use. The water needed for the federal reservation can be taken without compensation because the government's federal reserved right is prior in time, therefore, superior in right.[23]

Notwithstanding the dissatisfaction with and criticisms of the reserved rights doctrine, it seems to be here to stay. This is evidenced by the reluctance of the United States to surrender any rights acquired under the reserved rights doctrine. Furthermore, the United States continues to seek to limit the states' powers over water and to increase its own.

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ity of the Indian rights, some degree of certainty was established for the United States, Indians and non-Indians. *Id.* at 261-66.

The cases concerning Indian water rights have dealt with Indian reserved rights for irrigation. Another area of uncertainty exists because non-irrigation claims have never received judicial approval or disapproval. The Master held the measurement of the amount of water reserved was to be "determined by agricultural and related requirements, since when the water was reserved that was the purpose of the reservations." *Id.* at 265. The Master also stated, "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." *Id.* While the Master does not say there can be no non-irrigation uses, the measuring standard is the *agricultural* use if that was the purpose for which the reservation was created—measuring at the point in time of creation.

Courts have not yet been directly confronted with the question of whether Indian water rights can be transferred from one use or purpose to another. The answer to this issue would make a great deal of difference in the amount of water that would actually be applied as opposed to that which Indians may have a right to, yet do not exercise.

If a change in the character of the use (after quantification based on agricultural and related uses) is allowed, the water could be applied to new, more beneficial uses. By allowing a change, however, state water users are exposed to a greater risk of harm, *i.e.*, water not being available for their use. A change in use could possibly be limited by the concept which allows a change in use only if no unreasonable harm is inflicted upon junior water users. Even this concept may not be applicable since federal water rights are not subject to state water laws.

21. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 160 (1971).
22. *Id.*
23. Hillhouse, *supra* note 9, at 370.

A case pending in a Wyoming District Court, *In Re General Adjudication of All Rights to Use Water in Big Horn River System and All Other Sources*,[24] explicitly demonstrates the inclination of the government to resist any growth of state control over water. In this case, the State filed suit and served notice of an action to adjudicate rights to over twenty thousand water users—including the United States. The United States sought to remove the suit to the United States District Court for the District of Wyoming. In response, the State filed a motion to remand the suit to the state district court, and the motion was granted. The United States then filed a motion to dismiss in the state court and the motion was denied. In both the federal and state courts, the United States presented the same argument, *i.e.*, the action was not a suit or a general adjudication as required by the McCarran Amendment, therefore, the state court could not hear the action. This repeated use of technical defenses in an attempt to avoid an adjudication of federal water rights demonstrates the uncooperative attitude of the government in this area.

B. Interstate Allocation

The division of the waters of a river or stream that flows between and through two or more states has been accomplished in three ways: equitable apportionment by the courts, congressional apportionment and interstate compacts between states. A brief discussion of each follows.

Equitable Apportionment. Equitable apportionment was first espoused by the Supreme Court in *Kansas v. Colorado*.[25] The case involved a dispute over the division of the flow and benefits of the Arkansas River. Kansas, a riparian water law state, claimed the water by virtue of the fact the water flowed through the state. Colorado, a prior appropriation state, based its claim on its making beneficial use of the water at a point in time prior to those uses in Kansas. The Court did not actually divide the water between the two states because it found Kansas had suffered no harm, but indicated if it *had* done so, it would have applied equitable principles and given each state a just and reasonable share of the flow.

24. Dist. Ct. Civ. Action 4993 (5th Jud. Dist. 1977).
25. 206 U.S. 46 (1907).

The Supreme Court actually applied the equitable apportionment doctrine to an interstate stream for the first time in *Wyoming v. Colorado*.[26] In *Wyoming v. Colorado* the Court resolved the dispute between the two states over the waters of the Laramie River by allocating to each state a just and reasonable share of the benefits of the stream's flow.

