



LAWS OF THE TWELVE WESTERN STATES
PERTAINING TO
INTERSTATE AND/OR INTERBASIN WATER
TRANSFERS
AN UPDATE

September 10, 1982



STATEMENT
Before the
WATER RESOURCES SUBCOMMITTEE
of the
SENATE ENVIRONMENT & PUBLIC WORKS COMMITTEE
by D. Craig Bell
Executive Director
WESTERN STATES WATER COUNCIL

I am pleased to appear before the Subcommittee to discuss the possible ramifications of the Supreme Court's decision in Sporhase v. Nebraska. The Western States Water Council consists of representatives appointed by the governors of twelve western states. As such, the Council is vitally interested in questions of federal and state jurisdiction over allocation of water resources. Since the Council has not had an opportunity to formally react to the Sporhase decision, I can only share with you at this time some information which I hope will be valuable and some personal views.

As you know, the western states have comprehensive systems to effectuate allocation of precious water resources. The purpose of these systems is to make sure that water is put to the highest beneficial use for the benefit of the citizens of each respective state. Congress has traditionally and repeatedly deferred to the states' authority to allocate water resources. The Supreme Court, in the landmark case of United States v. California, noted thirty-seven statutes in which Congress has expressly deferred to such state authority.

This deference is based on a recognition that decisions regarding water allocation profoundly affect the destiny of a state's industries, farms and communities, as well as its environment. Such decisions are best left to those most affected.

In order to protect their water resources, virtually all western states have legislation dealing with export of water outside the state. Some of these statutes include prohibitions or restrictions of varying kinds and degrees with the purpose of preserving the water resources of the state for the health and prosperity of its citizens. The Supreme Court in Hudson County Water Company v. McCarter upheld such a state statute prohibiting transport of water of any state stream into another state for use therein. The Court stated that "the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessity is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape the lawyer's view. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

The recent Supreme Court decision in Sporhase runs counter to its earlier decision in Hudson County. The Court declared unconstitutional the provision in the Nebraska statute requiring that the state in which Nebraska ground water is to be used grant reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska. The Supreme Court found that ground water was an article of commerce and that the Nebraska legislation was discriminatory against interstate commerce and subject to the "strictest scrutiny." Under that test, the Court found the reciprocity requirement invalid. At the same time, the Court remanded to the lower court to determine whether other provisions of the export stat

could be upheld. In so doing, the Court noted that "a demonstrably arid state conceivably might be able to marshal evidence to establish a close means - end relationship between even a total ban on exportation of water and the purpose to conserve and preserve water."

Reciprocity requirements are not uncommon in the statutes of western states. In preparation for this hearing, we have compiled a brief summary of such export statutes, copies of which are provided as an appendix to my statement. You will note, for example, that Idaho prohibits issuance of permits to appropriate water within Idaho for diversion into another state unless the sister state has reciprocal legislation. California allows an appropriation of water within that state for use in another state provided the sister state reciprocates. Washington also requires reciprocity in legislation as a condition to issuance of permits for putting Washington waters to beneficial use in some other state or nation. Thus, the implications of the Sporhase decisions reach far beyond the State of Nebraska. Any such reciprocity provisions would appear to be in jeopardy, although the Court made it clear that the constitutional propriety of export statutes would be considered on a case by case basis, to be decided as the facts of each case warrant.

I would assume that each of the western states will be examining other provisions of their statutes in light of the Supreme Court's decision. The Sporhase case appears to indicate that such provisions must relate directly to conservation and preservation of water resources. Moreover, provisions which discriminate against uses outside of the state will be reviewed with

the closest scrutiny. Of particular interest will be the Court's ruling that ground water is an article of commerce and therefore subject to the Commerce Clause.

The Western States Water Council will be assisting states in this review and analysis. For this purpose, the Legal Committee of the Council will be meeting in mid-October to initiate a full discussion of the implications of the Sporhase case and consider what actions should be taken as a result.

Among the questions which I anticipate will be addressed are the following: What are the literal implications of the Sporhase case? What other cases may be pending which will further address the issue? What, if any, new basis does Sporhase provide for assertion of federal jurisdiction over water allocation? What additional precautions, if any, should be taken, to assure the validity of provisions in federal law deferring to state authority regarding water allocation? I would be most happy to provide the subcommittee with the results of the Council's efforts in this regard.

That concludes my statement. I would be happy to answer any questions which you may have.

LAWS OF THE TWELVE WESTERN STATES
PERTAINING TO
INTERSTATE AND/OR INTERBASIN WATER TRANSFERS

Prepared by the
Western States Water Council Staff
September 10, 1982

INTRODUCTION

The following is a compilation of western state water laws relating specifically to interstate and/or interbasin water transfers. In most cases merely a copy of the pertinent laws is included. Following the state laws is a memorandum regarding the constitutionality of such laws. It must be noted that no attempt has been made to deal with federal laws which might pertain to major interstate or interbasin transfers or to deal comprehensively with interstate compacts. The editorial notes dealing with interstate compacts are illustrative only.

ARIZONA

§ 45-153. Application for interstate operations

A. An application for appropriation of water shall not be denied because the point of diversion of water described in the application or any portion of the works to be constructed for the purpose of storing, diverting or distributing water, or the place of intended use, or the lands to be irrigated by the water or part of such water, is located in another state. If the point of diversion or any of the works, or the place of intended use, or the lands or part of the lands to be irrigated by such water, are located within the state, the permit shall be issued.

B. The director may, in his discretion, decline to issue a permit if the point of diversion is within the state but the place of beneficial use is in some other state. Amended by Laws 1979, Ch. 139, § 25, eff. April 24, 1979; Laws 1980, 4th S.S., Ch. 1, § 55, eff. June 12, 1980.

For legislative intent regarding termination of provisions added or amended by Laws 1979, Ch. 139, see note following § 45-103.

For impairment of obligations and nonseverability provisions of Laws 1980, 4th S.S., Ch. 1, effective June 12, 1980, see notes preceding § 45-401.

CALIFORNIA

Article 3

APPROPRIATION FROM INTERSTATE STREAMS

Sec.

1230. Appropriation of water for use in another state.
 1231. Stream flowing across state boundary; exception.
 1232. Interstate lakes.

§ 1230. Appropriation of water for use in another state

Upon any stream flowing across the State boundary, an appropriation of water in this State for beneficial use in another State may be made only when, under the laws of the latter, water may be lawfully diverted therein for beneficial use in this State.

(Stats.1943, c. 368, p. 1615, § 1230.)

Derivation: Stats.1913, c. 586, p. 1012, § 15a, added Stats.1917, c. 195, p. 284, § 1.

Law Review Commentaries

Ownership of waters in the Hetch Hetchy basin and water shed. (1941) 16 S.Bar J. 380.

Library References

Waters and Water Courses ⇐130.

C.J.S. Waters § 170.

§ 1231. Stream flowing across state boundary; exception

Upon any stream flowing across the state boundary a right of appropriation having the point of diversion and the place of use in another state and recognized by the laws of that state shall have the same force and effect as if the point of diversion and the place of use were in this State if the laws of that state give like force and effect to similar rights acquired in this State; provided, that this section shall not apply to the Walker River and its tributaries or claimed rights of appropriation therefrom in the State of Nevada, whether heretofore or hereafter initiated.

(Stats.1943, c. 368, p. 1615, § 1231. Amended by Stats.1961, c. 349, p. 1389, § 1, eff. May 13, 1961.)

Historical Note

The proviso was added in 1961.

Derivation: Stats.1913, c. 586, p. 1012, § 15a, added Stats.1917, c. 105, p. 284, § 1.

Cross References

Change in point of diversion, use and purpose, see § 1700 et seq.

§ 1232. Interstate lakes

Nothing in this article applies to interstate lakes, or streams flowing in or out of such lakes.

(Stats.1943, c. 368, p. 1615, § 1232.)

Derivation: Stats.1912, c. 586, p. 1012, § 15a, added Stats.1917, c. 195, p. 284, § 1.

Code Commission Notes

Strictly speaking this provision in the present law would exempt streams flowing into Lake Tahoe from the entire Water Commission Act. We assume that it was intended only to except such streams and the lake from the section, or from the act which added the section. Section 15a was added by Stats.1917, c. 195, p. 284 which affected no other part of the Water Commission Act.

Library References

Waters and Water Courses §130.

C.J.S. Waters § 170.

§ 10505. Restrictions on release or assignment

No priority under this part shall be released nor assignment made of any application that will, in the judgment of the board, deprive the county in which the water covered by the application originates of any such water necessary for the development of the county.

(Added by Stats.1943, c. 370, p. 1896. Amended by Stats.1957, c. 1932, p. 3405, § 257; Stats.1959, c. 2101, p. 4872, § 4; Stats.1965, c. 989, p. 2618, § 5.)

Derivation: See Derivation under § 10500.

Law Review Commentaries

Conflicts between federal and state laws. (1965) 1 C.W.L.R. 142

Legal aspects of interregional water diversion. Gary D. Weatherford (1965) 15 U.C.L.A.Law Rev. 1299.

Pacific Southwest water plan. Report of Assembly Interim Committee on Water, 1963-65, vol. 26, No. 8. Supp. Appendix to Journal of the Assembly, Reg.Sess., 1965.

Pacific Southwest water plan. Report of Assembly Interim Committee on Water, 1963-65, vol. 26, No. 13. Vol. 2 Appendix to Journal of the Assembly, Reg.Sess., 1965.

The "county of origin" and "watershed protection" statutes. (1960) 12 Stan.L.R. 450.

Unintended physical damage: loss of advantageous conditions. Arvo Van Alstyne (1969) 20 Hast.L.J. 469.

