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STATE PROHIBITIONS ON THE INTERSTATE EXPORTATION OF
SCARCE WATER RESOURCES

Steven E. Clyde
with
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I. Introduction. The decade of the 1970's saw a tremendous population shift to the West and Southwest. This coupled with increased industrialization and development of energy resources within the area is creating a heavy demand upon the area's limited water resources.

A. The response of the Western States to these demands have been mixed:

1. Some have accepted growth as inevitable, and have emphasized land use planning, proper zoning, reallocation of the available water resources, and creative tax measures and other laws to cope with the impact of rapid growth and development.

2. Others resist growth and in many instances have endeavored to use water as a land use regulator to stop development. As a result, state water policy is often misused for unrelated political purposes.¹

B. Scope of Paper: To examine various legislative prohibitions on the exportation of water for interstate use; prohibitions on interstate movement of water created by provisions in interstate compacts; discuss the constitutional issues raised by embargo type legislation and interstate

¹Clyde, the Anatomy of an Energy Project, 26 Rocky Mountain Mineral Law Institute, 365 (1980).
compact provisions; review existing appropriation statutes, and their suitability to the allocation of water for future development among competitive applicants.

II. Legislative Bars to the Exportation of Water Resources.

Western States have employed various legislative schemes to prohibit the exportation of their water resources to other and often non-contiguous states. This has in particularly been done in an effort to block the development of coal properties within their boundaries.2

A. Embargo type legislation falls within three somewhat generalized but distinct categories: The first allows the exportation of water but only upon legislative approval; the second allows the exportation of water but only upon a reciprocal basis; and, the third endeavors to create an absolute prohibition upon the interstate transportation of water for coal slurry pipelines.

1. The ostensible purpose of this legislation is to preserve for the States the limited water resources which are necessary for the health and prosperity of its citizens, and to promote the general welfare.3

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2. The effect of this legislation has been to delay new coal related energy projects.

3. The motivation behind the embargo legislation is multi faceted.\(^4\)

(a) The chief proponents include both environmentalists who oppose development and favor a no growth policy, and the natives who desire to maintain their agrarian lifestyles and avoid the disruptive social change associated with energy development.

(b) General fear of boom towns and the accompanying influx of people who embrace different social values and backgrounds, in numbers that often overwhelm municipal facilities. Boom towns often attract gambling, prostitution, drugs and other undesirable behavior. The population influxes are often temporary making the construction of schools, hospitals, sewer and water systems and other municipal improvements impractical, and the small community is unable to cope with these economic and other problems.

(c) Environmental concerns--fear of massive coal development in response to heavy demands and the national energy crisis.

\(^4\)Trelease, Back to Basics-Taking the Politics Out of Water Law Conference on Water Perspectives in the "Old West States", S.D. 1979
(d) The use of coal slurry pipelines for transportation which are viewed as a threat to the long established railroad industry.

(e) Reluctance of one segment of society or one area to sacrifice for the economic benefit of other segments of society or other areas. Utah, for example, does not want the air pollution and associated problems of coal fired generating facilities which will generate power for the California markets.

(f) Fear and outright resentment of Federal intervention in their lives.

4. The embargo type legislation will not accomplish its intended purpose. The statutes generally suffer from constitutional infirmities, and in the face of a national energy crisis, could invite the very Federal intervention which local politicians and populations seek to avoid.5

B. Specific Approaches Used by Various States:

1. Some states prohibit the interstate exportation of water except upon express legislative approval.

   (a) A Wyoming statute prohibits the appropriation of either surface or underground water for use

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outside of the State as a medium of transportation of mineral, chemical or other products to another State without specific and prior legislative approval.6

(b) Under South Dakota law, the legislature must approve any application to appropriate water in excess of 10,000 acre-feet annually. The same act denies the power of eminent domain to any common carrier which has failed to obtain such prior approval.7

(c) An Oregon statute provides that no water located within the State shall be diverted, impounded or in any manner appropriated for diversion and use beyond the boundaries of the State except upon the express consent of the legislature. The consent may be coupled with such terms, conditions, exceptions, reservations, restrictions and provisions as the legislature may care to make in protection of the interest of the state and its inhabitants.8

2. Other states require reciprocal treatment from the state in which the water is to be used.

(a) Nevada law provides that no permit for the appropriation of water shall be denied because the place of intended use is situated within any other state, when such

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6§41-3-105, §41-3-115 Wyo. Stat.
7§46-6-20.0 S.D. Comp. Laws
other state authorizes the diversion of water from such state for use in Nevada.\textsuperscript{9}

(b) In Washington, the State Engineer may not deny a permit for appropriation of water solely on the grounds that the intended place of use may be situated in another state or nation. However, the supervisor of water resources has discretion to decline such a permit unless the laws of such state authorize the diversion of water from that state for use within the State of Washington.\textsuperscript{10}