In applying the equitable apportionment doctrine, the Court generally attempts to protect existing rights in each state and to allocate the benefits as to the needs of each state. Each state is to receive a just and equitable share of the flow of the interstate stream although it may be difficult to determine what that share is. There are no real standards in equitable apportionment—only "relevant" factors that are considered by courts in dividing the interstate stream.[27]

Congressional Apportionment. Congressional apportionment is the allocation of the flow of an interstate stream by means of congressional enactment. Prior to *Arizona v. California*,[28] this method of division of interstate waters was not known to exist, and it is likely that Congress was not aware it was "apportioning" the Colorado River when it enacted the Boulder Canyon Project Act.[29] However, the Supreme Court in *Arizona v. California* found Congress had created its own comprehensive scheme of apportioning the waters of the Colorado River by the terms of the Act. The decision may have been the Court's way of resolving a forty-year old dispute so development could progress in the Lower Basin States of the Colorado River.[30]

Interstate Compacts. Interstate compacts provide for the distribution and use of the waters of streams and rivers that flow across state lines and allow states to resolve common problems on a cooperative basis. In the past, Congress has encouraged states to resolve their water problems in this man-

26. 259 U.S. 419 (1922).
27. In Nebraska v. Wyoming, 325 U.S. 589, 618 (1945), it is stated:
> [P]hysical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former. . . . [These] are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.
28. Arizona v. California, *supra* note 7.
29. 45 Stat. 1057 (1928).
30. The Lower Basin States are Arizona, California and Nevada.

ner by readily granting the constitutionally required consent. Interstate compacts attempt to accomplish an equitable apportionment of the interstate streams so the system can be developed without continuing controversy among the states over their relative rights in a common stream.[31]

After the Supreme Court expressed its approval of the equitable apportionment of the waters of the Laramie River in *Wyoming v. Colorado*,[32] western states began to realize they must agree among themselves as to the division of the water and benefits on interstate streams to preclude the courts doing it for them. One fear was that the faster growing Lower Basin States (California in particular) would receive a proportionately greater share of the water if the Court apportioned the streams. This fear was grounded on the fact that prior appropriation had been the overriding principle in the equitable apportionment decrees given by the Supreme Court.[33]

An interstate compact can apportion the water of a stream or river in various ways. For example, the Colorado River Compact[34] specifies the quantity of water to be received by the Upper and Lower Colorado River Basins in terms of acre feet per year of beneficial consumptive use and restricts the Upper Basin from depleting the flow below a certain amount at a designated point on the river.[35] Other compacts apportion the stream flow in terms of specified diversion rights measured in fixed percentages of available flow.[36] Still other compacts use combinations of the above.[37]

When the waters of most interstate streams were allocated, whether by equitable apportionment, congressional apportionment or interstate compact, little attention was given to the Indian or federal reserved rights to water. Consequently, uncertainty has been infused into each water right initiated after the creation of an Indian or other federal reservation.

31. NATIONAL WATER COMMISSION, INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL INTERSTATE COMPACT 9 (1971) [hereinafter referred to as INTERSTATE WATER COMPACTS].
32. Wyoming v. Colorado, *supra* note 26.
33. INTERSTATE WATER COMPACTS, *supra* note 31, at 17.
34. 45 Stat. 1057, 1064 (1928).
35. Colorado River Compact, art. III(a), (d), 45 Stat. 1057 (1928).
36. Bear River Compact, art. IV, 72 Stat. 38, 41 (1958); Yellowstone River Compact, art. V, 65 Stat. 663, 666 (1951); Snake River Compact, art. III, 64 Stat. 29, 30 (1950).
37. Amended Costilla Creek Compact, art. III and IV, 77 Stat. 350, 353 (1963); Upper Colorado River Basin Compact, art. III, 63 Stat. 31, 33 (1949).

These reserved rights bring into question the real effectiveness of the apportionment decrees, statutes and compacts. Of all reserved rights, Indian water rights pose the greatest threat to western water users and impair the effectiveness of interstate allocation of water. Approximately one-half of the compacts provide that Indian rights are to be charged against the allocation of the state in which the water is used.[38] The quantity of water belonging to the Indians under these compacts is not specified although these rights potentially demand the greatest quantity of water from an interstate stream and would have an early priority date.

III. RESERVED RIGHTS UNDER INTERSTATE ALLOCATION

A brief survey of equitable apportionment, congressional apportionment and interstate compacts evidences the common treatment of reserved water rights under each of these types of allocation.