Notes of Decisions

In general 2
Validity 1

1. Validity

Assignments by California department of finance to federal government of its applications to appropriate surplus water could not pass the right, title and interest in and to the water, since §§ 10500, 10504 and this section, under which department of finance filings were made created no

such property right in state and gave no right to appropriate water prior to a permit. Rank v. Krug (D.C.1956) 142 F. Supp. 1, affirmed in part, reversed in part on other grounds 293 F.2d 340, rehearing 307 F.2d 96, affirmed in part 83 S.Ct. 996, 372 U.S. 627, 10 L.Ed.2d 28, affirmed in part, reversed in part on other grounds 83 S.Ct. 999, 372 U.S. 609, 10 L.Ed.2d 15.

California watershed of origin and county of origin statutes are a part of the substantive law of California and are

binding on the United States and its officials. *Id.*

This section when properly construed so as to permit interim use by others of such water until needed by county of origin, does not violate provisions of Const. art. 14, § 3, that riparian rights attach only to so much flow as may be required or used consistently for purposes for which such lands are, or may be adaptable, and that right to use of water from natural stream shall be limited to such water as shall be reasonably required for beneficial use to be served. 25 Ops. Atty. Gen. 3.

2. In general

United States was not indispensable party in suit by certain owners of water rights to enjoin bureau of reclamation officials from impounding water at dam on river in contravention of rights of owners to beneficial use of waters below dam, where water rights had not been acquired by United States through exercise of power of eminent domain. *State of Cal. v. Rank* (C.A. 1961) 293 F.2d 340, rehearing 307 F.2d 98, affirmed in part 83 S.Ct. 996, 372 U.S. 627, 10 L.Ed.2d 28, affirmed in part, reversed in part on other grounds 83 S.Ct. 999, 372 U.S. 609, 10 L.Ed.2d 15.

The department of water resources may release from priority or assign a portion of applications for appropriations of water from the Mokelumne River to persons for use in other than the counties of origin on the making of certain determinations under the standards and the conditions set forth in the Water Code, particularly this section and § 10504. 28 Ops. Atty. Gen. 307.

Under this section department has no duty to determine amount of water necessary for development of county of origin and may properly make assignment conditioned by general reservation of all water originating in any county which is necessary for development of that county, and such assignment would not constitute any delegation of any mandatory statutory duty of department. 25 Ops. Atty. Gen. 32.

Under this section, the word "originates" means "falls in the form of precipitation" and the word "necessary" refers to entire county, regardless of whether

place of need is in different watershed from place where water originates. 25 Ops. Atty. Gen. 8.

This section and § 11460 require that when water which has been put to use in operation of projects in areas outside county of origin becomes necessary for beneficial uses of county or area of origin, such water shall be withdrawn from outside areas and made available to county or area of origin. *Id.*

The "county of origin" provision of this section applies only to applications for water filed under § 10500 and unless the water to be appropriated is obtained by virtue of such application, the provisions of this section and § 10500 are inapplicable to contracts between the state and water users for water exported from the area in which it originated. *Op. Leg. Counsel, 1959 A.J. 785.*

The "county of origin" provision of this section does not necessarily become a part of a contract to deliver water but may limit the water right on which the contract was based and, to the same extent, limit the water available to be disposed of by contract. *Id.*

If in the judgment of the department of water resources, an assignment or release from priority of an appropriation would not deprive a county in which the water originates of the water necessary for development of the county, and the department makes an unconditional assignment or release of the appropriation for uses in other areas, such contracts of assignment or release would not be subject to "county of origin" provision of this section. *Id.*

To the extent that water covered by applications now held by the department of water resources is used in connection with any facilities authorized as part of the Central Valley project or facilities which are constructed as part of the state water resources development system, county of origin provision of this section, precluding any release or assignments of water which in the judgment of the department of resources, would deprive the county in which the appropriated water originates of any water necessary for the development of the county, applies. *Op. Leg. Counsel, 1959 S.J. 2943.*

§ 10505.5 Territorial restrictions on use

Every application heretofore or hereafter made and filed pursuant to Section 10500, and held by the State Water Resources Control Board, shall be amended to provide, and any permit hereafter issued pursuant to such an application, and any license issued pursuant to such a permit, shall provide, that the application, permit, or license shall not authorize the use of any water outside of the county of origin which is necessary for the development of the county.

(Added by Stats. 1969, c. 1359, p. 2747, § 3.)

§ 11460. Prior right to watershed water; compliance with water quality standards

(a) In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.

(b) The project shall be operated in compliance with water quality standards set forth as conditions in permits or licenses as provided for in Part 2 (commencing with Section 1200) of Division 2 and in water quality control plans as provided for in Section 13170 or as established by contract, including rectifying failure of the United States to operate the federal Central Valley Project in accordance with such standards; provided that actions of the State Water Resources Control Board in establishing water quality standards and conditions in permits and licenses shall be a combined action meeting all the applicable requirements of Part 2 (commencing with Section 1200) of Division 2.

(c) The department, the Attorney General, and other state agencies shall take all necessary actions, including initiating or participating in judicial, administrative, and legislative proceedings, to assure that the federal Central Valley Project is operated in compliance with standards established by the State Water Resources Control Board as specified in subparagraph (A) of paragraph (1) of subdivision (a) of Section 11458.

(Amended by Stats.1980, c. 632, p. —, § 8.)

Delivery of substitute water supply, Sacramento-San Joaquin Delta, see § 12202.

1980 Amendment. Lettered the first paragraph as subd. (a); and added subds. (b) and (c).

Law Review Commentaries
Reborn federalism in Western Water Law: New Melones dam decision. Rodrick Walston (1979) 30 *Hast.L.J.* 1645.

2. Construction and application
California law did not bar Secretary of Interior from operating Trinity River Divi-

sion of Central Valley Project in response to 1976-1977 California drought so as to divert water said to be necessary to preserve Trinity River fishery, either on ground that United States never acquired right to appropriate such water under instruments governing acquisition or by virtue of provisions of Watershed Protection Act. *Trinity County v. Andrus* (D.C.1977) 438 F.Supp. 1368, motion denied 77 F.R.D. 29.

§ 11461. Purchase of watershed water rights

In no other way than by purchase or otherwise as provided in this part shall water rights of a watershed, area, or the inhabitants be impaired or curtailed by the department, but the provisions of this article shall be strictly limited to the acts and proceedings of the department, as such, and shall not apply to any persons or state agencies.

(Added by Stats.1943, c. 370, p. 1896. Amended by Stats.1957, c. 32, p. 3410, § 297.)

Historical Note

The 1957 amendment substituted "department" for "authority".

Derivation: Stats.1933, c. 1042, p. 2650, § 11.

Cross References

Beneficial use of water, see § 100.
 Constitutional provision relating to conservation of water resources and riparian rights,
 see Const. art. 14, § 3.
 Riparian rights, see § 101.
 State agencies defined, see § 11102.

Law Review Commentaries

Unintended physical damage: loss of advantageous conditions. Arvo Van Alstyne
 (1969) 20 *Hast.L.J.* 469.

Library References

Waters and Water Courses ¶190. C.J.S. Waters § 228.

Notes of Decisions

In general 1
 Federal legislation 2

2. Federal legislation

1. In general

Whether § 12931 gives a priority under the "watershed protection" provisions of this section and §§ 11460, 11462, 11463 to the entire San Joaquin Valley and Tulare Basin depends upon whether the area is "immediately adjacent" to the watershed of the Sacramento River, and whether the area "can conveniently be supplied with water" from the watershed of the Sacramento River. *Op.Leg.Counsel*, 1959 A.J. 5265.

Section 12931, providing that any facilities authorized as part of the Central Valley project or facilities acquired or constructed as part of the state water resources development system shall be acquired and operated pursuant to code governing the Central Valley project, applies to this section and §§ 11460, 11462, 11463, relating to the government of the Central Valley project and is incorporated therein by reference. *Op.Leg.Counsel*, 1959 S.J. 2942.

Congress, in making appropriations for construction of dam on river which was navigable in part, regardless of whether dam was for improvement of navigation or flood control, did not intend that riparian owners whose lands were located on river below dam should have no water rights and did not authorize the taking of any water rights without just compensation. *Rank v. Krug* (D.C.1950) 90 F. Supp. 772.

Congress, in making appropriations for construction of dam on river which was navigable in part, would not be presumed to have intended to take away water rights of riparian owners whose lands were located on river below proposed dam without just compensation or without due process of law. *Id.*

Neither the acts of Congress nor reports to Congress, by language or inference, indicate an intention to take plain-tiffs' water rights without compensation, or to take them at all. *Id.*

§ 11462. Creation of new property rights

The provisions of this article shall not be so construed as to create any new property rights other than against the department as provided in this part or to require the department to furnish to any person without adequate compensation therefor any water made available by the construction of any works by the department.

(Added by Stats.1943, c. 370, p. 1896. Amended by Stats.1957, c. 1932, p. 3410, § 298.)

Historical Note

The 1957 amendment substituted "department" for "authority".

Derivation: Stats.1933, c. 1042, p. 2650, § 11.

Cross References

Collection of rates, see §§ 11451, 11453.

Notes of Decisions

1. In general

Whether § 12931 gives a priority under the "watershed protection" provisions of this section and §§ 11460, 11461, 11463 to the entire San Joaquin Valley and Tulare Basin depends upon whether the area is "immediately adjacent" to the watershed of the Sacramento River, and whether the area "can conveniently be supplied with water" from the watershed of the Sacramento River. Op.Leg.Counsel, 1959 A.J. 3263.

Section 12931, providing that any facilities authorized as part of the Central Valley project or facilities acquired or constructed as part of the state water resources development system shall be acquired and operated pursuant to code governing the Central Valley project, applies to this section and §§ 11460, 11461, 11463, relating to the government of the Central Valley project and is incorporated therein by reference. Op.Leg.Counsel, 1959 S.J. 2943.

§ 11463. Exchange of watershed water

In the construction and operation by the department of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the department unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange.

(Added by Stats.1943, c. 370, p. 1896. Amended by Stats.1957, c. 1932, p. 3411, § 299.)

Historical Note

The 1957 amendment substituted "department" for "authority".

Derivation: Stats.1932, c. 1042, p. 2650, § 11.

