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## MARKETING OF SURPLUS WATER FROM FEDERAL RESERVOIRS

In the early 1940's, Congress directed the Corps of Engineers and the Bureau of Reclamation to undertake comprehensive studies for the development of the water resources of the Missouri River basin. Out of these plans came the Pick Sloan Missouri basin program<sup>1</sup> which, in its basic format, provided for the construction of reservoirs and related water works to meet the basin needs of irrigation, power generation, flood control and navigation. The plans were approved and authorized by Congress in Section 9 of the Flood Control Act of 1944.<sup>2</sup>

At that time the major consumptive use was anticipated to be irrigation.<sup>3</sup> As hundreds of millions of dollars were invested in the 1950's and early 1960's to construct the main stem reservoirs, agriculture production flourished to the point of crop surpluses. Consequently, the irrigation that was promised for the upper basin states was not pursued as originally planned.<sup>4</sup> The result has been unappropriated surplus water available for commitments to future use. In recent years when the nation's need for increased energy production became a reality attention began focusing on the actual commitments of those surpluses. Conflicts between water for energy and water for agriculture were inevitable.

On February 24, 1975 the Secretaries of the Army and Interior entered into a "Memorandum of Understanding"<sup>5</sup> concerning the marketing of surplus water from six reservoirs

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1. The Corps of Engineers report was prepared by Colonel Lewis A. Pick and was formalized in Congress as H.R. DOC. NO. 475, 78th Cong., 2d Sess. (1944); and the Bureau report was prepared by W. G. Sloan and was formalized in Congress as S. DOC. NO. 191 of the same Congress. The two plans were reconciled in S. DOC. NO. 247, 78th Cong., 2d Sess. (1944) and became popularly known as the Pick-Sloan Plan.
2. 58 Stat. 887, 891; 33 U.S.C. §§ 701-1 *et seq.* (1970).
3. See H.R. DOC. NO. 475, 78th Cong., 2d Sess. (1944); S. DOC. NO. 191, 78th Cong., 2d Sess. (1944).
4. *Hearings on Memorandum of Understanding Before the Subcomm. on Energy Research and Water Resources of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. pt. 1, at 11 (1975) (statement on behalf of Honorable Richard Knelp, Governor of South Dakota) [hereinafter cited as *1975 Hearings*].
5. The Memorandum of Understanding reads in its entirety as follows:

This Memorandum of Understanding is entered into this 24th day of February, 1975, between the Secretary of the Interior and the Secretary of the Army in order to expedite the use of water for energy development in the Missouri River Basin. The terms hereof apply only to the six main stem reservoirs of the Corps of Engineers on the Missouri River.

on the main stem of the Missouri River.<sup>6</sup> The memorandum was executed in order to expedite plans for using large amounts of coal in the Dakotas, Montana and Wyoming for developing new energy supplies and calls upon the Secretary of the Interior to contract for the sale of water from these reservoirs for industrial purposes. This agreement was to terminate on February 27, 1977 but was extended until September 1, 1977 to provide time for the assessment of the water marketing program. A further extension is now being considered.

The purpose of the memorandum is to permit the possible execution of industrial water service contracts of approximately one million acre feet of main stem storage water. Both departments have conceded that the water that could be contracted out is designated for future irrigation use on Bureau of Reclamation projects.<sup>7</sup> Figures provided by the Interior Department show that up to two million acre-feet would not

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1. The Secretary of the Interior shall determine the amounts of water available from the capacity provided in the main stem reservoirs for irrigation and for the probable extent of future irrigation and shall also determine the extent and for what duration such amounts of water will not be needed for irrigation and for the probable extent of future irrigation.

2. The Secretary of the Army shall determine how much of the water determined by the Secretary of the Interior to be excess to present irrigation needs can be made available for industrial uses.

3. The parties hereby agree that the Secretary of the Interior may, pursuant to applicable authorities, both on his own behalf and as agent for the Secretary of the Army, contract for the marketing of water for industrial uses and incidental purposes related thereto from the six main stem reservoirs as will not be needed for irrigation for a given period and as will not interfere with the operation of the reservoirs for flood control; provided, however, that

a. The Secretary of the Army shall retain all operational and managerial control over said reservoirs;

b. Contracts for the marketing of such water shall be executed under the terms of this agreement with full compliance with the requirements of the National Environmental Policy Act;

c. No contract for the marketing of such water shall be executed but on such terms and conditions as are mutually agreeable to the parties hereto; and

d. To the extent such contracts would reduce the quantity of power generated, no contract may be executed unless it has been determined jointly by the parties to this agreement that the proposed marketing for industrial purposes is a beneficial use of the water which should take precedence over hydroelectric power generation.

4. The Secretary of the Interior shall have the lead agency responsibility for compliance with the requirements of the National Environmental Policy Act.

5. This Memorandum of Understanding shall terminate at the end of two years. Contracts executed pursuant to this Memorandum of Understanding shall not be affected by such termination. During the term hereof, the Secretary of the Interior and the Secretary of the Army shall further cooperate in developing a long-range marketing program for municipal and industrial water.

6. The six main-stem storage dams are: Fort Peck in Montana; Garrison in North Dakota; Aohé, Big Bend, and Fort Randall in South Dakota; and Gavins Point in Nebraska.

7. 1975 Hearings, *supra* note 4, at 23.

be used by irrigation in the next forty to fifty years. It has been the government's position that any industrial water service contract would be for a term of years and that upon termination of those contracts the water will revert to its intended use.<sup>8</sup> The government has also been quick to point out the desirability and need for federal-state coordination in any marketing program and that the affected state would be given the right of first refusal in any option contract.<sup>9</sup>

The memorandum essentially states that the Secretary of the Interior shall determine how much water from the main stem reservoirs that has been allocated to irrigation is in excess of that needed for present irrigation and for the probable extent of future irrigation. In addition, the Secretary of the Army shall determine how much of the water determined by the Secretary of the Interior to be in excess of present irrigation needs can be made available for industrial uses. In both instances no mention of state participation is made.

Needless to say, the memorandum has generated a great deal of concern among the western states which fear this seemingly unilateral action by the federal government is only a foreshadowing of what is in store for unappropriated water in other federal installations and, as a consequence, state procedures and policies will be ignored and local benefits will be sacrificed.

The purpose of this Comment is to examine two initial questions raised by the federal proposals to sell impounded reservoir water to industrial users. First, what are the rights or powers of the states to control water within their borders, and second, what legal authority, constitutional, legislative or otherwise, do the Departments of the Interior and Army have for industrial water marketing from federal reservoirs. Other collateral yet significant issues will be considered as well.