Equitable Apportionment: When the Supreme Court apportioned the Laramie River in *Wyoming v. Colorado*,[39] it did not consider or discuss how reserved rights were to be satisfied. Although the Court in *Nebraska v. Wyoming*[40] did not explicitedly state the reserved rights of the United States should be charged against the allocation of the state in which the water was used, this seems to be the result of the case. This conclusion follows from the Court's refusal to allow the United States a separate allocation from the North Platte River because the rights of the government were effectively represented by Wyoming's claims.[41]

Congressional Apportionment: Arizona v. California[42] is the only case to have dealt with congressional apportionment. In that case, the Boulder Canyon Project Act[43] was interpreted by the Supreme Court to be an enactment by Congress for the purpose of allocating the Colorado River between the

38. Arizona v. California, *supra* note 7, reached the same result by apportionment decree.
39. Wyoming v. Colorado, *supra* note 26.
40. Nebraska v. Wyoming, *supra* note 27.
41. *Id.* at 629. The case cannot be distinguished on the basis that the United States' rights in question had been initiated pursuant to state law because the court expressly stated it made no difference in result whether the rights of the United States were initiated under state law or were gained by federal reservation. *Id.* at 612.
42. Arizona v. California, *supra* note 7.
43. 45 Stat. 1057 (1928).

Lower Basin States. The reserved rights for Indians and other federal reservation purposes were interpreted by the Court as being "presently perfected rights" under Section 617p of the Act[44] and, therefore, entitled to priority.[45] The Court stated the Indian water rights to be satisfied from the Colorado River were to be charged against the allocation made to each state under the Act. The Court also found the United States had reserved sufficient water from the Colorado River to satisfy the needs of other federal reservations, refuges, and recreation areas and was therefore entitled to have those claims recognized as against a state's claim for water.[46]

Interstate Compacts: There are a number of interstate compacts dealing with water distribution of interstate streams, the majority of which deal with rivers located in the western part of the United States. Approximately one-half of the compacts expressly provide the allocations are to include all federal uses made within that state.[47] The typical compact provision providing for federal rights within the state to be charged against that state's allocation is:

> The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the State in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State.[48]

Most compacts also provide they are to have no effect on federal rights, jurisdiction or powers.[49] This provision is commonly included in a compact as a precaution so the compact

44. 43 U.S.C. § 617p (1970).
45. Arizona v. California, *supra* note 7, at 598-600.
46. *Id.* at 601.
47. Arkansas River Basin Compact, art. VII, 80 Stat. 1409, 1411 (1966); Klamath River Basin Compact, art. XIII, 71 Stat. 497, 506 (1957); Yellowstone River Compact, art. VII, 65 Stat. 663, 668 (1951); Snake River Compact, art. XIV, 64 Stat. 29, 34 (1950); Pecos River Compact, art. XII, 63 Stat. 159, 165 (1949); Upper Colorado River Basin Compact, art. VII, 63 Stat. 31, 35 (1949); Belle Fourche River Compact, art. XIV, 58 Stat. 94, 98 (1944); Republican River Compact, art. XI, 57 Stat. 86, 90 (1943).
48. This clause was taken from Upper Colorado River Basin Compact, art. VII, 63 Stat. 31, 35 (1949), but most other compacts contain a similar or identical provision.
49. *See* Klamath River Basin Compact, art. XI, 71 Stat. 497, 505 (1957); Yellowstone River Compact, art. XVI, 65 Stat. 663, 670 (1951); Snake River Compact, art. XIV, 64 Stat. 29, 34 (1950); Pecos River Compact, art. XI, 63 Stat. 159, 164 (1949); Upper Colorado River Basin Compact, art. XIX, 63 Stat. 31, 42 (1949); Belle Fourche River Compact, art. XIII, 58 Stat. 94, 98 (1944); Republican River Compact, art. X, 57 Stat. 86, 90 (1943).

will not be interpreted to impliedly limit federal rights that conflict with the compact provisions.[50]

Most interstate compacts were entered into prior[51] to the rendering of the *Pelton Dam*[52] and *Arizona v. California*[53] decisions. Thus Indian water rights were known to exist when most compacts were entered into, but they were not dealt with in as comprehensive a manner as they might otherwise have been if the full extent of these rights had been known. However, the more extensive federal rights had not yet been acknowledged by the courts when most compacts were formed and were not dealt with at all. The compacts formed prior to 1963[54] had no conception as to the possible expansion of reserved rights. It was not within the states' contemplation that reserved rights might infringe upon their individual shares of water received under an interstate allocation. If so, the states might have made a different division of water between the states or might have made specific provision for sharing the burden of reserved rights.