3. Still other states have endeavored to create an outright embargo upon the interstate transportation of water.

(a) The State of New Mexico has declared that no person shall withdraw water from any underground source for use in any other state. This statute is currently being challenged on constitutional grounds.\textsuperscript{11}

(b) Oklahoma employed a unique approach. It conferred the power of eminent domain upon coal slurry

\textsuperscript{10}\$90.03.300 R.C.W.A.; in contrast, see \$73-2-8 U.C.A. 1953 which was amended in 1979 to delete the requirement of reciprocal benefits and now authorizes the State Engineer to approve applications to appropriate Utah water for use in any state.
\textsuperscript{11}\$72-12-19 N.M.S.A.; City of El Paso, Texas v. S.E. Reynolds, the State Engineer of New Mexico, Civil No. 80-730 HB, United States District Court for the District of New Mexico.
pipeline companies. As common carriers, the slurry pipeline companies are regulated and must secure licenses from the State. The license is withheld until the carrier demonstrates the adequacy of its water supply for the projected life of the project. The statutes then expressly prohibit the use of Oklahoma water to transport materials in slurry form to other states.12

(c) The Montana legislature has expressly determined that the use of water for the slurry transport of coal is detrimental to the conservation and protection of the water resources of the state, and consequently the use of water for the slurry transport of coal is not a beneficial use of water. Water, of course, can be appropriated only for beneficial uses.13

(d) Colorado statutes provide that it is unlawful to divert, carry or transport the water of any water source of the state into any other state for use therein,

12Okla. Stat. Title 27, Eminent Domain 7.1 and 7.6; see generally Haerle, Legal and Practical Aspects of Coal Slurry Construction and Use, Practicing Law Institute, Dallas, TX 1977, for a discussion on other developments in area of eminent domain and coal slurry pipelines. The railroads are trying to block slurry pipelines from crossing the railroads. The courts are holding that the railroads have only easements for the track bed, and that they cannot deny the pipeline companies the right to cross under the roadbeds. See ETSI v. U.P.R.R.C., 456 F. Supp. 154 (D.C. Kan. 1978), aff'd 606 F.2d 934 (10th C.A. 1979); ETSI v. U.P.R.R.C., 435 F. Supp. 313 (D.C. Wyo. 1977), aff'd 606 F.2d 934 (10th C.A. 1979).
13§85-2-104 Rev. Code MT 1979
except that the owner of agricultural lands in Colorado and and contiguous agricultural lands in bordering states may, upon specific legislative approval use water in the other state for agricultural use, if the other state has reciprocal rights.\textsuperscript{14}

III. Impact of Embargo Type Legislation on Interstate Commerce.

A. Under the Commerce clause [Article III, Section 8 Cl. (3) of the U.S.], Congress was granted the authority to regulate Commerce among the several states. It is generally held, that any state law or regulation which unreasonably burdens and interferes with interstate commerce is constitutionally void.

1. Whether or not a state act or regulation interferes with commerce turns on the nature and severity of the burden created, and the local purpose served by the imposition of the act or regulation.

2. If the regulation is protectionist in nature, it is per se invalid. If the regulation serves a legitimate local public interest, then the beneficial effect of the local regulation is balanced against the burden imposed upon interstate commerce.

3. State acts will be upheld where they promote legitimate local public concerns and only incidentally impose burdens on or discriminate against

\textsuperscript{14}§37-81-101 Colo.
interstate commerce. However, state acts will be held invalid where they discriminate against interstate commerce, or where the burdens imposed on commerce are clearly excessive in relation to the assumed local benefits. The test is one of degree and depends upon the nature of the local interest involved, and whether it could be promoted through a lessor impact on interstate activities. 15

4. The Court should consider the practical effect of the burdens state regulations impose on interstate commerce, rather than merely labels or statements of purpose. State acts and regulations making the furtherance of interstate commercial activities economically prohibitive, are constitutionally void. 16


B. As a general rule, both the articles and instrumentalities of interstate commerce are subject to congressional regulation and control:

1. Federal regulatory control has been extended to the extraction of natural resources, once those resources assume a form suitable for transit in interstate commerce.17

2. Instrumentalities of commerce--highways, telephone and navigable waterways--which facilitate the movement of items in commerce are also subject to congressional control.18

3. Attempts by states to prevent the exportation of natural gas have failed. The Supreme Court held that such statutes constitute an unreasonable intrusion into or the obstruction of interstate commerce by the states.19

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18The Daniel Ball, 77 U.S. 558 (1871); McDaniel, supra, Note 16
C. Applicability of commerce clause to water embargo situations:

1. **Hudson County Water Company v. McCarter**, 209 U.S. 389 (1909). The Supreme Court held that the State of New Jersey could prohibit the exportation of its water to New York City due to compelling local interests in preserving its scarce water supply for the benefit of its own citizens.