#### CONSTITUTIONAL AUTHORITY AND THE QUESTION OF OWNERSHIP<sup>10</sup>

The water of all natural streams, springs, lakes or other

8. *Id.*

9. *Id.*

10. The fundamental concepts found in this section on ownership are taken from an

collections of still water, within the boundaries of the state, are hereby declared to be the property of the state. Wyo. Const. Art. 8, § 1 (1889).

By constitution or by statute all seventeen of the western states have adopted the concept put forth in the above quote; having accepted its premise more on faith than anything else. Whether the belief is based on a theory of *public juris*, belonging to the public, or on a theory of *res publicae*, things belonging to the state as a corporate entity,<sup>11</sup> the state's rights view is uniform: water flowing within state boundaries belongs to the state. Upon this traditional states' rights view has been built the varying patterns of water policies and regulation among the western states.

These laws enacted to preserve private rights to the use of the waters and to secure future state development and prosperity unquestionably serve not only a legitimate state interest but a national interest as well. Nevertheless, it is important to recognize that state powers to regulate the water resources within her boundaries do not stem from state constitutional provisions or statutes but from the general sovereignty reserved to the states by the tenth amendment of the United States Constitution. It is important because, while a state constitution may purport to create an undivided interest in a water course, the tenth amendment would not. A state can not isolate herself from her sister states and thereby the nation as a whole by enacting laws purporting to give her exclusive jurisdiction over water. States are only quasi-sovereign and therefore consideration must be given to the interests of neighboring states.<sup>12</sup> This is especially true when water has been allocated by interstate compact or court decree. The federal government also has an interest in providing for the national welfare and has the power to realize that interest even to the extent overriding inconsistent state water law.<sup>13</sup>

The dividing line, however, between the delegated powers of the United States and the residuum powers of states is not

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article written by Professor Trelease. For a more in depth treatment on the subject see Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638 (1957) [hereinafter cited as Trelease, *Ownership and Trusteeship*].

11. *Id.* at 640.

12. Trelease, *Federal Limitations on State Water Law*, 10 BUFFALO L. REV. 399 (1961).

13. *Id.*

clear. And where the federal government and a particular state each have an interest in the same water, the conflict is especially keen and often bitter. Advocates of the states rights doctrine attempt to resolve the controversy by their argument that the states own the water.

The closest precedent to this position is the oft-quoted case of *Ickes v. Fox*<sup>14</sup> where the Supreme Court stated: "Although the government diverted, stored and distributed the water . . . the water-rights became the property of the land owners. . . . The government was and remained simply a carrier and distributor of the water. . . ." <sup>15</sup> The issue being addressed was whether the Secretary of the Interior, as distributor of project water, could force existing water right users to take less water than they had been using or pay for the excess. The landowners claimed property rights in the original quantity. The Court noted that under the Reclamation Act as well as under the law of Washington, beneficial use was the measure and limit of the water right and although the United States had complied with state law in diverting the water, the appropriation was made for the use of the landowner and not for the use of the government. Thus, it was held that "the water rights became the property of the landowner wholly distinct from the property right of the government in the irrigation works,"<sup>16</sup> and could not be destroyed by the Secretary. The significance of the *Ickes v. Fox* holding is that it recognized property rights of the project user, not the federal government and not the states. Moreover, the issue of rights to unappropriated water was not addressed.

The federal government, as expected, is not without a counter-position, which is the sometimes asserted argument that the United States acquired the original ownership of all rights in the water as well as the lands by cessions from France, Spain and Mexico and it still owns those rights in water to whatever extent it has not disposed of them.<sup>17</sup> Although the argument may seem a bit tenuous, it should not be discounted too quickly. The trend of the Supreme Court in this area of water law has been a gradual move away from a state's

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14. 300 U.S. 82 (1937).

15. *Id.* at 94, 95.

16. *Id.* at 95.

17. *Nebraska v. Wyoming*, 325 U.S. 589, 611 (1945).

rights view to a more omnipotent federal authority. Recent decisions on the reservation doctrine and the Court's strained interpretations of the reclamation laws<sup>18</sup> are strong incentives to proceed with caution before challenging the issue in federal court. Regardless of the apparent strength or flaws of these arguments, the conflict is not to be resolved on a question of ownership. To decide the issue on the basis of who has title to the water is illogical as well as dangerous. State ownership of its waters cannot be thought of in the same sense as one thinks of private ownership of tangible property. Phrases such as "state ownership" and "proprietary interests", at least where water is concerned, should only conjure up assertions of state police powers; the legal consequences are the same.<sup>19</sup> Arguably, it may only be a question of semantics; but, the distinction is worth noting. The foremost advocate of the non-ownership theory has summed up the argument, in the following manner:

State ownership means that the state has power to control the allocation of water rights by permits, that the state may adjudicate rights among appropriators, that it may take an active part in seeing that the water laws are obeyed, and that it may enact forfeiture laws. Why does it mean this? Because we use the words to express the complex of these legal consequences of the fact that the state is the organization set up to regulate and control the allocation of scarce things among the people. . . .

If we were to say, "ownership of property gives the right to do with it as the owner pleases," and reason from there, we would reach all sorts of absurd results. If we say, "The state owns the water and merely permits its use, therefore it may withdraw its permission at will," all appropriators and riparians will cry that due process is violated.<sup>20</sup>

Thus, it can readily be seen that attempts to equate the term "state ownership" with the term "private ownership" will be of little value. Private ownership implies a bundle of sticks of a different grade.

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18. See text accompanying notes 68 thru 71, *infra*.

19. Tarlock, *Recent Developments in the Recognition of Instream Use in Western Water Law*, 1975 UTAH L. REV. 871, 876.

20. Trelease, *Ownership and Trusteeship*, *supra* note 10, at 648.

Interestingly enough, the Supreme Court has never decided a water case on the basis of property concepts,<sup>21</sup> and has successfully managed to skirt the issue when directly presented. Whenever a conflict has arisen over water and where a federal interest of whatever sort is present, the Court instead has looked into the delegated powers of Congress to control commerce, provide for the common defense, make war, make treaties, control compacts between states, manage federal property and provide for the general welfare.<sup>22</sup> And when those powers are exercised under the supremacy clause,<sup>23</sup> state-created rights and state interests must conform or yield.<sup>24</sup> To argue that the federal government's constitutional authority over the nation's water is in any way limited by state right, is an exercise in futility. There should be no question as to the reach of its powers; when it chooses to rule and control, the constitutional authority of the federal government is ultimate.<sup>25</sup>

By far the largest body of federal water law is in relation to navigable waters. Congressional power to regulate commerce among the several states<sup>26</sup> was long ago said to include transportation which in turn included the regulation of navigation.<sup>27</sup> Once having laid the foundation the construction that followed, according to one commentator, has been unending:

[T]he power to regulate navigation comprehends the control of navigable waters for the purposes of improving navigation; this power to control includes the

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21. *Id.* at 651; *see also* *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Ickes v. Fox*, 300 U.S. 82 (1937). In the usual case the Court found that acquisition of water rights had been obtained in compliance with state law and therefore the issues were resolved without having to answer the question of who "owned" the water.
  22. An indepth analysis of all the natural powers that have at one time or another been called on to justify federal control over water is beyond the scope of this Comment. A brief discussion is devoted to those of greater significance and which have application to this article. For a more comprehensive treatment and from which this Comment has principally been drawn *see* Trelease, *Federal Limitations on State Water Law*, 10 BUFFALO L. REV. 399 (1961).
  23. U.S. CONST. art. 6.
  24. The full scope of the supremacy clause was summarized recently in *United States v. California*, 403 F. Supp. 874, 898 (1975), where the court stated:  
The Supremacy Clause of the United States Constitution is a limitation upon the states according to which federal law cannot be subordinated to state regulation within the areas of Congress' exclusive legislative powers.
  25. 1975 *Hearings*, *supra* note 4, pt. 2, at 242 (statement of Albert W. Stone, Professor of Law, University of Montana). There are a number of examples of federal action overriding state action, *see, e.g.*, *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946); *Arizona v. California*, 283 U.S. 423 (1930).
  26. U.S. CONST. art. 1, § 8.
  27. *Gibbons v. Ogden*, 9 Wheat. 1 (1824).

power to destroy the navigable capacity by damming the waters to protect adjacent lands from flood. The power to obstruct leads to the power to generate electric energy from the dammed water. Congress can protect the navigable capacity of water by preventing diversions or obstructions and the power to prevent obstruction leads on to powers to license obstructions.<sup>28</sup>

And now with *Arizona v. California*,<sup>29</sup> the Supreme Court has said that the power to construct federal enterprises and to store water includes the power to distribute that water among the states in proportions designated by the federal government.

At times the Supreme Court has questioned the somewhat attenuated construction of the commerce clause and in those instances has called upon other constitutional powers to justify federal control over water programs. Such was the case in *United States v. Gerlach Livestock Co.*<sup>30</sup> where the Court sustained the Central Valley Project in California based on Congress' power to tax and appropriate for the general welfare. "Thus the power of Congress to promote the general welfare through large-sale project for reclamation, irrigation, and other internal improvement, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of power over navigation."<sup>31</sup> The only limitation expressed by the Court was that the power must be exercised for the common benefit as distinguished from some mere local purpose.

Another source of federal jurisdiction is the property clause: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." In the western states, where the national government has title to vast amounts of public land, the property clause has been read to create a proprietary power over its interests.<sup>32</sup> Federal

28. Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation*, 1963 SUP. CT. REV. 158, 177 (1964).

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

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

31. *Id.* at 738.

32. *See Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955); *Winters v. United States*, 207 U.S. 564 (1908); *see also* Trelease, *Federal Limitations on State Water Law*, 10 BUFFALO L. REV. 399 (1961).

control over water stemming from the government's proprietary interest in its public lands and reservations is seen most recently in relation to the reservation doctrine. Originating in *Winters v. United States*<sup>33</sup> the reservation doctrine for many years was thought to be unique to Indian claims; then came the *Pelton Dam* case.<sup>34</sup> There the Supreme Court affirmed the granting of a license by the Federal Power Commission to a private energy company to construct a dam in the face of state protests. Unlike earlier cases where navigable water were at issue (allowing the invocation of the commerce clause)<sup>35</sup> in the *Pelton Dam* case no showing that the waters were navigable was made, yet authority was found on the basis that the dam would be built in federal lands. The western terminus of the dam was to be located on an Indian reservation, the eastern terminus was to occupy lands that had been "withdrawn from entry under the public land laws and reserved for power purposes."<sup>36</sup> The Court dismissed Oregon's claim that the Desert Land Act of 1877<sup>37</sup> gave the state exclusive jurisdiction over non-navigable water, stating the Act was inapplicable to reserved lands. The importance of the case lies in the federal government's authority over non-navigable water. The implications of the case have been summarized by Dean Trelease: "Whether or not the United States 'owns' the waters on these lands, it is now clear it has the power to use the water on the reserved lands to further the purposes for which the reservation was made."<sup>38</sup>

The property clause and its corollary proprietary powers have likewise been called upon in instances having no association with land. In *Ashwander v. Tennessee Valley Authority*<sup>39</sup> the Supreme Court held that the electricity generated from the falling water was an "inevitable incident of the construction of the dam" and thereby constituted property belonging to the United States.<sup>40</sup> "Authority to dispose of property

33. *Winters v. United States*, 207 U.S. 564 (1908).

34. *Federal Power Comm'n v. Oregon*, *supra* note 32.

35. *See First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946). Similar to the *Pelton Dam* case, a federal license was issued over state protests but in *First Iowa* the Supreme Court found authority based on a finding that the waters were navigable.

36. *Federal Power Comm'n v. Oregon*, *supra* note 32, at 344.

37. 19 Stat. 377, 43 U.S.C. § 321 (1958).

38. Trelease, *Water Rights of Various Levels of Government—States' Rights vs. National Powers*, 19 WYO. L.J. 189, 193 (1965).

39. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

40. *Id.* at 330.

constitutionally acquired by the United States is expressly granted to Congress by Sec. 3 of Article IV of the Constitution. . . . The Government could sell or lease and fix the terms."<sup>41</sup> The potential analogy is obvious. Under such a theory unappropriated stored water might also be regarded as property of the United States, capable of being marketed to whomever the Secretary of the Interior may designate.

The constitutional powers of the federal government coupled with the supremacy clause are indeed broad enough to further a national interest in the water resources of any state. Add to this the trend of recent judicial decisions in this area and it would seem that the Court would have little difficulty in finding constitutional authority to market stored waters in federally constructed projects, even to the possible prejudice of state interests.

#### EXPRESSED SECRETARIAL AUTHORITY

There can be no question that the powers of the federal government to rule are supreme. Thus, the question is not whether the government could exclusively control the nation's water resources—the important question is whether it has chosen to call upon its full authority. In the context of constitutional authority to market water from federal reservoirs, where then has Congress exercised that power in the statutes authorizing and regulating those reservoirs?

#### *Flood Control Act of 1944*

Legal authority for the marketing of stored water from federal enterprises is based in part upon Section 6 of the 1944 Flood Control Act.<sup>42</sup> That legislation clearly specified that the Corps of Engineers would be responsible for building the dams and for operating the reservoirs for flood control and navigation. The Bureau of Reclamation was designated to market the power generated at these reservoirs and also received authority to build irrigation projects for the benefit of agriculture production.