Cross References

Applicability to federal government, see § 11128.

Notes of Decisions

Diversion in general 3
Federal authority 2
Validity 1

1. Validity

This section, properly construed, so as to permit interim use by others of water reserved, does not violate provisions of Const. art. 14, § 3, that right to water from natural stream is limited to such as reasonably required for beneficial use to be served, and that riparian rights may not attach to any more of flow of natural streams than may be required for purposes for which riparian lands are or may be made adaptable. 25 Ops.Atty.Gen. 8.

2. Federal authority

Section 11460 and this section are applicable to United States in its operation of Central Valley Project in so far as law of California is concerned, but compliance by United States therewith is dependent upon the fact that United States has affirmatively elected so to comply. 25 Ops.Atty.Gen. 8.

3. Diversion in general

Where riparian rights of landowners along branch channel of San Joaquin River were subordinate to water rights of corporation which, with its subsidiary and affiliated companies, owned rights to use very substantial portion of flow of San Joaquin River, and United States, which,

in carrying out Central Valley Project for irrigation purposes, formulated plan whereby waters of San Joaquin River were diverted and waters of Sacramento River were substituted therefor, entered into contract with corporation and its subsidiaries for such substitution, and United States faithfully and fully delivered substitute waters, and landowners suffered no actual damage because of substitution, any impairment of landowners' rights because of substitution was at most a technicality, for which landowners could not recover from United States, since United States could not with impunity take away substitute waters. *Wolfsen v. U. S.* (Ct.Cl.1953) 162 F.Supp. 403, certiorari denied 79 S.Ct. 233, 358, 907, 3 L. Ed.2d 228.

The California county and watershed of origin statutes extend by statute the protection preserved by 1928 amendment of Const. art. 14, § 3 to riparian and overlying owners against diversion of water outside county or watershed before needs of riparian and overlying owners are met, to all inhabitants and property owners of county or watershed in which water origi-

nates, and they restore that protection indirectly received by all such property owners prior to 1928, when riparian and overlying owners could object to any upstream diversion of water, even though not presently needed by them. *Rank v. Krug* (D.C.1956) 142 F.Supp. 1, affirmed in part, reversed in part on other grounds 293 F.2d 340, rehearing 307 F.2d 96, affirmed in part 83 S.Ct. 996, 372 U.S. 627, 10 L.Ed.2d 28, affirmed in part, reversed in part on other grounds 83 S.Ct. 999, 372 U.S. 609, 10 L.Ed.2d 15.

Under California Watershed and County of Origin statutes, irrigation district located downstream from government reclamation dam was entitled to have its needs for reasonable beneficial use supplied before any water was made available for diversion to other irrigation districts outside of the watershed or county of origin, but amount which government was obligated to supply, at non-discriminatory charge, was limited by the reasonable beneficial needs of the district, to the extent those needs were not met at any given point in time by existing water supplies. *Id.*

§ 11128. Limitations

The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part.

(Added by Stats.1951, c. 1325, p. 3216, § 1.)

Cross References

Aid from other state agencies, see § 11135 et seq.
 Contracts concerning project, see § 11625 et seq.
 Description of project, see § 11200 et seq.

Note

The other enactment pertaining to interstate, interbasin transfers of water is the California-Nevada Compact. This Compact, which has been adopted by California and Nevada, but not ratified by the Congress, is designed to provide for the equitable apportionment of water between the two states. Article X of the Compact, entitled "Interbasin Transfers of Use" provides, in relevant part, that either state "may use directly, by exchange, or otherwise its allocated water of the Truckee River in Lake Tahoe Basin or the Carson River Basin, or its allocated water of the Carson River in the Lake Tahoe Basin or the Truckee River Basin". In effect, the two states are permitted to make transfers of water between basins which are expressly covered by the Compact. A copy of Article X of the Compact is attached.

Article X. Interbasin Transfers of Use

Either state may use directly, by exchange, or otherwise its allocated waters of the Truckee River in the Lake Tahoe Basin or the Carson River Basin, or its allocated waters of the Carson River in the Lake Tahoe Basin or the Truckee River Basin. The commission shall have authority to take such actions as it deems appropriate so that the allocations of water made by this compact to either state shall not be adversely affected by such use in the other state.

Nothing herein shall preclude the use of Lake Tahoe as a physical facility to accomplish the use of Truckee River waters in the Carson River watershed or Carson River waters in the Truckee River watershed, but in no event shall the use of Lake Tahoe as such a physical facility be inconsistent with any provision of Article V of the compact.

COLORADO

37-81-101. Unlawful to divert water for application outside of state.

(1) The general assembly hereby finds and declares that the location and availability of water in this state varies greatly from place to place and that such variation precludes the reasonable application of general law to situations and regions of such diversity. Accordingly, the general assembly hereby determines that, for the purpose of aiding and preserving unto the state of Colorado and all its citizens the use of all the waters of the springs, lakes, ponds, creeks, rivers, streams, and watercourses of this state, which waters do not increase with the growth of population and which are necessary for the health and prosperity of all the citizens of the state of Colorado, and for the growth, maintenance, and general welfare of the state, it is unlawful for any person, corporation, or association to divert, carry, or transport by ditches, canals, pipes, conduits, natural streams, or watercourses the waters of any spring, reservoir, lake, pond, creek, river, stream, or watercourse of this state into any other state for use therein. Where the same owner of agricultural land in Colorado owns agricultural land in the adjacent state that is contiguous with the agricultural land in Colorado, specific authorization of the General Assembly, on the advice of the state engineer, is required to enable the water to be used in the adjacent state for agricultural purposes only. In deciding whether or not to authorize the diversion of water from Colorado into another state, the general assembly shall consider the willingness of said state to allow diversions of its water for use in Colorado.

(2) This section shall not apply to section 37-81-103.

Source: Amended, L. 79, p. 1364, § 1.

Law reviews.

For article, "Intergovernmental Relations and Energy Taxation", see 58 Den. L.J. 141 (1980).

37-81-102. Officials charged with enforcement. It is the duty of the state engineer, the division engineers, and the water commissioners of this state to see that the waters of the state are preserved for the use and benefit of the citizens and inhabitants of the state for its growth, prosperity, and general welfare, and it is the further duty of said officials to prevent the waters thereof from being diverted, carried, conveyed, or transported by ditches, canals, pipes, conduits, natural streams, or watercourses into other states for use therein unless there is specific authorization of the general assembly, as provided in section 37-81-101. Upon its being brought to the knowledge of the state engineer of Colorado that any person, corporation, or association is carrying or transporting any of such waters into any other state for use therein, or is intending so to do, it is his duty to immediately call the matter to the attention of the attorney general, in behalf of and in the name of the state, who shall apply to any district court or to the supreme court of the state of Colorado for such restraining orders or injunctions, both preliminary and final, as may be necessary to enforce the provisions of this section and section 37-81-101, and jurisdiction is conferred upon said courts for such purposes.

Source: Amended, L. 79, p. 1365, § 2.

37-81-103. Effect of apportionment credits upon diversions of water from state. (1) In addition to the proscriptions imposed by any other laws which prohibit the diversion or transportation of water for application outside the state of Colorado, or in the event of the invalidity or inapplicability of any such other law, no water occurring in any aquifer or being a part of or hydraulically connected to any interstate stream system may be diverted or appropriated in Colorado for a use which contemplates or involves the transportation of such water into or through another state or states through which such interstate stream system flows, for use of such diverted water in such other state or states, whether as a vehicle or medium for the transportation of another substance, or for any other use, unless the amount of water so diverted or appropriated and transported through or into such other state or states is credited as a delivery to such other state or states by Colorado, of water to which such other state or states may be or claim to be entitled from such interstate source under an existing interstate compact or otherwise. Water mixed with other substances in the process of forming a slurry for the purpose of transporting any substance as a suspended solid shall not be deemed to have lost its character as water.

(2) The burden shall be upon the claimant or other person seeking to divert or appropriate water or seeking a water right based upon a claimed diversion or appropriation coming within the provisions of subsection (1) of this section to prove that a means exists and is accepted by each state, including Colorado, through which said stream system and said diverted water flows or will flow by which the credit required in this section will be entered and recognized by each such state.

(3) Where the equitable apportionment of the waters of such interstate stream system has been established by an interstate compact which is administered by a commission or other authority, any such means of credit must be expressly recognized and approved by such commission or other authority.

(4) In the event proceedings to apportion interstate waters are initiated, and if decrees to export water from the subject interstate waters in Colorado to a state through or into which the subject waters flow have been granted pursuant to subsection (1) of this section, the representatives of the state of Colorado in such proceedings shall require that credit be given to Colorado for those waters exported to such other state.

(5) This section shall not be applicable to water contained in agricultural crops, animal and dairy products, beverages, processed or manufactured products, or to products transported in cans, bottles, packages, kegs, or barrels.

Source: Added, L. 77, p. 1694, § 1.

IDAHO

CHAPTER 4

APPROPRIATIONS FOR USE OUTSIDE STATE

SECTION.

- 42-401. Appropriation for use in Oregon.
 42-402. Application and permit.
 42-403. Proof of completion of works.
 42-404. License.
 42-405. Idaho laws controlling.
 42-406. Rules and regulations.
 42-407. Appeal from department's decision.
 42-408. Appropriation subject to reciprocal legislation — Certain waters excluded.

SECTION.

- 42-409. Appropriation for use in Wyoming.
 42-410. Appropriation of water for use in Nevada.
 42-411. Appropriation of water for use in Washington.

42-401. Appropriation for use in Oregon. — Whenever it shall be desired to appropriate the public waters of the state of Idaho for use in the state of Oregon, the department of water resources shall grant a permit upon proper application therefor, provided the department be satisfied that the interests of the state of Idaho will not be materially injured by such use of its public waters in the state of Oregon, and provided that the department may as a condition to the granting of any such permit require that the intending appropriator shall file with his application for permit a certificate from the proper officer or official of the state into which the water is to be diverted, showing to the satisfaction of the department of water resources that the intended appropriation would be beneficial, and that the project for which the intended appropriation is required is feasible. [1915, ch. 111, § 1, p. 254; reen. C. L., § 3265n; C. S., § 5595; I. C. A., § 41-401; am. 1951, ch. 80, § 1, p. 149.]