2. The Supreme Court apparently recognizes that states are justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources, and will sustain state regulations which affect interstate and intrastate uses equally.\(^{20}\)

   However, the states regulatory authority is neither exclusive or absolute, and will not preclude the exercise of Federal controls under the commerce clause.\(^{21}\)

3. The conservation and wise development of water resources in the semi-arid west is indispensible to the general welfare of the area and to all activities of man. For that reason, water has been accorded special


\(^{21}\text{Baldwin v. Fish & Game Commission of Montana, 436 U.S. 385 (1978).}\)
consideration in the West. For example, a private appropriator is afforded the right of eminent domain so as to take his water from his point of diversion across the lands of another to his place of use. The right is afforded because the public has a substantial interest in the use of water.\(^\text{22}\)

The Mill Pond decisions from the mid-west states turned upon the same public interest principals.\(^\text{23}\)

4. Although water is a unique resource, it is still not so unique as to justify special treatment under the commerce clause. Water is not different from oil and gas insofar as the export of the product is concerned. Water is an article of commerce in that it is bought and sold as a commodity in every municipal water system for municipal and for general industrial use. As such, it clearly can be exported in a pipeline from state to state.

5. Water rights are property rights, and entitled to all constitutional protection, including due process, but it is a property right which is affected by the public interest. As such, its use is regulated both at the


initial appropriation process and as to later transfers to new uses under change application statutes. The state can prevent waste, mitigate interference, and provide for the forfeiture for non-use.

6. Although the Supreme Court upheld the right of a state to preserve its water resources in McCarter, the opposing view prevailed in City of Altus v. Carr, 255 F. Supp., 828 (1966). This decision was affirmed per curiam in 385 U.S. 35 (1966). The Federal District Court held that a Texas statute which prohibited the exportation of Texas ground water to Oklahoma without prior legislative approval constituted an unreasonable burden upon interstate commerce. The Court found the presence of both discrimination against interstate commerce and an absence of a sufficient public interest to justify the burdens imposed on interstate commerce. The court followed the rational of the prior natural gas cases which discuss the policy considerations as follows:

"If the states have such a power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principal". 24

7. Several law review articles have been written which examine the McCarter and Altus decisions. The consensus of opinion is that McCarter is no longer valid

24West v. Kansas Natural Gas Company, supra, Note 17; Pennsylvania v. West Virginia, supra, Note 17.
authority. It should be noted, however, that the Supreme Court affirmed Altus without opinion, and thus did not expressly overrule McCarter. It should also be noted that at least one writer contends that the Altus decision was based more upon an estoppel type theory rather than an invocation of the negative implications of the commerce clause, because the City of Altus had invested significant sums in the acquisition of land and water rights in conformance with Texas law. These expenditures occurred prior to the Texas legislature's enactment of the provision which prohibited the exportation of water.25

Notwithstanding this, it is doubtful that embargo type legislation, such as that in McCarter, can be sustained if subjected to the balancing test analysis.

E. Constitutionality of Specific Acts noted above:

1. Those statutes that create an absolute ban on the interstate movement of their water resources (such as Montana, Colorado, New Mexico, and Oklahoma) are protectionist in nature and discriminate against interstate

25Trelease, supra, Note 4; McDaniel, supra, Note 16; Zunker, supra, Note 5; Pennsylvania v. West Virginia, supra, Note 16; and West v. Kansas National Gas Company, supra, Note 17; but see Corker, Can a State Embargo the Export of Water by Transbasin Diversion?, 12 Id. L.R. L35 (1976)
commerce. Without question they are constitutionally void.26

2. Those statutes that require specific legislative approval, such as Wyoming, Oregon and South Dakota are also void under the balancing analysis. The statutory provisions unreasonably burden interstate commerce in furtherance of tenuous state interests. The statutes are substantially identical to the Texas statute struck down by the Federal Court in Altus v. Carr. However, legislative supervision is not per se discriminatory against interstate commerce. The legislature might restrict new appropriations or transbasin diversions for conservation purposes without discriminating in favor of instate uses. So long as a clear and demonstrable state purpose exists which does not unreasonably burden interstate commerce, no violation should occur. Examples of this might include the preservation of scenic and recreational values.27

3. Those statutes that allow the interstate movement of water upon a reciprocal basis are of questionable validity.

27McDaniel, supra, Note 16; Zunker, supra, Note 5; but see Corker, supra, Note 25; and, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); and, Cities Services Gas Company v. Pierless Oil & Gas Company, 340 U.S. 179 (1950)
(a) The intent is not to prohibit the interstate movement of water, but to reap reciprocal economic benefits from those states in which the water will be used.

(b) The magnitude of energy projects are such that most will be interstate in nature.