Through Section 6 Congress has granted to the Secretary of the Army implicit authority to market surplus water, but not without qualifications:

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41. *Id.*

42. 33 U.S.C. § 708 (1970).

The Secretary of the Army is authorized to make contracts with States, municipalities, private concerns or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army: *Provided*, that no contracts for such water shall adversely affect then existing lawful uses of such water.

The proviso severely restricts unilateral action on the part of the Secretary. To the extent that reservoir depletions through the servicing of industrial water contracts would adversely affect such lawful uses as navigation and hydroelectric power generation, the proviso is not complied with. The fact that there are other uses of the water that may prove more beneficial than an existing use is inconsequential in terms of the plain language of the statute.

The production of hydroelectric energy is the most obvious function served by stored waters. In the Missouri River Basin it was estimated that the sale of one million acre feet of surplus water from the main stem reservoirs to industrial users would result in an approximate five percent loss of kilowatt hours of electric production,<sup>43</sup> a definite adverse effect. The government's response has been that if there is a reduction of hydroelectric power beyond that authorized by Congress, then the sale of water otherwise used for power production would provide sufficient funds to cover any lost energy revenues. In addition, any funds remaining would be available to purchase alternative sources of energy if the need arose.<sup>44</sup> In spite of the revenues generated by industrial contracting, a five percent loss of electrical power constitutes a consequence adversely affecting an existing lawful use. If reliance on alternative sources of energy is necessary to offset possible adverse effects then it would seem appropriate to demand that serious studies of the future availability of other sources and their economics be required before the effects became irreparable.

Any possible effect on navigation, on the other hand, would appear to be negligible. It is unlikely that the quantum

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43. 1975 Hearings, *supra* note 4, at 35 (statement of Mr. Ed Sullivan, Assistant Commissioner of the Bureau of Reclamation).

44. *Id.* at 36.

of unappropriated water contemplated to be sold would adversely affect the navigable characteristics of a stream; nevertheless, it is a factor to be considered.

Another use of water captured by reservoirs is the augmentation of stream flows. Minimum stream flows are essential in most instances for the efficient operation of the irrigator's means of diversion and unless stream levels are maintained, the quantum of water to which an appropriator is entitled may never reach the fields. To force the irrigator to install pumps or other alternatives in order to divert his full appropriation, ignores the vested rights of the prior appropriator. The principles of prior appropriation are well established in this area. A prior appropriator has a vested interest in a reasonable means of diversion and subsequent appropriators take with notice of the conditions existing at the time of their appropriations.<sup>45</sup> Although surplus water is not water to which landowners are entitled under their appropriation, the use of such water to maintain stream levels should be considered a lawful use.

#### *Reclamation Project Act of 1939*

The Secretary of the Interior through Section 9(c) of the Reclamation Project Act of 1939<sup>46</sup> has also been delegated with the legal authority to market industrial water from federal enterprises. But again the authorization has its limitations. Specifically:

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes. . . . No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

45. *State ex rel. Crowley v. District Court*, 108 Mont. 89, 88 P.2d 23 (1939). There a junior appropriator had impounded by their dams the entire flow of the river so that the water level at plaintiff's point of diversion was so low water could not be diverted. The Montana Supreme Court rejected junior's contention that an appropriator's vested interest is only in the use of the quantum of water appropriated by him without reference to his means of diversion.

*But see* *Environmental Defense Fund v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976). There the court rejected plaintiffs claim to a property right in having stored waters released to augment stream flows. The court reasoned that since property rights to reclamation water were based in part on repayment contract and thus since plaintiffs were not paying for the supplementation they had no rights to the surplus water.

46. 43 U.S.C. § 485h(c) (1970).

In fact the Section only authorizes the Secretary to contract for municipal and miscellaneous purposes; no specific reference is made to industrial use at all. Certainly the omission opens the door to anyone challenging secretarial authority but the argument that had Congress intended industrial use it could have said so is only superficially appealing. There can be no question in this day and age that projects built by the Bureau of Reclamation are of a multipurpose nature, including features for production of hydroelectric energy, control of floods, improvement of navigation, municipal and industrial water supplies, recreation and fish and wildlife preservation, as well as for irrigation.<sup>47</sup>

Industrial water use may actually qualify for either "municipal" or "miscellaneous" water use.<sup>48</sup> Due to the closeness of their association, it is not uncommon to see municipal and industrial uses grouped into a single category of "M & I" use. Furthermore any ambiguity as to the meaning of "municipal and miscellaneous purposes" would appear to have been resolved by the Act of June 21, 1963,<sup>49</sup> wherein Congress expressly authorized the renewal of contracts previously made by the Secretary under authority of the 1939 Act for "municipal, domestic or industrial water supplies." In any event, it would impose little strain on a court to read industrial use into the words "miscellaneous purposes".

Assuming then that industrial use was intended, the statute still imposes the limitation that no contract shall be made unless in the judgment of the Secretary it will not impair the efficiency of irrigation. Unless the impairment is quite certain a challenge on this basis would be easy to overcome since the Act itself does not provide any guidelines on which the determination is to be made. The Secretary is given considerable latitude in this regard and will be afforded a presumption of regularity.<sup>50</sup> Aside from the actual scope of authority already assumed to exist, the Secretary's actions are constrained only by standards of arbitrariness, capriciousness, and abuse of discretion.<sup>51</sup> Such a standard requires that the decision be based

47. *TRELEASE, CASES AND MATERIALS ON WATER LAW: RESOURCE USE AND ENVIRONMENTAL PROTECTION* 732 (2d ed. 1974).

48. *Environmental Defense Fund v. Morton*, 420 F. Supp. 1037, 1042 (D. Mont. 1976).

49. Pub. L. No. 88-44, 77 Stat. 68 (1963).

50. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

51. *Id.* The holding in *Overton Park* actually establishes three elements as the scope for judicial review of Secretarial determination. They are: (1) whether his action was

on a consideration of the relevant factors; namely, the amount of surplus water available and present and future irrigation needs.<sup>52</sup> To say the Secretary must take into account full potential irrigation development may overstate what is relevant. But, at a minimum, the statute contemplates that consideration be given to future irrigation needs for a period equal in time to the industrial contracts.

### *Other Federal Legislation*

Legislative authorization is also apparent from the Act of February 25, 1920<sup>53</sup> which provides that the Secretary in connection with reclamation projects is authorized to enter into contracts to supply water for purposes other than irrigation provided that the approval of such contracts by the water-users association or associations shall have first been obtained, that no such contract shall be entered into except upon a showing that there is no other practical source of water supply for the purpose, and that no water shall be supplied if the delivery is detrimental to the irrigation functions of the project.