Compiler's notes. Section 2 of S.L. 1951, ch. 80, is compiled herein as § 42-403.

The names of the department of water administration and the director of the department of water administration (formerly the department of reclamation and the state reclamation engineer) have been changed to the department of water resources and the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801).

Cross ref. Appropriation for survey to determine whether or not Idaho should enter into water compacts with certain other states, see compiler's note, § 42-101.

Comp. leg. Cal. Deering's Gen. Laws 1937, Act 9091, § 15a.

Sec. to sec. ref. This section is referred to in §§ 42-403, 42-404.

ANALYSIS

Interstate adjudication.

Priority.

Rule in absence of statute.

Interstate Adjudication.

Rights, as between states, to share in the waters of interstate stream, were a matter for adjustment between states, and individual users could not raise question about the use of such water in another state out of the territorial jurisdiction of court. *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.* (1917), 245 Fed. 9.

Priority.

Right obtained by appropriation of water from stream in one state for use on lands in another state was superior to later appropriation in former state for use in former state. *Weiland v. Pioneer Irr. Co.* (1922), 259 U. S. 498, 66 L. ed. 1027, 42 Sup. Ct. 568.

Rule in Absence of Statute.

Prior to the passage of this act there was no authority for diversion and appropriation of waters of this state for application to a beneficial use in another state. *Walbridge v. Robinson* (1912), 22 Idaho 236, 125 P. 812, 43 L.R.A. (n.s.) 240.

Collateral References.

78 Am. Jur. 2d, Waters, § 340.

Cooperation or compacts between states as to water rights. 134 A.L.R. 1412.

42-402. Application and permit. — The application for permit and the permit issued thereon as provided in section 42-401, shall be in accordance with the laws of the state of Idaho, relative to the filing of application for permit and the obtaining of permit to appropriate the public waters of the state of Idaho. [1915, ch. 111, § 2, p. 254; reen. C. L., § 3265o; C. S., § 5596; I. C. A., § 41-402.]

Cross ref. Application, hearing proof of completion and issuance of license, §§ 42-202, 42-203, 42-214, 42-219.

42-403. Proof of completion of works. — Proof of completion of works under such permit shall be made in accordance with the laws of the state of Idaho relative to proof of completion under a permit to appropriate the public waters of the state of Idaho, as to all works of diversion under such permit: provided, that the department of water resources may as a condition to the issuance of a certificate of completion under such proof require from the officer or official mentioned in section 42-401 a certificate to the effect that the proper public records of such sister state show the works to have been completed under said permit, said certificate to show in second feet the capacities of the various conduits constructed and to show in acre feet the capacities of reservoir, if any there be, constructed in such sister state under said permit. [1915, ch. 111, § 3, p. 254; reen. C. L., § 3265p; C. S., § 5597; I. C. A., § 41-403; am. 1951, ch. 80, § 2, p. 149.]

Compiler's notes. Section 1 of S.L. 1951, ch. 80, is compiled herein as § 42-401.

The name of the department of water administration (formerly the department of

reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-404. License. — The department of water resources shall issue a license in accordance with the laws of the state of Idaho relative to the issuance of license under a permit, upon receipt of such proof as will satisfy the department as to application of the waters to beneficial use, and may as a condition of granting any such license require a certificate from the officer or official mentioned in section 42-401, to the effect that the proper public records of such sister state show that beneficial use has been made of the waters sought to be appropriated under said permit, said certificate to show the extent of such use in second feet. If such use is for irrigation, such certificate shall give a description by legal subdivisions of the land which is irrigated by such water. If such use is for power purposes such certificate shall describe the location of the point of use. [1915, ch. 111, § 4, p. 254; reen. C. L., § 3265q; C. S., § 5598; I. C. A., § 41-404; am. 1951, ch. 80, § 3, p. 149.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water

resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-405. Idaho laws controlling. — Appropriations of water made under the provisions of this chapter shall be subject to the laws of the state of Idaho relative to administration, control and distribution of public waters, so long as said waters appropriated in accordance herewith shall remain within the state of Idaho: provided further, that such rights in their entirety shall be subject to all laws of the state of Idaho which have been or may be passed from time to time relative to the appropriation and control of public waters, to the end that such rights may be upon a parity with water rights within the state of Idaho. [1915, ch. 111, § 5, p. 254; reen. C. L., § 3265r; C. S., § 5599; I. C. A., § 41-405.]

Compiler's notes. The words "this chapter" refer to S.L. 1915, ch. 111, compiled herein as §§ 42-401 — 42-408.

Collateral References.
93 C.J.S., Waters, §§ 167-193.

42-406. Rules and regulations. — The department of water resources is empowered to make such rules and regulations as may be necessary to the proper administration of the provisions of this chapter. [1915, ch. 111, § 6, p. 254; compiled and reen. C. L., § 3265s; C. S., § 5600; I. C. A., § 41-406.]

Compiler's notes. For sections in which "this chapter" is compiled see compiler's note to § 42-405.

Cited in: Hart v. Stewart (1974), 95 Idaho 781, 519 P.2d 1171.

42-407. Appeal from department's decision. — Whenever any person or persons feel themselves aggrieved by the determination or decision of the department of water resources relative to the granting of permit, the issuance of certification of proof of completion or the issuance of license, as hereinbefore provided for, such person or persons may request a hearing pursuant to section 42-1701A(3), Idaho Code, if a hearing on the matter has not been held, or, if a hearing has been held, may seek judicial review pursuant to section 42-1701A(4), Idaho Code. [1915, ch. 111, § 7, p. 254; reen. C.L., § 3265t; C.S., § 5601; I.C.A., § 41-407; am. 1980, ch. 238, § 13, p. 526.]

Compiler's notes. Sections 12 and 14 of S.L. 1980, ch. 238 are compiled as §§ 42-311 and 42-1503, respectively.

Section 25 of S.L. 1980, ch. 238 read: "The provisions of this act are hereby declared to be

severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

42-408. Appropriation subject to reciprocal legislation — Certain waters excluded. — No permit to appropriate the public waters of the state of Idaho shall be granted by the department of water resources, unless the sister state, to which it is desired to divert such water, shall have enacted legislation generally similar in purport to the provisions of this chapter, whereby water may be appropriated within such sister state for use within the state of Idaho: provided, that no permit to appropriate the waters of the Pend d'Oreille, the Clark Fork of the Columbia, or Spokane rivers, or any of the streams or lakes tributary thereto whose waters drain into the said

streams, shall be granted where such waters are to be used outside of the state of Idaho: and, provided further, that no permit to appropriate or impound the waters of Lake Coeur d'Alene shall be granted where such waters, or electrical energy to be developed therefrom is to be used outside of the state of Idaho. [1915, ch. 111, § 8, p. 254; reen. C. L., § 3265u; C. S., § 5602; am. 1925, ch. 3, § 1, p. 7; I. C. A., § 41-408.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1925, ch. 3 declared an emergency. Approved January 15, 1925.

42-409. Appropriation for use in Wyoming. — The department of water resources shall, under the laws of this state, allow the appropriation of water in this state for beneficial use in the state of Wyoming only when, under the laws of the latter, water may be lawfully diverted therein for beneficial use in the state of Idaho. Upon any stream flowing across the state boundary a right of appropriation, having the point of diversion and the place of use in the state of Wyoming and recognized by the laws of that state, shall have the same force and effect as if the point of diversion and the place of use were in this state: provided, that the laws of that state give like force and effect to similar rights acquired in this state. [1919, ch. 118, § 1, p. 404; C. S., § 5603; I. C. A., § 41-409.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Collateral References.

Cooperation or compacts between states as to water rights. 134 A.L.R. 1412.

42-410. Appropriation of water for use in Nevada. — Any application to the director of the department of water resources of Idaho for permit to appropriate and divert within the state of Idaho public waters for domestic, livestock and irrigation use within the state of Nevada, shall be allowed precisely as if the proposed place of beneficial use were within the state of Idaho; and any application to said director of the department of water resources to change the point of diversion or place of use of the waters of any interstate stream from a point of diversion or place of use within the state of Idaho to a point of diversion or place of use within the state of Nevada, shall be allowed precisely as if the proposed change of point of diversion or place of use were to a point or place within the state of Idaho. [1949, ch. 24, § 1, p. 41.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1949, ch. 24 declared an emergency. Approved February 4, 1949.

Cross ref. Allowance of applications to appropriate water, § 42-202 et seq.

Change of point of diversion and place of use, § 42-222.

42-411. Appropriation of water for use in Washington. — Any application to the director of the department of water resources of Idaho for permit to appropriate and divert public waters within the state of Idaho for use within the state of Washington, shall be allowed precisely as if the proposed place of beneficial use were within the state of Idaho; and any application to said director of the department of water resources to change the point of diversion or place of use of the waters of any interstate stream from a point of diversion or place of use within the state of Idaho to a point of diversion or place of use within the state of Washington, shall be allowed precisely as if the proposed change of point of diversion or place of use were to a point or place within the state of Idaho. All water appropriated under this section shall be appropriated for municipal and industrial use within the city of Pullman, Washington, and/or Washington State University, at Pullman, Washington. [I.C., § 42-411, as added by 1970, ch. 89, § 1, p. 217.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to the director of water resources on the authority of S.L. 1974, ch.

286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1970, ch. 89 declared an emergency. Approved March 3, 1970.