IV. PROBLEMS FROM THE STATES' VIEWPOINT

A compact is a contract between the party states. Drawing upon contract law, only those reserved rights in existence or reasonably foreseeable should be allowed to reduce the amount of water available to a state under its compact allocation. On the other hand, in order to prevent conflicts over rights in interstate streams, it would seem best to strictly construe the compact and charge whatever federal uses that may surface at any time against the allocation of the state in which the water is used. Support for this position can be found in the compact clauses which provide no rights of the United States are to be impaired by the compact.[55] A counter-argument can be made that charging the uncontemplated federal

50. INTERSTATE WATER COMPACTS, *supra* note 31, at 224.
51. The exceptions to this statement are: Upper Niobrara Basin Compact, 83 Stat. 86 (1969); Arkansas River Basin Compact, 80 Stat. 1409 (1966); Amended Costilla Creek Compact, 77 Stat. 350 (1963); Klamath River Basin Compact, 71 Stat. 497 (1957); Bear Creek Compact, 72 Stat. 38 (1958).
52. Federal Power Comm'n v. Oregon, *supra* note 6.
53. Arizona v. California, *supra* note 7.
54. *Id.*
55. For example, Yellowstone River Compact, art. XVI, 65 Stat. 663, 670 (1951), provides:
> Nothing in this Compact shall be deemed:
> (a) To impair or affect the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such com-

rights that surface in the future against just one state does not further the purposes of compacts because the state is deprived of its bargain, disputes are not prevented, and the compact is not carried out as the parties intended.

The question is unresolved whether the clause providing for the charging of federal rights against a state's allocation applies to all uses that might be asserted at any time in the future or only to amounts being used or contemplated at the time the compact was formed. Cases indicate that upon the creation of a federal reservation, a sufficient amount of water for the purposes of the reservation for both present and future needs is also reserved. But, are the quantities required for those needs to be determined from the point in time at which the reservation was created or from a point when the water is actually being applied to the reservation purposes? Are the needs to be ever increasing or are they fixed upon the reservation's creation and by what was contemplated to be needed at *that* time? When a court is faced with these questions and the responsibility of making an apportionment, it would seem more equitable to impose upon a state only the burden of the amount of water contemplated at the time of the reservation's creation. This conclusion is based upon the fact that charging federal rights against a state's allocation reduces the water available for state development and use.

Charging all federal uses against the state in which the use is made is workable as long as the state's allocation is sufficient to satisfy the federal reserved rights. If federal rights in one state are too large, the question arises, "Where does the additional water come from?" The sharing of the burden would give uniform treatment to all reserved rights, but at the expense of ignoring the express provisions of the compacts. Basin-wide sharing would further the purpose of interstate compacting, and no state would have to function in perpetual fear that it might lose all or most of its allocated water because the government asserted dormant reserved rights. Further discussion of basin-wide sharing follows later in this Comment.

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pact, any rights or powers of the United States of America, its agencies, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin nor its capacity to acquire rights in and to the use of said waters.

The failure of compacts to allocate water to satisfy federal rights could be cured by a reformation or amendment. Some compacts specifically provide for alteration or amendment by unanimous consent of all parties to the compact.[56] This would involve a process similar to the initial compact negotiations.[57] The voluntary modification of compacts would avoid long legal battles and unsatisfactory court reformation.

V. EFFECT OF CONGRESSIONAL APPROVAL OF INTERSTATE COMPACTS ON RESERVED RIGHTS

The basis of authority for an interstate compact is found in the compact clause of the United States Constitution.[58] When a compact is approved by Congress, the compact becomes the law of each compacting state, and no state may withdraw or modify the compact except when the compact provides otherwise or with concurring action of other compacting states plus congressional approval.[59]

The question arises whether Congress has in any way limited or compromised[60] the reserved water rights it would otherwise have had by approving an interstate compact.[61] For example, under the Upper Colorado River Basin Compact, Wyoming is to receive fourteen percent of the water available for consumptive use in the Colorado River.[62] Assume the United States claimed an amount of water for reserved rights from the river for use in Wyoming equal to twenty percent of the consumptive use. Is the United States bound by its ap-