Finally, in the Water Supply Act of 1958<sup>54</sup> the Bureau of Reclamation and Corps of Engineers are specifically authorized to impound water for present or anticipated future demand or need for industrial water in constructed or to be constructed reservoir projects. The Act, however, further directs that any modification of existing projects to include storage which would seriously affect the purposes or operation for which the project was planned and constructed shall be

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arbitrary, capricious or an abuse of discretion; (2) whether the action was within the scope of his authority; and (3) whether his action complies with the applicable procedures. Assuming authority does exist the second element is of no value; and furthermore it is doubtful that the Secretary is required to make formal findings under the Administrative Procedure Act 5 U.S.C. §§ 553, 554 (1970) in this instance. *See also* Environmental Defense Fund v. Morton, 462 F. Supp. 1037, 1044 (D. Mont. 1976).

52. In Environmental Defense Fund v. Morton, 420 F. Supp. 1037 (D. Mont. 1976) the court found that the Secretary had made an analysis of water supply and irrigation needs and that that was sufficient. The court refused to consider potential irrigation development.

It might be remembered that the Memorandum of Understanding *supra* note 5, directs the Secretary to consider the probable extent of future irrigation before proceeding with an industrial water contract.

53. 43 U.S.C. § 521 (1970). There may be a question whether the 1920 Act has been overruled by implication by the Reclamation Act of 1939 (43 U.S.C. § 485h (1970)), since expressed in the 1939 Act is the authorization to enter into industrial water contract subject only to the judgment of the Secretary as to the impairment of irrigation.
54. 43 U.S.C. § 390(b) (1970).

made only upon approval of Congress.<sup>55</sup> In those federal enterprises where contemplated use of stored water was to be for flood control, energy production and irrigation, water marketing for industrial purposes arguably constitutes a modification of project purposes and operations and, therefore, requires Congressional approval. The problem, of course, is determining what constitutes a "serious affect". The words resemble the 1944 Flood Control Act proviso "that no contracts for such water shall adversely affect the existing lawful use of such water . . ." <sup>56</sup> and undoubtedly a similar test would be applied.

#### EXPRESS RECOGNITION OF STATE WATER LAW

The reclamation and flood control acts enacted by Congress pursuant to its constitutional power over the nation's water resources have been seen to provide the Secretaries of the Army and Interior ample authority to market unappropriated water from federal reservoirs, but in no instance is such authority unfettered. While the powers of the federal government are ultimate in this area, it is not often that Congress has called upon its full authority. Frequently, Congress has chosen to waive exclusive jurisdiction in deference to state regulation.<sup>57</sup>

For many years the reclamation laws were looked upon as exemplifying that congressional attitude. The western states have consistently contended that Congress intended to afford to the states primary responsibility in water distribution and that the federal government role was solely one of participation and cooperation. The truth of the matter turns on the construction of the reclamation laws, not so much as they were enacted, but as they have been interpreted over the years.

In 1902 there were some 535 million acres of public land among the sixteen western states and territories still held by the federal government. Much of this land however was either arid or semi-arid; but, with the introduction of extensive irrigation projects it was estimated that thirty-five million acres

55. 43 U.S.C. § 390b(d) (1970).

56. 33 U.S.C. § 708 (1970).

57. *California v. Environmental Protection Agency*, 511 F.2d 963, 967 (1975); *see also Paul v. United States*, 371 U.S. 245, 263 (1963).

of this arid land could be converted into agriculture production.<sup>58</sup> Earlier attempts to undertake the reclamation of these lands by private capital proved unsuccessful<sup>59</sup> because the costs were too overbearing. In order to implement such a plan, it was believed that the expenditure of public money would be necessary. Behind the vigorous efforts of President Theodore Roosevelt and a number of western representatives, Congress enacted into law the Reclamation Act of 1902.<sup>60</sup> The general outline of the Act envisioned that the proceeds arising from the sale of public lands in these sixteen states and territories should be placed in a trust fund to be set aside for use in the construction of irrigation works. The cost of each project was to be assessed against the land irrigated and as money was continually paid in, it was to be used in the construction of other works. The construction of irrigation projects opened up once undesirable public lands to settlement under the homestead laws. Where private lands were included within the serviceable area of the irrigation project water right were restricted to 160 acres.

The attention given to the possible reclamation of western lands by the federal government did not completely overshadow the legitimate state interests in the appropriation, use and distribution of water already recognized by the Desert Land Act of 1877.<sup>61</sup> This policy became one of the fundamental concepts of the 1902 Act and is expressed in Section 8:

Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with

58. H.R. REP. NO. 1468, 57th Cong., 1st Sess. (1902).

59. Projects initiated by the private sector while sometimes successful were relatively simple in character and serviced only limited areas. The Carey Act of 1877 (19 Stat. 377, as amended 43 U.S.C. § 661 (1970)) marked the first attempt by the federal government to assist in western reclamation by granting to the participating states millions of acres, yet projects were to be built with private funds. Nevertheless, the Carey Act proved to be a failure in the long run.

60. 43 U.S.C. §§ 371 *et seq.* (1970).

61. 43 U.S.C. § 322 (1970). The Act in general terms encouraged the settlement of lands by making large tracts available to those who would redeem them and declared that all non-navigable water located on public lands would be held free for appropriation. In *California-Oregon Power Co. v. Beaver Portland Co.*, 295 U.S. 142 (1935) the Supreme Court held that all non-navigable waters on the public domain should be reserved for the use of the public under the laws of the states and territories. *Id.* at 162.

such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, that the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure and the limit of the right.<sup>62</sup>

Over the years the Reclamation Act has been amended and supplemented by a long line of related legislation; yet either by express provision or incorporation by reference the basic premise of Section 8 remains.

The actual working of Section 8 had been the subject of considerable debate. The states rights proponents pushed for stronger language favoring more absolute control of the waters rendered available by the constructed projects. In the end a scaled down version of state authority prevailed.<sup>63</sup> Notwithstanding legislative history, it was thought by both the states and federal government that Section 8 required the United States to proceed in compliance with state law in appropriating water rights for its projects. Once having done so the United States stands in the same position as any individual acquiring a state water right,<sup>64</sup> and its appropriative right is limited to beneficial use.<sup>65</sup>

Furthermore, Section 8 taken on its face suggests reclamation projects and national policy are subject to state control and possibly state veto. If indeed this is true, the Section establishes a theory of dual control by the federal and state governments, a proposition clearly denied when the federal government exercises its complete authority through one of its delegated powers.<sup>66</sup> The behavior of both state and federal officers during the last three quarters of a century indicate that there might have been a time when the federal government actually believed Section 8 to mean what the words seem

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62. 43 U.S.C. § 372 (1970).