(c) Any attempt to prohibit the interstate movement of water because one of the states involved does not provide for the reciprocal use of its water may unreasonably burden interstate commerce, and thus be constitutionally void. 28

IV. Impact of Interstate Compacts Upon the Exportation of Water.

A. Purpose of Interstate Compacts: The purpose of interstate compacts is to equitably apportion the water of interstate streams among the several states along the interstate river system. Additionally, compacts help facilitate planning, and settle present and future disputes in regard to river administration. They may also help establish preferences between different beneficial uses on a system wide basis, and promote interstate comity.

B. Equitable apportionment is accomplished in one

28 Atlantic & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366 (1976), wherein the Supreme Court struck down a mandatory reciprocal requirement pertaining to the processing of milk, on the grounds that no state interests were of sufficient importance to save "that devastating effect upon the free flow of interstate milk".
of three ways: 29

1. by negotiated contractual apportionment ratified by the participants and the national congress (interstate compact).

2. Equitable apportionment by judicial decree. Perhaps the most famous example is Arizona v. California, which apportioned the waters of the Colorado River among the lower basin states. 373 U.S. 546 (1963). 30

3. By congressional fiat, although the constitutional basis for such congressional allocation is questionable. Nevertheless, the Supreme Court in Arizona v. California held that Congress had such authority. 31

C. Apportionment is primarily a quantification of the extent of each state's right to develop the water within an interstate river system. This right, however, is always

31 Arizona v. California, 373 U.S. 546 (1963); see generally, Clyde, The Colorado River Decision, Vol. 8, #4, Ut. L.R. 299 (1963-64); Corker, supra, Note 25
subordinate to the dominant federal power to regulate navigation and commerce upon interstate streams. ³²

1. Interstate compacts may place restraints upon the place of water use, and nearly always allocate the water which each state may use from the interstate source. Under the Colorado River Compact ³³, the water of the Colorado River system was allocated by compact between the upper and lower basin. The water allocated to the upper basin was then apportioned among the states of the upper basin by the Upper Colorado River Compact ³⁴. The Supreme Court held in 1963 that Congress apportioned the water among the lower basin states. See Arizona v. California, supra.

2. Under the upper Colorado River Compact for example Colorado could construct a dam on the White River in Utah, and divert the water for use in Colorado for an oil shale project. The water so used would be charged against Colorado's allocated share of the Colorado River system.

3. In 1979, the Utah Legislature amended §73-2-8 U.C.A. 1953 by deleting the requirement of

³²National Water Commission, A Summary Digest of State Water Laws, supra, Note 26; and see generally, Clyde, The Colorado River Decision, Vol. VIII, No. 4 Utah L. Rev. 229 (1963-64); Articles XVIX(c) Upper Colorado River Compact Act of April 6, 1949, Ch. 48, 63 Stat. 31; Article XVI, Yellowstone River Compact, Act of June 2, 1949 (P.L. 83, 81st Congress)
³⁴Upper Colo. River Compact (63 Stat. 31).
reciprocal treatment, so as to accommodate Nevada Power Association's use of Utah's ground water in a coal slurry pipeline to take Utah's coal to a power plant in Nevada.

This raises several interesting problems. The source of supply is ground water from the deep navajo sandstone formation. Presumptively, the water is tributary to the Colorado River. The point of diversion may be located so that it will involve water that has been allocated to the upper basin. Thus the water will move not only from state to state, but possibly from the upper basin to the lower Basin as well.

The water will not be piped from Utah for an end use in Nevada. Instead, the water will be used to transport Utah coal in slurry form to a power plant outside Las Vegas, Nevada. How should the water be charged between states and between basins? The answer could become important as each state and basin approaches full development, for it is clear that the citizens of each state are bound by interstate compacts.35

The answer may also create constitutional problems. If the appropriation in Utah is charged against Arizona's allocation, and if Arizona had fully developed its allocated

share, the appropriation could be void, as it would violate the compact allocations. Enforcement of the allocations might thus obstruct the free flow of interstate commerce.

4. The states cannot do by interstate compact, what they cannot do by direct legislation notwithstanding congressional ratification of the same. By consenting to the compact, Congress does not surrender any federal interests. Congress cannot delegate away its supreme authority to regulate navigation and commerce.36

Thus, any compact provision which would place an unreasonable burden upon interstate compact could be unconstitutional, notwithstanding congressional ratification.

D. The Yellowstone River Compact:

1. The Yellowstone Compact37, executed in 1950 by the States of Montana, Wyoming and North Dakota, may well create similar constitutional problems.

Articles X of the compact provides that no water shall be diverted from the Yellowstone River Basin without the unanimous consent of all other signatory states. This provision applies only to rights initiated in the Yellowstone River Basin after 1950.

36Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851)
37Act of June 2, 1949 (P.L. 83, 81st Congress)
2. The apparent purpose of this provision was to retain the benefit of return flow waters in the Yellowstone River Basin, rather than to impede interstate commerce—but as applied, it could do just that.

3. The Northern Great Plains contain a substantial quantity of both water and coal. However, political and legal constraints are curtailing the coal development by creating legal water shortages.