MONTANA

85-1-121. Out-of-state use of water. None of the waters in the state of Montana shall ever be appropriated, diverted, impounded, or otherwise restrained or controlled while within the state for use outside the boundaries thereof, except pursuant to a petition to and an act of the legislature of the state of Montana permitting such action. Any appropriation, diversion, impounding, restraining, or attempted appropriation, diversion, impounding, or restraining contrary to the provisions of this section shall be null and void. All officers, agents, agencies, and employees of the state are prohibited from knowingly permitting, aiding, or assisting in any manner such unauthorized appropriation, diversion, impounding, or other restraint. It shall be unlawful for any person, persons, or corporation, directly or indirectly, personally or through agents, officers, or employees, either to attempt to so appropriate, divert, impound, or otherwise restrain or control any of the waters within the boundaries of this state for use outside thereof, except in accordance with the terms of this section.

History: En. Sec. 1, Ch. 220, L. 1921; re-en. Sec. 7135, R.C.M. 1921; re-en. Sec. 7135, R.C.M. 1935; R.C.M. 1947, 89-846.

85-1-122. Clark Fork River. The waters of the Clark Fork River may be impounded or restrained within the state of Montana for a distance not exceeding 25 miles from the Idaho-Montana boundary line by a dam located on said river in the state of Idaho and constructed by any person, firm, partnership, or corporation authorized to do business in the state of Montana. Any present or future appropriations of water in the watershed in the state of Montana for irrigation and domestic use above said dam shall have priority over water for power use at said dam.

History: En. Sec. 1, Ch. 3, L. 1951; R.C.M. 1947, 89-856.

Note

Also of importance is the Yellowstone River Compact, enacted in 1951. Article VII thereof authorizes the diversion of Yellowstone River system waters in one signatory state (Montana, Wyoming, and North Dakota) for use in another signatory state under outlined procedures. However, Article VII is modified by Article X which provides:

No water shall be diverted from the Yellowstone River basin without the unanimous consent of all the signatory states. In the event water from another river basin shall be imported into the Yellowstone River basin or transferred from one tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming, or any of them jointly the state having the right to the use of such water shall be given proper credit therefor in determining its share of the water apportioned in accordance with Article V herein.

NEVADA

MISCELLANEOUS PROVISIONS

533.515 Permits for appropriation when point of diversion is outside state, or lands to be irrigated are outside state.

1. No permit for the appropriation of water shall be denied because of the fact that the point of diversion described in the application for such permit, or any portion of the works in such application described and to be constructed for the purpose of storing, conserving, diverting or distributing such water, or because the place of intended use, or the lands to be irrigated by such water, or any part thereof, may be situated in any other state, when such state authorizes the diversion of water from such state for use in Nevada; but in all such cases where either the point of diversion or any of such works or the place of intended use, or the lands, or part of the lands to be irrigated by means of such water, are situated within the State of Nevada, the permit shall issue as in other cases.

2. The permit shall not purport to authorize the doing or refraining from any act or thing, in connection with the system of appropriation, not properly within the scope of the jurisdiction of the State of Nevada, and the state engineer thereof, to grant.

[1:174:1913; 1919 RL p. 3307; NCL § 7986]

533.520 Permits for change of use or transfer of water, water rights beyond state borders not to be issued; applicability of section.

1. It is hereby declared to be contrary to the economic welfare and against the public policy of the State of Nevada to change the place of use or transfer, or to permit a change of the place of use or transfer, of water or water rights for use beyond the borders of the State of Nevada, as to any water appropriated and beneficially used in the State of Nevada for irrigation or other purposes prior to or after March 23, 1951, and no permit or authorization shall be issued or given for such change of use or transfer.

2. This section shall not apply to nor is it intended to affect waters or water rights as to such waters as shall have been prior to March 23, 1951, and which now are diverted in Nevada and which were prior to March 23, 1951, and now are used for domestic or industrial purposes beyond the borders of the State of Nevada.

[1:325:1951] + [2:325:1951]

533.522 Appropriation from interstate streams: Appropriation in this state for beneficial use in another state. Upon any stream flowing across the state boundary, an appropriation of water in this state for beneficial use in another state may be made only when, under the laws of the latter, water may be lawfully diverted therein for beneficial use in this state.

(Added to NRS by 1957, 155)

533.524 Appropriation from interstate streams: Right of appropriation having point of diversion and place of use in another state. Upon any stream flowing across the state boundary, a right of appropriation having the point of diversion and the place of use in another state and recognized by the laws of that state shall have the same force and effect as if the point of diversion and the place of use were in this state if the laws of that state give like force and effect to similar rights acquired in this state.

(Added to NRS by 1957, 155)

NEW MEXICO

72-12-18. [Underground waters declared to be public.]

For the purposes of this act [72-12-18 to 72-12-21 NMSA 1978] all underground waters of the state of New Mexico are hereby declared to be public waters and to belong to the public of the state of New Mexico and to be subject to appropriation for beneficial use within the state of New Mexico. All existing rights to the beneficial use of such waters are hereby recognized.

History: 1941 Comp., § 77-1122, enacted by Laws 1953, ch. 64, § 1; 1953 Comp., § 75-11-19.

Cross-reference. — For substantially similar provision, see 72-12-1 NMSA 1978.

Underground waters public. — Laws 1953, ch. 64, declares all underground waters to be public waters subject to appropriation for beneficial use. State ex rel. Reynolds v. Mendenhall, 68 N.M. 467, 362 P.2d

998 (1961).

Law review. — For student symposium, "Constitutional Revision — Water Rights," see 9 Nat. Resources J. 471 (1969).

Am. Jur. 2d and C.J.S. references. — 78 Am. Jur. 2d Waters § 148.

93 C.J.S. Waters § 169.

72-12-19. Removal of underground waters from state.

No person shall withdraw water from any underground source in New Mexico for use in any other state by drilling a well in New Mexico and transporting the water outside the state or by drilling a well outside the boundaries of New Mexico and pumping water from under lands lying within the boundaries of New Mexico; provided that nothing in this act [72-12-18 to 72-12-21 NMSA 1978] prohibits the transportation of water by tank truck from any underground source in New Mexico to any other state where the water is used for exploration and drilling for oil or gas. The owner of the well from which the water is withdrawn shall have a duty to ascertain that the water exported is used only for the above purposes and such owner shall keep and maintain accurate records of the amount of water withdrawn and make such records available to the state engineer of New Mexico upon request. The amount of water withdrawn from any one well for such exportation shall never exceed three acre-feet.

History: 1941 Comp., § 77-1123, enacted by Laws 1959, ch. 319, § 1; 1959 Comp., § 75-11-20; Laws 1959, ch. 319, § 1.

Cross-reference. — For definition of "acre-foot," see 72-12-1 NMSA 1978.

Emergency clause. — Laws 1959, ch. 319, § 2, makes the act effective immediately. Approved April 2, 1959.

State engineer. — See 72-2-1 NMSA 1978.

C.J.S. reference. — 94 C.J.S. Waters § 313.

OREGON

DIVERSION AND USE OF WATERS OUT OF STATE

537.810 Out-of-state use, diversion or appropriation of waters without legislative consent prohibited; terms of consent. No waters located within this state shall be diverted, impounded or in any manner appropriated for diversion or use beyond the boundaries of the state except upon the express consent of the Legislative Assembly. In the event the Legislative Assembly shall give its consent to any such request it may attach thereto such terms, conditions, exceptions, reservations, restrictions and provisions as it may care to make in the protection of the interests of the state and of its inhabitants.

537.820 Application of provisions to waters forming common boundary between states. ORS 537.810 to 537.860 shall also apply to the waters located within the boundaries of this state of any river, stream, lake or other body of water serving as part of the common boundary of this state and any other state and over which this state has concurrent jurisdiction, except that said sections shall not apply to the diversion, impoundment or appropriation of waters for the development of hydroelectric energy, flood control, irrigation or other uses in waters forming a boundary of the state in cases where such waters are not to be diverted from the drainage basin wherein such waters are located.

537.830 Filing upon or condemnation of waters without legislative permission prohibited. No person, or agency of any state or of the United States, shall attempt to file upon or to condemn any waters within the boundaries of this state for any purpose mentioned in ORS 537.810 to 537.860 without first obtaining legislative permission as provided by those sections.

537.835 City of Walla Walla, Washington, may appropriate, impound and divert certain waters from Mill Creek. (1) Pursuant to the provisions of ORS 537.810, consent is hereby given to the City of Walla Walla, a municipal corporation of the State of Washington, to appropriate, impound and divert certain waters from Mill Creek, a tributary of the Walla Walla River, located in Township 6 North, Range 38, E.W.M., Umatilla County, Oregon, for the beneficial use of both the State of Oregon and within the City of Walla Walla, State of Washington, subject to the following terms and conditions:

Oregon in the construction and maintenance of the project.

(2) The Water Resources Director may from time to time direct that a designated portion of the impounded waters shall be held in the State of Oregon for fire protection, for use by Oregon residents, for wildlife habitat needs, and to maintain proper stream flow during the summer months.

(3) Prior to commencing construction, the City of Walla Walla shall make application for such appropriation, impoundment and diversion to the Water Resources Director and such appropriation, impoundment and diversion shall be allowed upon such additional terms, conditions, reservations, restrictions and provisions, including minimum stream flow, as the Water Resources Director shall impose for the protection and benefit of the State of Oregon. (1975 c.732 §2)

537.840 Legislative consent; filing of certified copy; appropriation rights and procedure. Upon receiving legislative permission to appropriate waters under ORS 537.810 to 537.860, the permittee, upon filing in the office of the Water Resources Director a certified copy of the Act, certified to by the Secretary of State, may proceed to obtain an appropriation of waters in the manner provided by the laws of this state for the appropriation of waters for beneficial use, subject to all existing rights and valid prior appropriations and subject to the terms, conditions, exceptions, reservations, restrictions and provisions of such legislative consent.

537.850 Suits to protect state interests; right of redress to private persons. In the event of any violation or attempt to violate any of the provisions of ORS 537.810 to 537.860, the Governor shall cause to be instituted such suits and actions as may be necessary to protect and defend the sovereign rights and interests of the state in the premises. Persons are given right of redress against such violator at private suit or action under any appropriate remedy at law or in equity.