63. For a more inclusive history of the adoption of Section 8, see *United States v. California*, 403 F. Supp. 874 (E.D. Cal. 1975).

64. See *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935).

65. It is the general practice of the Bureau of Reclamation in filing claims to water for its projects to request an appropriation to all unappropriated water of the river. This, however, does not foreclose future appropriations or state development since the United States is still subject to the limitations of beneficial use. Trelease, *Reclamation Water Rights*, 32 ROCKY MTN. L. REV. 464, 466 (1961).

66. See text accompanying notes 27 through 41, *supra*; see also Trelease, *Reclamation Water Rights*, 32 ROCKY MTN. L. REV. 464, 468 (1961).

to express.<sup>67</sup> But today that possibility is very remote, if it exists at all. The intended meaning of Section 8 has now been read out of the reclamation laws.

The ground work for the current interpretation of Section 8 was laid in *Ivanhoe Irrigation District v. McCracken*<sup>68</sup> when the Court stated:

We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the state. . . . [I]t merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interest therein.<sup>69</sup>

While consistently cited for this proposition, it is important to note that the only issue decided in *Ivanhoe* was that the state could not force the federal government to deliver water to lands in excess of 160 acres in derogation of the 1902 Act. Simply stated, *Ivanhoe* was an easy case that made bad law.<sup>70</sup>

In the celebrated congressional apportionment case of *Arizona v. California*<sup>71</sup> the Court again had occasion to construe Section 8; however, this time it did so in an indirect manner. At issue was how much water each of the several lower Colorado River Basin states had a legal right to use of the Colorado River and its tributaries. At the center of the controversy was the Boulder Canyon Project Act<sup>72</sup> which not only contained a provision<sup>73</sup> similar to Section 8 but also a provision making the Act supplemental to the Reclamation Act of 1902, thereby incorporating by reference Section 8. Despite these provisions the Court, relying in large measure on *Ivanhoe*, found authorization for the Secretary of the Interior to allocate water among the states and to enter into water delivery contracts without regard to state law in choosing between users.<sup>74</sup>

67. An example of such an understanding is when the Secretary of the Interior applied to the State Engineer of Wyoming for a permit to construct Glendo Dam in the North Platte River. The permit was denied on grounds that the proposed use might be detrimental to the public interests. The plan called for the irrigation of 45,000 acres, all of which were in Nebraska. Negotiations resulted in a modified application calling for the irrigation of 15,000 acres in Wyoming and 25,000 in Nebraska and on this basis the permit was granted. Trelease, *Reclamation Water Rights*, 32 ROCKY MTN. L. REV. 464, 468 (1961).

68. *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958).

69. *Id.* at 292, 291.

70. MEYERS & TARLOCK, *WATER RESOURCE MANAGEMENT* 505 (1971).

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

72. 43 U.S.C. §§ 617 *et seq.* (1970).

73. 43 U.S.C. § 617q (1970).

74. *Arizona v. California*, *supra* note 71, at 587-88.

If any part of the fundamental concept recognized in Section 8, as enacted in 1902, survived *Arizona v. California*, the *coup de grace* recently came in the Ninth Circuit Court of Appeals decision of *United States v. California*.<sup>75</sup> There the United States through the Bureau of Reclamation sought to obtain permits to appropriate unappropriated water from the Stanislaw River for development of the New Melones Project. The California State Water Resources Control Board granted the permits but placed various terms and conditions on them (a practice recognized in most western states). The United States objected to the imposition of any conditions by the state, taking the position that the United States can appropriate unappropriated water necessary for use in any federal reclamation project without having to apply for a state permit. California's position rested on the plain language of Section 8 of the 1902 Act. The court held that the United States must apply to the State Board but that the Board must grant such application if unappropriated waters are available and may not impose any terms or conditions on the permits issued to the United States,<sup>76</sup> stating:

Under § 8, the national government, in constructing and administering reclamation projects, must recognize and cannot nullify either water rights created by state laws or the laws that create them. But enforcement of the government's duties via the permit device is not handed over to the states.<sup>77</sup>

This limited compliance with state law, the court said, was necessary for two reasons: "(1) to enable the state to determine according to its law whether there is sufficient unappropriated water available for the project; and (2) to give notice to the state of the scope of the project."<sup>78</sup> Section 8 was viewed by the court simply as a reaffirmation of the doctrine that the states are free to apply their own rules of water law unhindered by federal influence and when read in conjunction with the eminent domain proceeding of Section 7, the

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75. *United States v. California*, 558 F.2d 1347 (9th Cir. 1977), *aff'g*, 403 F. Supp. 874 (E.D. Cal. 1975), *cert. granted*, 44 U.S.L.W. 3373 (No. 77-285).

76. *Id.* at 1351.

77. *Id.*

78. *United States v. California*, 403 F. Supp. 874, 890 (E.D. Cal. 1975), *aff'd*, 558 F.2d 1347 (9th Cir. 1977). In addition the district court held that it was "in accordance with comity" the United States must apply to the State Board. On this point the Court of Appeals disagreed; the requirement was not one of comity but a legal requirement of § 8.

federal government is required to look at state law in defining the property interests for which compensation must be made.<sup>79</sup>

The court's holding as to Section 8 was buttressed by two recent Supreme Court cases, one concerning the Clean Air Act,<sup>80</sup> the other decided under Water Pollution Control Act Amendment of 1972.<sup>81</sup> Both statutes contained language providing that the federal installation must "comply with federal, state, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements."<sup>82</sup> In both instances the Court found the language unclear and ambiguous and refused to subject federal installations to state regulation absent a more specific mandate from Congress.<sup>83</sup>

In like manner the Court of Appeals found that Section 8 of the 1902 Act was no more specific in subjecting federal projects to state permit requirements than the statutory provision construed in the aforementioned cases. Moreover, the court felt compelled to reach such a result since California's permit requirement did not exist in 1902 and it could not have been the intention of Congress to subject federal projects to a law not yet in existence. The court's reasoning is at best curious. For it seems that now after dozens of judicial decisions and seventy-five years of consistent compliance with state law by the Bureau of Reclamation Section 8 is suddenly ambiguous.

In light of subsequent reclamation legislation calling for the construction of multi-purpose projects, Section 8 of the 1902 Act may or may not constitute a limitation on industrial marketing of stored water by the Secretary of the Interior. However, it has been important to trace the evolution of Section 8 for two reasons. First, if *United States v. California* is upheld by the Supreme Court, the theory of dual control

79. *Id.* at 887, citing *Fresno v. California*, 372 U.S. 627 (1963); *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 466 (1958).