4. Massive coal deposits lie near Gillette, Wyoming, just outside the Yellowstone Basin. Article X of the compact is being asserted to prohibit Wyoming and those who have appropriated water under Wyoming law from using Wyoming's allocated share of the Yellowstone River for coal slurry pipeline development.\footnote{McDaniel, supra, Note 16; Clyde, supra, Note 1}

   This, of course, may not always involve the interstate movement of water, but the effect has been to deny this water for coal slurry pipeline use to transport Wyoming coal and water to Arkansas.

5. Article X of the Yellowstone Compact is currently under attack on this constitutional ground. The plaintiff contends that it creates an unreasonable burden on interstate commerce. The case is \textit{Intake Water Company v. Yellowstone River Compact Commission}, Civil No. 1184, United States District Court for the District of Montana. Motions to Dismiss have been filed by the various defendants on
jurisdictional grounds, and the court has yet to rule on these motions.

V. Appropriation and Reallocation of Water to New and Competing Uses Under the Existing Appropriation's System.

The existing appropriation statutes provide adequate tools to protect the limited unappropriated water for future uses, and to reallocate the water to new and often competing uses. These tools include the ability to deny new applications where they are contrary to the public interest, or would interfere with more beneficial uses of the water. Additionally, states may withdraw their water from appropriation, either through direct legislative withdrawals, or through the statutorily authorized instream appropriations by state agencies. Concepts of beneficial use are being redefined to include social and environmental values which were not traditionally recognized as beneficial uses. States are also administratively allocating their water rights through short term permits, and through the imposition of conditions upon changes of use which may protect not only vested rights, but the public rights as well. The state's ability to implement its new water policy is subject to the assertion of the superior federal rights, which may ultimately remove the remaining undeveloped Western water from state control.

A. General historical evolution of the appropriation doctrine:
1. Historically, water rights were initiated simply by diverting and applying the water to some beneficial use. The concept of priority of rights was established to protect the vested rights of those first on the stream. Those who were subordinate thereto, simply fell in line.

2. The Federal Government was the proprietor of the western lands. Congress by its silence was held to have assented to the general occupation of its land.

3. In 1866, Congress expressly confirmed the acquisition of water rights in accordance with local custom. The courts were bound to protect rights which vested under local law, whether the rights were initiated prior to or after the passage of the act.

4. The nature of the water right acquired was a vested property right, protected by due process. Protection of prior rights was given express judicial sanction as a matter of "natural justice".

40Atkinson v. Peterson, 87 U.S. 507 (1874).
41Act of July 26, 1866, Ch. 262 (14 Stat. 251).
44Atkinson v. Peterson, supra, Note 40.
5. The concept of the state having an interest in the manner in which its water resources were appropriated for private use has been a part of the law from the outset. The states have always had the power to prevent waste, to insure the water would be implied to a beneficial use and to reject applications which were not in the public interest. 45

6. The state permit statutes had little practical impact on the early development of water law. Rights were initiated simply by the diversion and application of water to some beneficial use. There simply was no need to involve the state. Western water law evolved over many years as a matter of practical necessity and compromise. The permit systems came later and simply imposed regulatory controls over the existing custom and usage.

7. Today, most western states have permit systems in place that control the appropriation process. Nearly all of the statutes require the rejection of an application if there is no unappropriated water in the source; if the proposed use would interfere with a prior vested right; if the proposal is not physically or economically feasible; and, if the applicant himself lacks the economic capability of completing the proposed work. Many states also provide for the rejection if the application will

45Comp. Laws of the State of Deseret (Utah) 1851 Ch. 1, §38; Comp. Laws of Wyoming 1876 Ch. 65, §4; Colorado Revised Statutes 1867 Ch. XLV; and, Laws of Montana 1885 p. 131
interfere with a more beneficial use of the water, or would be contrary to the public interest. Moses Lasky prophetically noted in 1929 that:

"We have left behind a system of individual property rights in water and are fast approaching a system of economic distribution of (perhaps state-owned) water by a state administrative machinery under state-granted conditional privileges of water."

8. We have now moved even further, and the permit process is now being successfully used to distribute water to non-revenue producing beneficial uses. The permit system is inherently flexible and provides the states with continuing opportunities to mold new water policies as social values change, and to prevent or limit uses which it determines to be not in the public interest.