56. *See* Snake River Compact, 64 Stat. 29 (1950).
57. Interstate compacts do represent more than a method of avoiding judicial apportionment. In forming a compact, states send delegates who represent each state's interests. The states engage in a negotiation process analogous to those engaged upon when corporations negotiate contracts or mergers. Compact negotiation is a political process involving more than a matter of each state attempting to have the interstate stream divided in a fair manner. Each state seeks to gain as much as possible from other states while giving up as little water and as few economic benefits as possible. States enter into compacts and agree to terms and conditions which they view as benefiting them, or at least, minimizing possible harm.
58. U.S. CONST., art. I, § 10, cl. 3.
59. Bloom, *The Effects of Interstate Water Quality Controls on Legal and Institutional Water Allocation Mechanisms—Can the Environmental Protection Agency Amend an Interstate Compact?*, 22 ROCKY MTN. MIN. L. INST. 917, 931 (1976) [hereinafter referred to as Bloom].
60. By "limited or compromised," what is meant is: (1) when the compact refers to federal water rights, the governments right to water under the reserved rights doctrine is the amount of water actually being used at the time of the consent or (2) when the compact is silent on federal water rights, the federal government has no rights under the reserved rights doctrine.
61. *See* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study of Interstate Adjustments*, 34 YALE L.J. 685 (1925).
62. Upper Colorado River Basin Compact, 1948, art. III, 63 Stat. 31.

proval of the compact not to look to other states for satisfaction of the reserved rights in excess of that fourteen percent?[63] If Congress is not bound by its consent, Wyoming would receive a greater portion of the river than it is entitled to under the compact terms. Conversely, if the water were used for reservations outside Wyoming, the state would be deprived of the allocation it had bargained for. No definite answers are available, as neither the courts nor the compacts have addressed this issue. The language of the compacts, however, lend support to an argument that the United States is not bound by the allocations made by the compacts and could assert its reserved rights against the allocations of other states.[64]

A number of cases concerning congressional consent to compacts have arisen in other contexts. By analogy to these decisions, there is some guidance as to how the problem might be resolved. The earlier cases dealt primarily with the situation in which Congress had given its consent to a compact and attempted to revoke or alter the consent by enacting inconsistant legislation. These cases took the position Congress had merely given temporary approval to the interstate compact subject to continuing congressional power to revoke or modify its consent whenever Congress believed national legislation should supercede the compact provisions.[65] In 1855, the Supreme Court held Congress possessed the power to enact legislation inconsistent with previously approved compacts.[66] The Court's decision was based on the proposition that one session of Congress cannot impair the legislative power of subsequent ones.[67] In *dictum*, the Court of Appeals in *Tobin v. United States*[68] rejected the argument that an explicit reservation by Congress to alter or repeal its consent was unconstitutional.

Based on these cases, it can be argued Congress has not limited or compromised the United States' claims to reserved water rights merely by giving consent to an interstate com-

63. In the Pyramid Lake controversy, United States v. Nevada, 412 U.S. 534 (1973), the Supreme Court seemed to believe the possibility of a real conflict of this nature to be very remote.
64. *See* Yellowstone River Compact, art. XVI, 65 Stat. 663, 670 (1951); Upper Colorado River Basin Compact, art. XIX, 63 Stat. 31, 42 (1949).
65. Bloom, *supra* note 59, at 932.
66. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 433 (1855).
67. *Id.*
68. 306 F.2d 270 (2d Cir. 1962), *cert. denied*, 371 U.S. 902 (1962).

pact. Even if Congress were found to have limited or compromised the government's claims, if Congress can legislate in a fashion incompatible with an approved compact, it would seem it can also revoke or amend the legislative consent as changed conditions may warrant. This position is consistent with the basic purpose of the compact clause of the Constitution, *i.e.*, to protect and promote the national interest in connection with interstate undertakings. The purpose of the clause makes it necessary for Congress to retain its flexibility to reconsider previously granted consent.[69]

Conversely, it can be argued Congress *has* limited or compromised the government's rights to water by the failure to make express provision for reserved water rights in its consent to the compact. The argument is developed in this manner: Once Congress has given consent, it has agreed the subject matter of the compact is to be governed by the interstate mechanism. There is no right in Congress to modify or withdraw its approval except upon invitation by the compacting states. The congressional consent to the interstate compact is a contract between Congress and the compacting states. This "contract" delineates the parties' respective rights and entitles the states to rely upon local governmental mechanisms to deal with the compact subject matter free from assertions of federal rights contrary to the express terms of the compact.[70]

Two early Supreme Court Decisions[71] held that, when Congress approves interstate compacts fixing state boundaries, Congress is precluded from subsequently revoking or altering that consent. Compacts concerning interstate rivers and streams, on the other hand, fix the amount of water the respective states are to receive. By analogy, Congress should not be allowed to alter those allocations in order to acquire water under the reserved rights doctrine.