80. *Hancock v. Train*, 426 U.S. 167 (1976); 42 U.S.C. §§ 1857 *et seq.* (1970).

81. *Environmental Protection Agency v. California ex. rel. State Water Resources Control Board*, 426 U.S. 200 (1976); 33 U.S.C. §§ 1251 *et seq.* (Supp. V 1975).

82. 42 U.S.C. § 1875f (Supp. V 1975); 33 U.S.C. § 1323 (Supp. V 1975).

83. It is indeed worthy of notation that Congress recently amended the Water Pollution Control Act to effectively overrule *Environmental Protection Agency v. California*, *supra* note 81. Clean Water Act of 1977, Pub. L. No. 95-217, § 61, 91 Stat. 1566 (1977).

once thought to exist by virtue of Section 8 is abolished and the government's authority in reclamation cases is now as omnipotent as its powers over navigable rivers and reserved lands.<sup>84</sup> Secondly, it reveals the current interpretation of statutory provisions requiring the accommodation of state laws found not only in Section 8 but in the legislation relied on by the federal government for its authority to enter into industrial water option contracts.

In those statutes expressly authorizing the federal marketing of surplus water Congress has continually recognized individual state interest in connection with control, appropriation, use and distribution of water. Section 1 of the Flood Control Act of 1944<sup>85</sup> is indicative of this express congressional intent:

[I]t is hereby declared to be the policy of the Congress to recognize the interests and rights of the states in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes.

Affirmation of congressional policy in this area can be found in the Water Supply Act of 1958,<sup>86</sup> where in conjunction with an express declaration of the states primary responsibility in developing municipal and industrial water supplies, the federal government is directed to cooperate and participate in the materialization of such supplies in connection with the construction, maintenance, and operation of navigation, flood control irrigation or multi-purpose projects.<sup>87</sup> In addition, it should be remembered that the Act of February 25, 1920<sup>88</sup> requires, among other things, the Secretary of the Interior obtain the approval of the water users association or associations before entering into contracts to supply water

84. See text accompanying notes 22 through 41, *supra*.

85. 33 U.S.C. § 701-1 (1970).

86. 43 U.S.C. § 390b (1970).

87. 43 U.S.C. § 390b(a) (1970). It should be further noted that § 390b(c) of the same act specifically provides that the act shall not be construed to modify provisions of Section 8 of the 1902 Act; impliedly reaffirming a policy of compliance with state law.

88. 43 U.S.C. § 521 (1970). There are also a number of federal statutes unrelated to reclamation that require the secretary to consult with state agencies prior to entering into contracts related to the use of water. See, e.g., Fish and Wildlife Coordination Act of 1934, 16 U.S.C. §§ 661, 662(a)(1) (1970); National Environmental Policy Act, 42 U.S.C. §§ 4321, 4332(2)(c) (1970).

for purposes other than irrigation. Also, these policy directives are the result of an enormous effort on the part of states to insure a present and future voice in the development and planning of their own economic growth. But do the provisions actually insure that state voices will be heard? The answer varies, depending upon the source consulted.

In the public hearing conducted by the Senate Subcommittee on Energy Research and Water Resources, in reference to the Memorandum of Understanding, the Secretaries of the Army and Interior were asked whether industrial contracts were contingent upon the intended purchaser's possession of a state water right. Their response read in part: "Our contracting principles will require that water users obtain from the Corps of Engineers the necessary permits and licenses to place diversion facilities on Federal property and contractors will be expected to comply with all applicable State laws."<sup>89</sup> In other words the federal position is that the government has control over impounded waters within its own reservoirs, but as waters are sold from these reservoirs state laws covering the use and disposition of these waters become applicable and state water permits are required.

While the government's position appears to be in line with the statutory policy declared by Congress, one has to remain a little skeptical. History in this area reveals a pattern of inconsistencies between practice and policy. As one commentator has stated, the provisions of federal legislation addressing state interests are only expressions of policy and not guarantees.<sup>90</sup> *United States v. California* bears evidence to that proposition. In interpreting the policy declarations of the 1944 Flood Control Act and the Water Supply Act of 1958 the court stated: "it would be too broad a reading of this section to infer that the federal government is thereby subjected to individual state *control* in the development and operation of federal reclamation projects."<sup>91</sup> Those sections, according

89. 1975 Hearings, *supra* note 4, at 7.

90. Trelease, *Federal Limitations on State Water Law*, 10 BUFFALO L. REV. 399, 419 (1961).

91. *United States v. California*, *supra* note 78, at 894; *see also* First Iowa Hydro-Electric Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946). At issue there was a provision of the Federal Power Act (16 U.S.C. § 821 (1970)) requiring applicants to submit satisfactory evidence that the applicant has complied with the requirements of state law. The Supreme Court held that "satisfactory evidence" of compliance need not include a showing that the applicant has received state approval.

to the court, are no more than a recognition of individual states' primary obligation to develop water supplies for internal uses.

There can be no doubt that under the Constitution the federal government possesses ultimate control over the operations of federal installations; nor should there be doubt as to the clear intent of Congress to waive federal jurisdiction in the appropriate situation. If in fact the recognition of states rights pervasive throughout reclamation law is simply an example of federal comity then, state jurisdiction over water running through federal projects is only a privilege capable of being withdrawn at any time. However, if federal waiver of exclusive jurisdiction has risen to the level of a statutory right, then at a minimum applicants who contract with the Secretary for industrial water supplies must be subject to state permit requirements and to the conditions of applicable state law.

Recognition of state laws and regulations to a certain extent is necessary for reasons other than simply enabling states to determine whether there is sufficient unappropriated water available for federal projects. When the river basin involved is the subject of an interstate compact or Supreme Court apportionment, a definite problem arises as to whether a federal contract to deliver industrial water preempts a states' rights to regulate allocation. If the government was to proceed with its marketing program irrespective of state laws and permit requirements, it may be an unfair burden to force an allotment on a state which it does not want and which is facing its own decisions about water for agriculture and industry. Whereas, if state permits are required and in turn issued to industrial users, a state would have no standing to dispute that the allotment is not attributable to its interstate share.

The problem on the surface may not be all that substantial, since the concern here is with unappropriated surplus water. Moreover, interstate compacts must be approved by Congress and it would seem unlikely that having given consent to a specific allocation of water, Congress would allow the Secretary to impair a state's ability to develop its own compact allocation. But by looking only at the immediate ef-

fect of the federal marketing proposals, a very real problem is ignored. The end consequences may not be felt for some time despite assurances by the government that the water will be returned to its intended use when the contracts expire.<sup>92</sup> When that time arrives the loss of jobs and capital investment would be unacceptable to both the states and national government.