B. Denial of Applications not in the Public Interest:

1. Historically, environmental values were not equated with the public interest. The courts and

46 Legislation of this type can be found in the statutes of Arizona (Arizona Revised Statutes §45-143); Kansas Statutes Annotated 82(a) 711 and 712; Nebraska Revised Statutes §46-235; Nevada Revised Statutes §533.370; New Mexico Statutes Annotated §75-5-6; North Dakota Century Code §61-04-07; South Dakota Comp. Laws §46-5-18; Utah Code Annotated §73-3-8; Washington Revised Code §90.03.290; Wyoming Statutes Annotated §41-203
47 Rocky Mountain Law Review, 161, and continued into Rocky Mountain Law Review 35
48 Sax, Water Law Planning and Policy, p. 222
administrative agencies focused merely on economic concerns in approving and rejecting applications under public interest statutes.49

2. Perhaps the landmark decision was by the Utah Supreme Court in 1943, in Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943). There, the Utah Supreme Court approved a junior multipurpose application over a senior single purpose application in the same stream. Although the court did not clearly state that the public interest consideration should be the dominant consideration, it did hold that where the large multipurpose project was beyond the blue print stage and ready for construction, it should be given a preference over a private competing power project.

3. Another early case affirming the State Engineer's rejection of an application to build a dam because of public interest is Big Horn Power Company v. State.50

The reservoir would have interfered with the only economically feasible railroad route connecting the Northwest portion of Wyoming to the rest of the state.

49Clyde, Water Acquisition for Mineral Development Institute Paper 2, p. 10 (Rocky Mountain Mineral Law Foundation 1978)  
5023 Wyo. 271, 148 P. 1110 (1915).
In *Young and Norton v. Hinderlider*\(^{51}\), the Supreme Court of New Mexico applied a public interest statute in a case involving competing irrigation projects. The court approved the project which would provide the most economic benefit in relation to its cost.

In *East Bay Municipal Utility District v. Department of Public Works*\(^{52}\), an application for power was conditionally approved. The condition was that the permit could be revoked if the water was later needed for domestic or irrigation use.

The California court again disregarded priority in the time of filing in *Johnson Rancho County Water District v. State Water Rights Board*\(^{53}\), and indicated that the Water Board should give consideration to the benefits and economic feasibility of competing projects.

4. Without question, we have reached a point where almost no one is willing to give the production of wealth a monopoly on social purpose. There are values in water other than economic values and there is a need in the state allocation process to protect these other

\(^{51}\) 15 N.M. 666, 110 P. 1045 (1910)
\(^{52}\) 21 Cal.2d 476, 35 P.2d 1027 (1934)
\(^{53}\) 45 Cal Rept. 589, 235 Cal. App. 2d 863 (1965)
values.54

5. States now recognize social and environmental values in approving new appropriations. In 1976, the Utah Legislature amended §73-3-8, thereby granting the State Engineer authority to deny applications which will unreasonably affect public recreation, or the natural stream environment, or those applications which are detrimental to the public welfare.55

6. Most surface streams in Utah are essentially fully appropriated. These prior vested rights must also be protected. Consequently, instream appropriations to protect public recreation, fish propagation and natural stream environments may not be possible in a state such as Utah.56

C. Withdrawal of water from further appropriation and instream appropriations.

1. Water is being withdrawn from further private appropriations, either by legislative withdrawals of the water, or, by instream appropriations by state agencies pursuant to statute. At least one of the purposes of these

54 Clyde, supra, Note 49
55 See also Washington Revised Code; 75.20.050 (1976) and Tarlock, Water Acquisition for Mineral Development Institute Paper 6, p. 17 (Rocky Mountain Mineral Law Foundation 1978)
56 Tarlock, supra, Note 55
withdrawals is to preserve the water until existing uses and future public needs can be ascertained and analyzed; at which time the water can be released and become available for appropriation.

1. Water is being withdrawn from private appropriation at both the Federal and State level. The Federal Government has done so under Wild and Scenic Rivers Act.57

2. The Federal Courts have also denied licenses where the proposed project would have adverse environment effects.58

3. The States of California and Oregon have enacted their own version of the Wild and Scenic Rivers Act and thereunder have withdrawn portions of several state and interstate streams.59 These acts to provide for limited withdrawals for such uses as domestic, municipal and stockwatering purposes. Withdrawals of water must be subject to periodic review, otherwise, they may become politically motivated and used to defeat energy development by withdrawing water from appropriation in those areas where energy development is likely to occur.

4. Some state constitutions provide that the right to appropriate the unappropriated water of the state

59 Oregon Revised Statute Ch. 538 and §309.805 (1975); California Public Resource Code §3093.50-65. See also §73-6-1 U.C.A. 1953.
shall never be denied. Idaho, by statute, authorized the State Parks Board to appropriate and hold in trust the unappropriated water in the Malad Canyon area. The appropriation contemplated leaving the water in its natural channel. It was argued that this appropriation effectively withdrew this water from appropriation in violation of the Idaho Constitution. The Idaho Supreme Court in a three-to-two decision upheld the statute and the appropriation. The legislature has thus expressly permitted a state agency to file for an instream use of the water for the purpose of preserving its scenic beauty and recreational value for the public.

5. The Idaho Supreme Court has also held that where a natural stream, navigable under state law, runs through private land, the land is subject to a servitude in the nature of a public easement. The easement includes the right of the public to utilize the navigable stream, up to the high water mark, as a public highway and for all other uses for which the stream is suited, including but not limited to boating, swimming, hunting and fishing.