(a) The City of Walla Walla shall pay the entire cost of constructing and maintaining this project; and

(b) The City of Walla Walla shall employ only residents and inhabitants of the State of

537.860 Vested rights protected. ORS 537.810 to 537.850 shall not affect any valid prior appropriation or water right existing on May 12, 1951.

537.870 Out-of-state municipalities; acquisition of land and water rights in Oregon. Subject to the limitations imposed by ORS 537.810 to 537.860, any municipal corporation of any state adjoining Oregon may acquire title to any land or water right within Oregon, by purchase or condemnation, which lies within any watershed from which the municipal corporation obtains or desires to obtain its water supply.

PENALTIES

537.990 Penalties. (1) Violation of ORS 537.130 (2) is punishable, upon conviction, by a fine of not less than \$10 nor more than \$250, or by imprisonment in the county jail for not more than six months, or both.

(2) Any person who wilfully diverts or uses water to the detriment of others without compliance with law shall be punished as provided in subsection (1) of this section. The

possession or use of water, except when a right of use is acquired in accordance with law, shall be prima facie evidence of the guilt of the person using it.

(3) Violation of ORS 537.535 (1) is punishable, upon conviction, by a fine of not less than \$10 nor more than \$250, or by imprisonment in the county jail for not more than six months, or both. Violation of ORS 537.747 is a Class B misdemeanor.

(4) Justice courts and district courts shall have concurrent jurisdiction with the circuit courts in the trial of all violations under this section. [Subsection (3) enacted as 1955 c.708 §36; 1963 c.293 §3; 1981 c.416 §8]

Note

The Goose Lake Interstate Compact between the States of Oregon and California provides for diversion, storage, and conveyance of water from the Goose Lake Basin in one state for use within the basin in the other state. However, export of water from the basin for use outside the basin without prior consent of both state legislatures is prohibited. The rights to a use under the terms of the Compact must be secured by appropriation under the general laws of Oregon or California and the laws of the state from which the water is to be taken. See 45 Oregon Revised Statutes Section 542.510 et. seq. This Compact has not been approved by Congress; therefore, even though passed by the states it is not operational or effective.

The states of California and Oregon have also entered into the Klamath River Basin Compact. Under the Compact, each state is granted the right to construct and operate facilities for the measurement, diversion, storage and conveyance of water from the Upper Klamath River Basin in one state for use in the other "insofar as the exercise of such right may be necessary to effectuate and comply with the terms of its Compact." The Compact further provides that rights to the use of unappropriated waters originating with the Upper Klamath River Basin for any beneficial use in the Upper Klamath River Basin may be acquired by appropriation under the laws of the state where the use is to be made. However, a number of additional provisos are set forth in the Compact with respect to such uses. Among these is a general prohibition with respect to uses in Oregon against diversion of waters from the Upper Klamath River Basin, except for out-of-basin diversions of waters originating with the drainage area of Fourmile Lake. A condition imposed with respect to uses in California is that waters diverted from the Klamath River within the Upper Klamath River Basin for use in California cannot be taken outside the Upper Klamath River Basin. See 45 Oregon Revised Statutes Section 542.610 et. seq. The Compact is administered by a commission composed of the representative of the California Director of Water Resources and the Oregon Water Resources Director and the chairman who is appointed by the President. The Commission is funded one-half by each state and the chairman has no vote.

TEXAS

§ 5.085. Interwatershed Transfers

(a) No person may take or divert any of the water of the ordinary flow, underflow, or storm flow of any stream, watercourse, or watershed in this state into any other natural stream, watercourse, or watershed to the prejudice of any person or property situated within the watershed from which the water is proposed to be taken or diverted.

(b) No person may transfer water from one watershed to another without first applying for and receiving a permit from the commission to do so. Before issuing such a permit, the commission shall hold a hearing to determine the rights that might be affected by the transfer. The commission shall give notice and hold the hearing in the manner prescribed by its rules.

(c) A person who takes or diverts water in violation of this section is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than \$100 nor more than \$500 or by confinement in the county jail for not more than six months.

(d) A person commits a separate offense each day he continues to take or divert water in violation of this section.

UTAH

73-2-8. Power to appropriate water from any source in Utah for beneficial purposes in other states — Co-operation with other states. The state engineer is hereby authorized and empowered to receive and grant applications to appropriate water from any source in Utah, where such water is to be conveyed and used for beneficial purposes within any state, and to issue certificates of appropriation for this water only after the state engineer shall evaluate and make public the advantages to the State of Utah and its citizens of exporting water. The state engineer shall co-operate with the state engineer or other proper officer of any state in the determination, supervision, regulation and control of all water and water rights and to that end the state engineer, by and with the consent of the governor, may enter into agreements with the proper officer of any state to carry out the purposes of this subsection.

History: L. 1921, ch. 70, § 1; R. S. 1933, 100-2-8; L. 1941, ch. 96, § 1; C. 1943, 100-2-8; L. 1953, ch. 133, § 5; 1979, ch. 246, § 1.

Compiler's Notes.

The 1941 amendment substituted "provided the law of such border state in like manner permits the appropriation of water therein for use in Utah" for "upon satisfactory evidence that the waters appropriated have been put to the beneficial use set forth in the application" at the end of the present first

sentence; inserted "The state engineer" at the beginning of the second sentence and added a third sentence which read: "The state engineer is hereby authorized to represent the state of Utah in all interstate conferences held for the purpose of negotiating and entering into compacts between the state of Utah and one or more sister states for the division of the waters of interstate rivers, lakes, or other sources of supply; provided, however, that any such compact signed by the state engineer shall not become binding

upon the state of Utah until it has been ratified and approved by the legislature of Utah and the legislatures of other states which are parties thereto"; and made minor changes in phraseology and punctuation.

The 1953 amendment deleted the third sentence added by the 1941 amendment.

The 1979 amendment substituted "any source" before "in Utah" in the first sentence for "interstate streams"; substituted "within any state" in the first sentence for "within any border state"; substituted "for this water * * * exporting water" at the end of the first sentence for "hereon; provided, the law of such border state in like manner permits the appropriation of water therein for use in Utah"; substituted "any state" both places it appears in the second sentence for "any

adjoining state"; deleted "in interstate streams" after "water rights" in the second sentence; deleted "the necessary and lawful" before "agreements" in the second sentence; deleted "duly authorized thereto" after "the proper officer" in the second sentence; substituted "subsection" at the end of the second sentence for "section"; and made minor changes in punctuation.

Sections 1 to 4 of Laws 1953, ch. 133 are compiled as sections 73-10-3, 73-10-4, 73-10-8 and 73-10-11.

Cross-References.

Representative to be appointed by the board of water resources to represent the state in interstate conferences and compacts, 73-10-3.

WASHINGTON

90.03.300 ————**Diversion of water for out-of-state use—**
Reciprocity. No permit for the appropriation of water shall be denied because of the fact that the point of diversion described in the application for such permit, or any portion of the works in such application described and to be constructed for the purpose of storing, conserving, diverting or distributing such water, or because the place of intended use or the lands to be irrigated by means of such water, or any part thereof, may be situated in some other state or nation, but in all such cases where either the point of diversion or any of such works or the place of intended use, or the lands, or part of the lands, to be irrigated by means of such water, are situated within the state of Washington, the permit shall issue as in other cases: *Provided, however,* That the supervisor of water resources may in his discretion, decline to issue a permit where the point of diversion described in the application is within the state of Washington but the place of beneficial use in some other state or nation, unless under the laws of such state or nation water may be lawfully diverted within such state or nation for beneficial use in the state of Washington.

LEGISLATIVE HISTORY

Enacted Laws 1917 ch 117 § 31-a, as added by Laws 1921 ch 103 § 3 p 305.

See RRS § 7383 and former RCW 90.20.070.

CROSS REFERENCES

Interstate compact commission: RCWA Chapter 43.57.

Reciprocity in appropriation of water for use outside state: RCWA 90.16.120.

Water for use outside state: RCWA 90.16.110.

NOTES OF DECISIONS

In condemnation proceeding to secure right of way for irrigating canal, it is not necessary for irrigation company to show that it has condemned or purchased water rights from riparian owners of stream it proposes to tap. *Prescott Irr. Co. v Flathers* (1899) 20 Wn 454, 55 P 635.

Where irrigation company is openly and in good faith prosecuting construction of its ditch for use of waters of stream, it is not necessary that it previously condemned its water rights in order to give priority over another company lower down on stream subsequently seeking to use same waters. *State ex rel. Kettle Falls Power & Irr. Co. v Superior Court* (1907) 46 Wn 500, 90 P 650.

Where irrigation company, prior in point of time, was already in good faith prosecuting its construction work for use of waters of stream, another company acquiring

riparian rights for use of same waters took such rights subject to condemnation existing against riparian owners in favor of prior company. *State ex rel. Kettle Falls Power & Irr. Co. v Superior Court* (1907) 46 Wn 500, 90 P 650.

As between two irrigation companies seeking to use same waters, one prior in time is prior in right, and fact that later company is public carrier does not enlarge its riparian rights. *State ex rel. Kettle Falls Power & Irr. Co. v Superior Court* (1907) 46 Wn 500, 90 P 650.

Irrigation company may condemn land for reservoir sight, where it is necessary to store water in order to accomplish irrigation, since such is "necessary corporate purpose" within this statute. *State ex rel. Golden Valley Irr. Co. v Superior Court* (1912) 67 Wn 556, 122 P 19.

90.16.110 Water for use outside state. Whenever the use of water shall be necessary for domestic, manufacturing, irrigation, or in interstate transportation at or for any incorporated or unincorporated city, town, village or hamlet situated partly in Washington and partly in an adjoining state or where any city, town, village or hamlet is incorporated on one side of the state line and there are inhabitants living in adjacent and contiguous territory on the other side, it shall be lawful for any person, association or corporation to locate, appropriate, divert and deliver any of the unappropriated public waters of this state necessary for the use of such city, town, village or hamlet and the inhabitants thereof and those residing in and embracing such contiguous territory both within this state and such adjoining state; and locations may be made and authority is hereby granted for such purpose the same as for any other appropriation within the state and a diversion and delivery for such purpose shall have the same force and effect as if made for use wholly within this state and any appropriation, diversion or use heretofore made for such purpose shall be deemed as valid and legal as if made for a use wholly within this state and priority thereof shall date from the appropriation and diversion the same as if it had been made for use wholly within this state.