*Environmental Defense Fund v. Morton*<sup>93</sup>

The worst fears of the states concerning the industrial marketing of surplus water may have already been realized. In 1975 the Secretary of the Interior entered into two industrial water service contracts to be satisfied from two reservoirs on the Yellowstone River, a tributary of the Missouri. The action brought immediate challenge in the federal district court of Montana by several environmental groups seeking to restrain the Secretary from undertaking any activities in connection with the disposition of water for industrial purposes. The thrust of the plaintiffs' argument was that the construction of the reservoirs in question was for the exclusive purposes of providing agricultural irrigation, hydro-electric power, flood control and supplementation of stream flow, and that the industrial water option contracts were purely administrative decisions unauthorized by Congress. The Secretary of the Interior asserted the position that the marketing of surplus water for industrial use is expressly authorized by the 1944 Flood Control<sup>94</sup> Act and the Reclamation Project Act of 1939.<sup>95</sup> The court agreed.

The statutory provisions granting general secretarial authorization to market water have already been reviewed, but without specific reference to the legislation which authorized the construction of the particular project. In *Environmental Defense Fund* the controversy centered around two reservoirs built under the Pick-Sloan Missouri Basin program and authorized by Section 9 of the 1944 Act.<sup>96</sup> Section 9 merely

92. 1975 Hearings, *supra* note 4, at 23. Both the Secretaries of the Army and Interior have repeated the assurance that the contracts to furnish water for industrial use under the Memorandum of Understanding are only for a term of years and that at the expiration of the contracts the water will return to its intended use.

93. *Environmental Defense Fund v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976).

94. 33 U.S.C. §§ 701 *et seq.* (1970).

95. 43 U.S.C. § 485h (1970).

96. Pub. L. No. 78-534, § 9, 58 Stat. 891 (1944).

adopted the comprehensive plans prepared by the Bureau of Reclamation and Corps of Engineers and formalized in Senate Document No. 191 and House Document 475,<sup>97</sup> respectively. The specific objectives of both plans were that all beneficial uses of the Basin water would be developed "so as to realize the greatest procurable economic return and human benefits for the entire region."<sup>98</sup> It must have been contemplated, therefore, that the facilities' multi-purpose nature would include industrial use.

Having found sufficient authorization to enter into the option contracts the court without discussion dismissed all of the plaintiffs' claims based on other reclamation statutes; in effect holding that those laws were inapplicable to the dispute at hand. Of significance, however, was the court's cursory disposal of the Reclamation Act of 1902, since Section 9 of the Flood Control Act explicitly states that the reclamation and power development to be undertaken by the Secretary of the Interior shall be governed by the federal reclamation laws and specifically the Reclamation Act of 1902. Another allegation in plaintiffs' complaint deserves mention *i.e.*, their claim that the industrial water marketing program violated the percentage allocations under the Yellowstone Compact. Some discussion has already been devoted to interstate compacts but not in the context of the allegations present here. In essence, the contention was that by virtue of the industrial contracts one state may receive more than her compact allotment. The complaint in some ways mirrors the ongoing controversy concerning the Colorado River Compact. There the charge has been that the Secretary of the Interior is contracting away the upper-basin states' share of the Colorado River to the point that now California far exceeds her compact allocations. Technically, the compact is being violated but until the time that states like Wyoming are able to make full use of their allotments there is no effect and the contracts will continue. In *Environmental Defense Fund* the claim was dismissed for want of any evidence of a violation. The court, however, did go on to suggest that the water from any particular project

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97. H.R. DOC. NO. 475, 78th Cong., 2d Sess. (1944); S. DOC. NO. 191, 78th Cong., 2d Sess. (1944).

98. S. DOC. NO. 191, 78th Cong., 2d Sess. 10 (1944). The report goes on to explicitly state that the project was to provide both "domestic and industrial water".

need not be apportioned according to the percentage allocations of the compact.<sup>99</sup>

At this point the true precedential value of *Environmental Defense Fund* is unclear. The holding, as previously mentioned, concerned marketing activities of two off-stem reservoirs of the Missouri River basin constructed pursuant to the 1944 Flood Control Act and to that extent the case may be confined to its facts. Although the court did devote a considerable portion of its opinion to the Secretary's general authorization to sell industrial water, its treatment of the extent the federal government must recognize state regulations is limited and leaves much to be said. In fact, it does not appear that the issue of whether industrial users must obtain state water permits was ever raised. The only discussion in this regard was a statement made by the court that "[a]ll purchasers of water under the option contracts have the same priority and that priority is the date of priority of the United States for the impounding of waters in the Reservoirs."<sup>100</sup> It is wishful thinking to believe that one case will resolve the present controversy over unappropriated stored water; however, *Environmental Defense Fund* does stand as a warning of the obstacles to be overcome.

#### CONCLUSION

Hopefully, the issue of who has ultimate jurisdiction over impounded surplus water will not come down to a contest between the states and national government. If anything at all is gleaned from this Comment, one fact should be that the constitutional authority of the federal government to control the disposition of water in federal reservoirs is almost unlimited. Whenever a national interest arises in a water project funded by the United States, its power to further that interest to the possible prejudice of states' rights and interests is unquestionable. That is not to say that state interests are always ignored. On the contrary, the history of reclamation and flood control projects has demonstrated a rather laudable working arrangement marked by coordination, cooperation and accommodation. In most instances, injury to existing

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99. *Environmental Defense Fund v. Morton*, *supra* note 93, at 1049.

100. *Id.* at 1046.

rights have been worked out long before the first shovel touches the ground. States realize the need for federal assistance and usually welcome the projects with open arms. The public benefit as a result of those programs has been realized on both a national and state level. It is only in those rare instances where in the opinion of the state the proposed use might be detrimental to the public interest that a dispute ever develops.

Certainly states have their own ideas about the rate and extent of industrial development within their borders and those interests must be respected. States view their sovereign powers over water as insurance that those interests will be recognized despite the scope of the federal project. In support of their position the states often look to the provisions of the enabling legislation which on their face contemplates compliance with state laws. But, whatever may have been the original intent of those legislative provisions, it is clear now that control over federal programs will not be handed over to the states. The means of insuring that states will be heard are not found in attempts to indirectly regulate the federal government. It simply will never happen. Instead of fighting federal encroachment every inch of the way, the states might be better off channeling their energies towards widening existing lines of communication, not only at the planning stage, but at any time a new use of water is considered. The real answer lies in the realization that the federal reclamation programs were initiated on an understanding of intergovernmental cooperation and participation.

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