6. The doctrine was further applied in Ritter

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60 Article XVI, §6, Colorado Constitution; and Article XV, §3, Idaho Constitution.
61 State Department of Parks v. Idaho Department of Water Administration, 530 P.2d 924 (1974); see also Idaho Constitution §67-4307; §89-890 R.C. Mt; and, Colo. R.S. §37-92-102(3); see also Day v. Armstrong, 362 P.2d 137 (1961).
v. Standa1.63 There the Court held that a private appropriator could not block the public easement in a stream navigable under state law, and ordered the removal of a fish hatchery operation which spanned an estuary of the Snake River thereby blocking the public's access to the estuary and the riparian lands.

7. There are problems in authorizing single purpose agencies such as a fish and game department to appropriate it for instream uses. Single purpose agencies do not necessarily reflect the broad public interest and may appropriate all of the unappropriated water in a stream thereby prohibiting all other future appropriations and uses. This is especially troublesome in states where the appropriator need only show that he is first in time, that there is unappropriated water in the source and that there is no public interest limitations on the right to appropriate. Thus the State Engineer must retain the discretion to reduce, restrict or even reject an applications for instream appropriations under statutory guidelines if the application is not in the broader public interest. Rights may vest in instream appropriations thereby giving state agencies standing to challenge changes of use in the stream that may

63566 P.2d 769 (Id. 1977)
impair public recreation and the natural stream environment. 64

8. Preferably, the withdrawal of unappropriated water should be left to legislative determination which is more representative of the people's will. Unlike instream appropriations, property rights would not vest in water withdrawn by the legislature. The water would simply be held in the public trust. A future change in state water policies and goals could restore in whole or in part the water which had been previously withdrawn from appropriation without impairing vested instream rights.

D. Redefinition of Beneficial Use to Reflect Changing Social and Environmental Values:

1. Changing social values now recognize that there are values in water other than the production of wealth. The need exists in the state allocation process to protect these values. These values, however, cannot be protected by express bans on the use of water, nor by defining certain uses as non-beneficial uses under the law. 65 However, substantial protection may be afforded to these values through the expanded concepts of beneficial use.

65 Trelease, supra, Note 4
2. Water can be appropriated only for beneficial use. This test has been easily met where the water has been used to fulfill a desired or need of mankind, or to produce wealth.66

3. The traditional beneficial uses have been irrigation, domestic, storage, stockwatering, mining and milling, and the floating of logs for commercial use. Today, uses such as fish propagation, maintenance of minimum stream flows and environment, public recreation, industrial, manufacturing and the transportation of salt in solution have received both judicial and legislative recognition as beneficial uses.67

E. Administrative Allocation of Water through Short Term Permits, and Imposition of Conditions in Approving Changes of Use:

1. The appropriation system has also provided for the administrative allocation of water, through public interest limitations on the right to appropriate, but this
has been a secondary function of the law. The permit system was primarily designed to bring order and efficiency in the appropriation and distribution of water, and to protect vested rights against junior appropriations.68

2. The Utah Legislature in 1976 amended §73-3-8 U.C.A. 1953 to provide for the appropriation of water for a limited time. The permits are limited to appropriations for industrial, power, mining development, and manufacturing purposes.

3. An appropriation under this statute creates a short term vested property right instead of a perpetual one, but while in force, the right is entitled to full legal protection.69

4. Upon cessation of the appropriation period, the water reverts back to the public for reappropriation where it once again becomes subject to the right of the State Engineer to reject applications on public interest grounds, or because the appropriation would impair a more beneficial use. This section then provides for the administrative reallocation of the water through the appropriation process

68U.S. v. District Court, 121 Utah 1, 238 P.2d 1132 (1951)
rather than the market place and changes of use. It helps promote the reuse of water for multiple and perhaps the sequential rather than simultaneous development of resources, in lieu of attempts to initiate new appropriations for these uses. It promotes conservation of water and, may assist the states in preserving the remaining water for instream and other public interest uses. It may also slow the pace of development without unreasonably burdening interstate commerce.

5. There is little unappropriated water in Utah, and consequently the provision was enacted too late to be of much assistance. However, in states having unappropriated waters a provision of this nature might be well employed to reallocate water to new uses to conserve the undeveloped water of the state. However, a right so appropriated would have a 1981 date of priority and in the water short West a 1981 date of priority would be of questionable value to energy developers who cannot tolerate interruptible water supplies.