LEGISLATIVE HISTORY

Enacted Laws 1919 ch 41 § 1 p 85.
See RRS § 11577.

CROSS REFERENCES

Appropriation of water rights: RCWA 90.03.010.
Diversion of water for out-of-state use: RCWA 90.03.300.
Necessity of reciprocity: RCWA 90.16.120.
Water rights of United States: RCWA Chapter 90.40.

COLLATERAL REFERENCES

Am Jur Waters §§ 291 et seq.
CJS Waters § 17L.

Forms:

13 Am Jur Legal Forms, Nos. 13:1611 et seq. (forms as to conveyance of water).

21 Am Jur Pl & Pr Forms, Nos. 21:251 et seq. (pleading and practice forms relating to supply of water).

Law Review Articles:

31 Wn LR 243 (Washington water rights).

Key Number Digests:

Waters and Water Courses ←13L.

90.16.120 ———Reciprocity. The provisions of this act shall not apply to any territory or the inhabitants thereof situated or located in any adjoining state which does not by its laws, usages or legal regulations grant similar or reciprocal rights, privileges and opportunities to this state and its inhabitants and adjacent and contiguous territory whether incorporated or unincorporated as in this act specified.

LEGISLATIVE HISTORY

Enacted Laws 1919 ch 41 § 2 p 86.
See RRS § 11578.

REVISER'S NOTE

"This act" (1919 c 41), is codified in RCW 90.16.110 and 90.16.120.

CROSS REFERENCES

Appropriation of water rights: RCWA 90.03.010.
Interstate compact commission: RCWA Chapter 43.57.

COLLATERAL REFERENCES

Am Jur Constitutional Law § 220.
CJS States § 8, Waters § 17L

Forms:

8 Am Jur Pl & Pr Forms, No. 8:379 (motion for taking of judicial notice of statute of adjoining state).

Key Number Digests:

States ⇐5.
Waters and Water Courses ⇐131.

WYOMING

§ 41-3-105. Use of water outside the state.

No use of water outside the state of Wyoming, except water allocated to other states, shall be granted without prior consent of the legislature. (Laws 1974, ch. 23, § 2; 1975, ch. 67, § 1.)

Editor's note. — This section as it appeared before the 1975 amendment was located under § 41-3-104 as an editor's note.

Application of act. — Section 3, ch. 23, Laws 1974, reads: "Nothing in this act shall apply to

or affect any petition which is pending before the board as of February 1, 1974."

Effective date. — Section 4, ch. 23, Laws 1974, makes the act effective immediately upon passage. Approved February 20, 1974.

§ 41-3-115. Applications for use of water outside the state.

(a) All water being the property of the state and part of the natural resources of the state shall be controlled and managed by the state for the purpose of protecting and assuring the maximum permanent beneficial use of waters within the state.

(b) None of the water of the state either surface or underground may be appropriated, stored or diverted for use outside of the state or for use as a medium of transportation of mineral, chemical or other products to another state without the specific prior approval of the legislature on the advice of the state engineer.

(c) No holder of either a permit to appropriate water or a certificate to appropriate water, nor any applicant for a right to appropriate the unappropriated water of this state, may transfer or use the water so appropriated, certificated or applied for outside the state of Wyoming without prior approval of the legislature of Wyoming, provided further, that as a prerequisite to any use or transfer any adjoining state in which any such water is used shall grant reciprocal rights for the use of water in Wyoming.

(d) Subject to the approval of the state engineer, and notwithstanding the provisions of section 41-10.5(b) [subsection (b) of this section] of the statutes, the legislature hereby approves the proposal of Energy Transportation Systems, Inc., a Delaware corporation, to appropriate no more than twenty thousand (20,000) acre-feet annually of the unappropriated underground waters of the state for use in a coal slurry pipeline extending from Wyoming to Arkansas. The state engineer, may in his discretion, issue permits to appropriate such underground water to the extent necessary not to exceed twenty thousand (20,000) acre-feet annually to meet the requirements of that project and subject to such conditions as the state engineer may require, and provided that the state engineer determines to his satisfaction that such appropriations of the project meet his requirements, which requirements shall include, but are not limited to the following:

(i) That the water to be used is underground water, from the Madison or Bell Sand formations;

(ii) That such use will not interfere with domestic, municipal, stock watering or irrigation uses or other existing beneficial uses within Wyoming;

(iii) That the water is withdrawn from a source of supply located at a minimum of two thousand five hundred (2,500) feet below the ground surface, from wells constructed to a depth of more than two thousand five hundred (2,500) feet beneath the ground surface; and

(iv) That the wells are cemented or otherwise sealed off from the surface of the ground to the top of the formation or formations from which the water is withdrawn, in order to prevent any movement of water in the well outside the casing and to prevent the entry of water from overlying aquifers into said wells, and that the water so withdrawn will be used to develop other resources of Wyoming.

(e) Nothing in subsection (d) shall be construed as a directive for the state engineer to grant his approval.

(f) The permits shall contain the following requirements and provisions, and any others deemed necessary or desirable, for protection of Wyoming's water and other resources, ecology and environment, by the state engineer and environmental quality agency after mutual consultation:

(i) If at any time the permittee so operates his wells as to lower the water table so as to endanger the water supply of any domestic, municipal, stockwatering or irrigation use or other beneficial use of appropriated water within the state of Wyoming existing at the time the application underlying this permit was filed, permittee may be required by the state engineer at permittee's own expense to either:

(A) Deepen the well and pay the additional costs of pumping water for any person whose water supply has been endangered by reason of permittee's pumping operation so that it is equal to the supply available prior to permittee's pumping; or

(B) Provide any person whose water supply is endangered that quantity of suitable water required to equal the amount available prior to permittee's pumping operation; or

(C) Obtain its water from another source that will not significantly affect or endanger the supply of water available to the beneficial users herein described;

(ii) Permittee will pay the costs of court and reasonable fees of attorneys and experts of any person who is required to enforce the terms of this permit by legal action, provided said person is successful in obtaining a final judgment in his favor and against permittee, and provided said fees are found by a court of competent jurisdiction to be both reasonable and necessary. Any such action must be brought in the courts of the state of Wyoming;

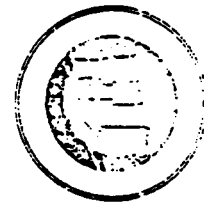
(iii) If the state engineer finds reasonable cause to believe the permittee has endangered or is about to endanger the existing water table, an order to show cause why the permit should not be terminated or suspended may be issued. Any hearing held under this section shall conform with the provisions of the Wyoming Administrative Procedure Act [§§ 9-4-101 to 9-4-115]. (Laws 1974, ch. 25, § 1.)

Note

Wyoming is also a signatory state to the Yellowstone River Compact enacted in 1951. Article VII of the Compact authorizes the diversion of the Yellowstone River System waters in one signatory state for use in another signatory state according to specified procedures. However, Article X prohibits any diversion from the Yellowstone River Basin without the unanimous consent of all the signatory states. For a more detailed description of these provisions please refer to Montana's section in this report. Wyoming, unlike Montana, passed its statutory restrictions on the exportation of state waters after ratifying the Yellowstone River Compact. However, the Compact provides that any amendments must be approved by each of the signatory states and consented to and approved by the United States Congress. It is the editor's opinion, therefore, that the Wyoming statute has no application with respect to diversions within the terms of the Yellowstone River Compact.

MEMORANDUM

WESTERN STATES WATER COUNCIL



MEMORANDUM

BY: CRAIG BELL

RE: CONSTITUTIONALITY OF STATE STATUTES PROHIBITING
OR RESTRICTING THE EXPORTATION OF STATE WATERS

DATE: NOVEMBER 4, 1976

The statutes compiled in this report prohibiting or restricting the exportation of state waters undoubtedly resulted from the desire to preserve the vital water resources for the citizens of the respective states. No one can deny that the state has a legitimate interest in preserving its natural resources. However, a state is limited in exercising its police power in such a manner as to restrict or interfere with interstate commerce. Therefore, each statute raises the question of whether its prohibition against or its restriction on the exportation of state waters constitutes a legitimate exercise of the police power, or whether it is an interference with and unreasonable burden on interstate commerce and therefore unconstitutional. 1/

Typical of the provisions in these statutes is a general prohibition against the use of water outside the state without legislative approval. 2/ Common also is a restriction against the granting of permits for use of water outside the state in the absence of reciprocal rights from the benefiting state. 3/ In one instance, the state statute expressly prohibits the use of water for slurry to export coal outside the state. 4/ In another case, the statute provides that no waters of the state shall be used as a medium of transportation of mineral, chemical or other products to another state without specific approval of the legislature. 5/ Questions regarding the constitutionality of such statutes can best be considered by analyzing these provisions separately. However, as a preface, two apparently different views on the validity of such statutory prohibitions, each finding support in a Supreme Court decision, should be reviewed.