In connection with the above, a compelling argument can be made that Congress has limited the rights the government might otherwise have had by giving its consent to a compact and failing to provide for its reserved rights. If Congress fails

69. INTERSTATE WATER COMPACTS, *supra* note 31, at 290.
70. Bloom, *supra* note 59, at 932.
71. Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 725 (1838); Poole v. Fleeger's Lessee, 36 U.S. (11 Pet.) 185, 209 (1837).

to protect governmental interests at the time consent to a compact is sought, government rights are limited to that extent.[72] This argument is based on the importance of an interstate compact and the great reliance, in terms of individual actions and financial investments, on rights allocated by the compact.

The argument has been presented that congressional consent is more than a mere revocable consent for compacting states to act in a given manner until Congress acts inconsistently.[73] Long series of federal acts which rely on compacts have been enacted for the purpose of enabling states to develop the water received under the interstate allocations. Congress granted each state the right to develop its waters free from federal interference and hinderance. The congressional consent was a limitation or compromise of the government's claim to water for satisfaction of reserved rights otherwise Congress would be interfering with the development they had authorized the states to engage upon.[74]

VI. RECOMMENDATIONS

There is no indication that federal reserved rights will be curtailed or abolished in the near future. Accordingly, it is necessary that steps be taken toward resolving the problems created by reserved rights so states can function in this environment and water be developed to the fullest extent possible.

Reserved rights can be treated as a national, state or basin-wide obligation. The most equitable method of dealing with reserved rights is to treat them as a national obligation. This would require the government to buy the water needed for federal and Indian reservations rather than invoking its powers under the reserved rights doctrine. If voluntary sales agreements could not be reached, the power of eminent domain could be exercised and the water rights condemned. In both instances, the money would come from the national treasury and those who had been using the water are compensated.

72. It should be noted however, Tobin v. United States, *supra* note 85, would be of aid to the government's position because most compacts do reserve the power to alter or amend the compact.
73. Bloom, *supra* note 59, at 937.
74. *Id.*

A federally-initiated program to establish quantity ceilings for federal water rights could also be of value. Under this program, the United States would determine and itemize the ceiling amounts of water to be claimed in each state for all reservations—except Indian reservations. The government would renounce all claims to a greater amount of water under its reserved rights, in effect, abolishing reserved rights on federal lands other than Indian reservations. Any amount in excess of the ceiling would be acquired by purchase or exercise of the power of eminent domain. The ceilings have the advantage of allowing states to deal more fairly with the division of an interstate stream so each state actually receives the benefits it believes it is receiving under an interstate agreement. However, there are several problems with regard to this federal program. Given the present attitude of the government toward western water, one problem is the impracticality; another is the cost involved. Also, the government could establish the ceiling limits at a point so great as to make the program of no benefit to either the federal or state governments.

The surrender of federal rights in excess of a specified amount would create special problems with regard to Indian rights. Undoubtedly, the federal government can renounce its reserved rights for its own federal reservations. However, Indians have an interest akin to a property right in the water they presently use and the amounts they have a right to use in the future, and the government cannot renounce rights that belong to another. The Indians could agree to renounce their reserved rights in exchange for the government's promise to purchase water whenever the need for additional water arises. The Indians, however, would most likely be apprehensive of an agreement calling for the relinquishment of their rights in return for a promise to act in a particular manner in the future.

Achieving certainty with regard to reserved rights and interstate allocation may call for congressional action. Legislation may be one way to effectively deal with an interstate river basin in a manner that will protect all parties with an inter-

est in the stream.[75] The advantage does exist of furthering the national interest by protecting public lands and reservations by making certain sufficient water is available for use on those lands. Congressional action has the disadvantage of federal involvement in an area which states prefer to believe within their control.