6. Generally speaking, anyone entitled to the use of water may change his place and nature of use, and his point of diversion under the appropriations system. The right to change is an inherent legal right, but it is not an absolute right. The right is qualified in that the change may be made only so long as no other rights are impaired
thereby.\textsuperscript{70}

7. Under the change of use statutes, an appropriator may reallocate his own water to other beneficial uses any number of times, without the loss of his original date of priority. This is of importance to energy developers who must acquire relatively dependable water supplies. This can only be accomplished through the acquisition of early priority rights and then a change of the nature of use as required.\textsuperscript{71}

8. Vested rights, whether subordinate or senior, are protected against interference caused by a change of use. If interference occurs, the statutes require either monetary compensation or replacement of the lost water. Further, a party is entitled to move only that quantity of water actually consumed. The balance of the water must remain within the system to compensate those who have vested rights in the return flow. In short, an appropriator cannot enlarge his consumptive use by change application.

9. The State Engineer may impose reasonable conditions upon approval of a change application to protect private vested rights, and theoretically, to protect the

\textsuperscript{70}\$73-3 \textsuperscript{ } U.C.A. \textsuperscript{ } 1953; Lehmitz v. Utah Copper Company, 118 F.2d 518 (1941); U.S. v. Caldwell, 64 Utah 490, 231 P. 434; East Bench Irrigation Company v. Deseret Irrigation Company, 21 Utah 2d 170, 271 P.2d 449.

\textsuperscript{71}\$73-3-3 \textsuperscript{ } U.C.A. \textsuperscript{ } 1953
10. The states might impose conditions upon a change of use that would require the appropriator to utilize more efficient means of transportation and use of water. Examples might be to require the use of sprinkler irrigation systems in lieu of flood irrigation methods, or enclosed pipelines versus open ditches. This would promote the conservation of water and other water policies. Additionally, the state might impose conditions which would help insure the maintenance of minimum stream flows and the protection of public rights in the stream.

F. Revival of Federal-State Conflicts over Water Rights:

1. The majority of water yet to be developed in the arid west will likely be under federal control. The water will be developed under large block appropriations, which will include all of the unappropriated water in a watershed area. The projects will be large multipurpose projects financed primarily with federal funds. The water will be allocated by federal agencies or state sponsoring

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73 Tarlock, supra, Note 55; Dewsnip and Jensen, supra, Note 67
agencies, but in accordance with federal, rather than state law. Thus state appropriation statutes and water policies may play a more diluted role in the future.74

2. The Federal Government has a duel interest in western water. Its first role is that of a sovereign entity, exercising the specific powers granted to the Federal Government by the United States Constitution. The Government is also in the position of a proprietary owner of western lands and the waters arising thereon.

3. The sovereign powers are conferred by constitution, and cannot be delegated away.75 The Federal Government has the supreme authority to make treaties, and to regulate commerce and navigation. Federal enterprises are essentially free from state control.76

4. The Federal Government acquired much of the West by purchase or otherwise, and holds title as a proprietary owner. Under the property clause of the U.S. Constitution, the government can dispose of its property

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75Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851)
Congress, in the act of 1866 released its land to settlement and in the Deseret Land Act of 1877, severed the unappropriated and non-navigable water from the land, so that thereafter, patents conveyed no interest in the appurtenant water rights, leaving the same subject to state control. 78

5. It then appeared that Congress had permitted the states to control the appropriation of non-navigable water. It must be remembered, however, that although Congress can release this proprietary interest in land and water, and allow the States to control the appropriation and use thereof, the relinquishment of the proprietary interest does not also relinquish the sovereign powers of the United States. Congress still has the power to regulate commerce and control navigation. The failure of Congress to exercise that full power will not preclude it from doing so in the future. 79

6. Thus the creation of federal water projects and the assertion of federal reserved rights may remove the

77 Art. IV, §3, Cl. (2 U.S. Constitution; Alabama v. Texas, 347 U.S. 272 (1954)


remaining unappropriated water in the West from state control. Certainly further attempts by the states to withhold their limited water from energy development projects will invite further federal intervention into the state water allocation business. In fact, under the Reagan administration this is not just an idle threat, but a very real possibility.

V. Conclusion.

Professor Frank Trelease has said:

"In all of the western states a water right is a property right, defensible and protected, firm enough to give security to investments and enterprises, flexible enough to allow changes to new and more productive uses, subject to governmental controls that insure beneficial use and protect other public interests including the environment. That is what water law is all about." 80

The states cannot deny their water resources to energy developers for interstate use, nor should they endeavor to do so. They can, however, through utilizing the exiting appropriation laws effectively implement state water policy and protect emerging social and enviromental values by maintaining minimum stream flows denying applications which are not in the public interest, and by withdrawing water from appropriations. So long as these efforts are not solely protectionist and promote some legitimate state goals, they will not be held to unreasonably burden interstate commerce.

80 Trelease, supra, Note 4.
The majority of the unappropriated Western water will likely be developed in federally funded projects and subject to federal allocations and controls. Congress can, as it has in the reclamation statutes, require the federal agencies to conform to state water laws. However, Congress need not do this. Continued state efforts to deny water for energy development will, in my opinion, result in federal intervention with a resulting loss of some control by the states over the allocation and use of their limited water resources.