The first view upholds the validity of such statutory restrictions and stems from the Supreme Court's decision in Hudson County Water Co. v. McCarter. 6/ In this case, the Supreme Court upheld a New Jersey statute which read as follows:

"It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this state into any other state for use therein." 7/

The Supreme Court upheld the statute in the following terms:

"The constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep, and give no reason for its will." 8/

An apparently different view was expressed in Altus v. Carr, 9/ a three judge federal district court decision which was affirmed by the Supreme Court, per curiam and without opinion, 10/ striking down a Texas statute which had been passed after the plaintiff had entered into a contract with a Texas resident to purchase his groundwater and export it to Oklahoma. The statute in question read as follows:

"No one shall withdraw water from any underground source in this state for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the state unless the same be specifically authorized by an act of the Texas legislature and thereafter as approved by it." 11/

The federal district court limited its holding to the question of the statute's interference with the transportation and use of groundwater after it had been withdrawn from the well and become personal property. The holding can thus be distinguished from the earlier McCarter case, since the New Jersey statute in McCarter did not endeavor to cut off an established use of New Jersey water in New York. Notwithstanding, the federal district

expressed a substantially divergent view from McCarter of the propriety of the state's attempt to restrict the exportation of state waters. This view apparently rested upon the following theories. First, the district court considered water to be an article of commerce. Secondly, the court found insufficient public interest to support the state action. Finally, the court found an impermissible statutory attempt to interfere with and burden interstate commerce. 12/

Because the federal district court limited its holding, the Supreme Court's affirmance of the federal district court decision should not necessarily be considered as tacitly overruling McCarter. However, the district court refused to be persuaded by the reasoning in McCarter and instead concluded that water was like natural gas and should be viewed as an article of commerce. Its transmission across state lines therefore constituted interstate commerce according to the court. The possibility therefore exists that the per curiam affirmance of the district court's decision indicates the Supreme Court's own willingness to abandon McCarter. 13/ Nevertheless, there is nothing in the Supreme Court's natural gas cases to conclusively determine that the court has abandoned McCarter in cases involving water regulation. Indeed, the Supreme Court has implied that there is a fundamental difference between natural gas and water as natural resources. 14/ It may be that this difference is sufficient to permit the states to restrict the exportation of water even when the same rationale will not allow them to condition the exportation of natural gas. 15/ Furthermore, it seems unlikely that the Supreme Court would alter a long standing legal view without an opinion. It thus may well be that the court affirmed solely on the basis of the narrow holding in Altus without adopting the broader language of the decision. However, this does not mean that the Court will continue to follow McCarter when another case come before it in which a similar prohibition against the exportation of water is challenged and the Court decides that the entire concept of McCarter is ripe for review. Therefore, it is well to consider typical provisions of state statutes prohibiting or restricting the exportation of water in light of current Supreme Court doctrine on the reach of the commerce clause.

General Prohibition Against Out-Of-State Use Without Legislative Approval

Supporting the validity of a prohibition against exporting state waters without legislative approval is the fact that the state has an obligation to promote public convenience and prosperity, and that this obligation may include preserving a valuable natural resource within the states' boundaries. Therefore, it is arguably a legitimate exercise of the state police power for the legislature to determine if the exportation of state waters is within the public welfare. 16/

On the other hand, a court could well decide that it is an unreasonable burden upon and interference with interstate commerce to require any

prospective diverter of a state's water for use outside the state to get legislative approval. The protection and preservation of waters within the state can be accomplished within the framework of existing statutes without imposing the additional burden of going to the state legislature for approval. Thus, there are typically statutory instructions to state water rights administrators to protect and assure the maximum permanent beneficial use of state waters. Therefore, it may be argued that the burden of requiring legislative approval only for potential uses outside the state serves only to duplicate procedures and requirements already provided for by statute and therefore does not confer a local benefit which may be deemed to outweigh any competing national interests underlying the congressional power to regulate interstate commerce. 17

Prohibition Against Water Exportation Without Reciprocal Rights From The Benefiting State

The local interest versus the national interest problem is also important in assessing the constitutionality of a prohibition against the appropriation, storage, or diversion of the water of the state for use outside the state without reciprocal rights being granted by the recipient state. On the one hand, the argument may be made that the activity which the statute seeks to regulate bears such a close and substantial relation to interstate commerce that it is essential and appropriate for Congress to exercise control over the activity in order to protect commerce from burdensome obstructions. In such case, it is irrelevant that Congress has failed to enact legislation in the particular area. The statute purports to exercise the very power granted to Congress. The motivation behind this provision could be construed to be simply the commercial conservation and preservation of the natural resource and therefore defective in the same sense as a statute purporting to permit a state to keep its corn, wheat, cotton, fruit, lead, iron, and petroleum within its borders. To permit this would be to permit the destruction of interstate commerce. And yet, arguably, it is just exactly this kind of thing which such a provision appears to do. 18

On the other hand, it may be argued in the first place that the granting of permits for use of water outside the state, absent reciprocal rights from the benefiting state, is not in the public interest. Availability of water in sufficient quantities is essential for social and economic development. Water taken out of the state to develop industry, agriculture or other forms of economic activity elsewhere deters or denies similar activity in the state. Thus, it would seem reasonable to require reciprocal rights so that an alternative source of water is available should the need arise. Moreover, in addition to this local interest, it would not seem that the provision requiring reciprocity is injurious to the national interest in regulating interstate commerce. It would not seem to be in the national interest to require one state to sacrifice its natural resources in order to

promote the economic growth of a sister state. It is also arguable that any adverse effect on interstate commerce is only incidental and indirect in view of the local benefits the provision is designed to achieve.

Prohibition Against The Use Of State Waters To Transport Minerals, Chemicals, Or Other Products Out Of The State Without The Prior Approval Of The Legislature.

It can be said on behalf of this provision that the prohibition does not prevent transportation of minerals, chemicals or other products out of the state by more conventional means. Neither does the statute prevent items of commerce from moving into the state. Furthermore, the statute does not prevent these items from being exported out of the state on the navigable waterways of the state. Rather, it can be argued that the statute simply implies that the use of its water as a conduit for moving other natural resources or products out of the state is not a per se beneficial use of the state's water. Therefore, before such a use will be permitted, the legislature, upon the advice of the state engineer, will have to determine if such a proposed use is beneficial. In supporting this argument, it could be pointed out that the state should have considerable leeway in analyzing local evils and in prescribing appropriate cures. So long as the local benefit which the statute is designed to achieve outweighs the minor inconvenience, the statute must be seen as a legitimate exercise of the police power. The commerce clause does not require the state to yield to the mere convenience and advantage of particular industries when it may reasonably consider conservation to be of paramount importance. 19/

On the other hand, the provision can be attacked as a restriction with respect to a medium of transportation to another state and therefore clearly an instrumentality of commerce subject to the reach of the commerce clause. The attempt to place restrictions upon the use of state waters as a medium of transportation of products out of the state could be seen as an unconstitutional interference with and burden upon interstate commerce. In the first place, since the state cannot impose similar restrictions upon trains moving in interstate commerce, it could be argued that it should not be able to impose them upon water when it is to be used as a medium of transportation moving in interstate commerce. Secondly, the restriction upon the use of water as a means of interstate transportation could be considered inherently discriminatory. It is entirely possible that state waters may be used as a medium of transportation of mineral, chemical or other products within a state without requiring legislative approval, and without substantial justification. Thus, the burden on interstate commerce could be seen as clearly excessive in relation to the local benefits the restriction purports to assure.

Conclusion

There are currently two views as to the constitutionality of state prohibitions or restrictions on the export of state waters. The first view is that of the McCarter case which gave the state broad control over its water even where interstate commerce is involved. The other view is that of the Altus case which, although limited in its holding, proposed treating water like any other natural resource so that a state could not restrict its use in interstate commerce to any greater degree than with respect to any other natural resource. In view of the limited holding in the Altus case, it should not be considered as overruling McCarter. However, in view of the evolution of the Supreme Court cases involving the commerce power, it may be unrealistic to assume the virtually unlimited control envisioned by McCarter. Rather, any statute seeking to restrict or prohibit the movement of waters found entirely within a state's boundaries should be considered in light of current doctrine relative to interstate commerce and the reach of the commerce clause.

With this view in mind, each of the typical provisions discussed above could come under attack as an unreasonable interference with interstate commerce. The provision prohibiting the use of state waters as a medium to transport minerals, chemicals or other products without legislative approval seems the most vulnerable. On the other hand, water is a unique natural resource which has traditionally been treated specially by both the federal and state governments and the courts and such special treatment should justify the states placing greater burdens upon interstate commerce for the purpose of protecting the public welfare of its residents without violating the commerce clause.^{20/} Nevertheless, we can only speculate as to the outcome of a court review of these provisions. It seems clear,^{21/} however, that their constitutionality cannot now be taken for granted.

FOOTNOTES

1. See Comment, "Its Our Water!" - Can Wyoming Constitutionally Prohibit the Exportation of State Waters?, Vol. X, No. 1 Land and Water L. Rev. 119 (1975).
2. E.g., Sec. 89-846, R.C.M. (1947) (Mont.).
3. E.g., Utah Code Ann., Sec. 73-2-8 (1953).
4. Sec. 89-867, R.C.M. (1947) (Mont.).
5. Wyoming Statutes, Sec. 41-10.5 (b) (1957).
6. 209 U.S. 349 (1908).
7. Id. at 353.
8. Id.
9. 255 F. Supp. 828 (W.D. Tex. 1966).
10. 385 U.S. 35 (1966).
11. Altus v. Carr, 255 F. Supp. 828, 830 (W.D. Tex. 1966).
12. Id. at 840.
13. Comment, supra note 1, at 122.
14. Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229, 258-60 (1910).
15. See id.
16. Comment, supra note 1, at 124
17. Id. at 144.
18. Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229, 255 (1910); Pennsylvania v. West Virginia, 262 U.S. 533 (1922).
19. Corsa v. Tawes, 149 F. Supp. 771, 776 (D. Md. 1957), aff'd, 355 U.S. 37 (1957).

FOOTNOTES (Cont.)

20. Professor Charles Corker of the University of Washington Law School concludes in an article written for the Idaho Law Review as follows: "Interstate 'commerce' may or may not be involved, but if it is, nondiscriminatory legislation is likely to survive if it has a clear and demonstrable relation to any state purpose - preserving Idaho rivers for salmon, for recreationists, for irrigators, or for cities wherever located." C.E. Corker, Can A State Embargo the Export of Water by Transbasin Diversion?, 12 Idaho L.Rev. 135 (1976).
21. Of course, it seems clear that a state cannot forbid an export of water authorized by Congress. See id. at 137 - 146.