State and federal cooperation is also a desirable method of resolving conflicts; cooperation protects state water users yet allows the United States to acquire water needed for federal reservations purposes.[76] Notwithstanding the power to seize water used by junior appropriators, reserved rights should not be blindly asserted until the effects on existing state water users, plans and projects can be observed. Often, the purchasing of water rights by the United States would be considerably less costly in terms of public relations and cooperation. In addition, upon the creation of new reservations, Congress should report to the state, at the time of the reservation's creation, the water claimed in clear terms and definite quantities.

While treating reserved rights as a national obligation may be preferable, at the present time, it seems the states will have to deal with the demands of reserved rights. It should be considered that although the general attitude toward reserved rights has been that they are detrimental, they may, in fact, be advantageous for a state. The state is assured of capturing a certain quantity of water for use within the state. Also, it must be assumed the Indians and the federal government will apply the water to beneficial and productive use to the same degree other water users would. Arguably, even though different users are producing and receiving the rewards of the water, the net benefits to the state—and nation—are the same.

If the reserved rights are treated as an obligation of each individual state, the allocation of the state in which the reserved rights exist will be charged with the amount required to satisfy the demands. This imposes a burden on the state that may not have been contemplated when the allocation was made. This would be especially true with reserved rights

75. ECONOMICS AND PUBLIC POLICY IN WATER RESOURCE DEVELOPMENT 327 (Smith & Castle eds. 1964).
76. *Id.* at 333.

for federal reservations, other than Indian reservations, because it was not until 1963[77] that reserved rights were known to apply to all federal reservations. Placing the burden on just one state seems to unfairly benefit other states in the river basin and deprives the burden-bearing state of the benefits of its agreement. However, it may be desirable to require an individual state to bear the reserved rights when the quantity required is extremely small. The administrative convenience outweighs any hardship the state might experience, and it is doubtful a small amount would affect junior appropriators except in years of extreme shortage.

The inventory and quantification of reserved rights would be the most popular and practicable way to prevent future and to cure some of the problems posed by these enigmatic rights. States need to take greater advantage of the McCarren Amendment,[78] *Eagle County*[79] and *Colorado River Water Conservancy District*[80] to identify and quantify reserved water rights so junior appropriators who are and have been applying the water to beneficial use can be protected. The need to have full and precise knowledge of Indian and federal reserved rights will become even greater as the competition for water increases.[81] While preferable, this solution is not very practical. The impracticality is demonstrated by the government's unwillingness to voluntarily consent to adjudication of their water rights and the long legal battles involving the adjudication of reserved rights.

A suggestion for dealing with reserved rights is to provide in the interstate compact that each state bears the burden of the reserved rights within the state—but with a limitation on the total quantity. In this way, a state bears the burden of satisfying reserved rights up to a certain specified amount. When the federal demands exceed this amount, the obligation becomes one of the river basin as a whole, to be divided on a pro rata basis equal to the portion of the stream flow received. An arrangement such as this assures each compacting state that it will not individually bear a burden beyond that agreed.

77. Arizona v. California, *supra* note 7.
78. 43 U.S.C. § 666 (1970).
79. United States v. Dist. Court in and for the County of Eagle, *supra* note 14.
80. Colorado River Water Conservancy Dist. v. United States, *supra* note 17.
81. Veeder, *Indian Prior and Paramount Rights to the Use of Water*, *supra* note 10, at 662.

A more equitable way to deal with the conflict is to distribute the entire burden among all states in the river basin. The regional distribution is consistent with basin-wide development and protects one state from having to bear a burden that was unprovided for when the allocation was made. The burden of federal and Indian reserved rights would be divided among the basin states by reducing each state's share of the water in proportion to its allocation.

VII. CONCLUSION

In the area of reserved rights and interstate allocation of water, there are many questions and problems, but no definite answers. As federal water demands grow, competition between states increases, and water becomes more scarce, uncertainty created in state water rights and interstate allocations will become more significant, and the need to resolve the many unanswered questions will become more imminent. Action is needed now to avoid problems created by reserved rights in the context of interstate allocations so a "patchwork remedy" approach will not be utilized and a long legal battle can be avoided at a time when answers, action and water will be more important.

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