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State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation

Part 2

by

D. Craig Bell & Norman K. Johnson

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The principle derived from *Winters*, known as the Winters doctrine, was initially viewed as an aberration of federal Indian law.[240] More than fifty years passed before the Supreme Court ruled that the Winters doctrine of implied reserved water rights applied to non-Indian federal reservations as well as Indian reservations.[241] Even now, courts have quantified only a small percentage of all reserved rights claims. In the meantime, development of water resources under state law continued. Additionally, agricultural uses increased and western cities and industries expanded, such that most of the West's river basins became fully or nearly fully appropriated.

Estimates vary as to the quantities of water that are being claimed, or that may be claimed for reserved rights. However, the sheer amount of federally reserved land in the West indicates that the volume of reserved water rights for use on that land is substantial.[242] In Arizona, for example, the potential for conflict between appropriated rights and federal reserve water rights is great. The total dependable water supply for the state is less than five million acre-feet per year. The adjudicated Indian water rights, together with the reserved rights claims for federal Indian reservations in the state, exceed the dependable supply.[243] In other states, Indian reserved rights claims are only a fraction of dependable water supply, in some instances a small fraction.[244] Still, when compared to the amount of water available for new uses, the claims are substantial in almost every instance. The potential for conflict is great because when all reserved rights claims are quantified, the early priorities of most reserved rights may mean that they will displace a significant number of existing state water rights.

The fact that most reserved rights are not quantified is thus a major issue. However, it is by no means the only pending re-

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240. A historian who reviewed the case carefully noted that the decision "took all parties by surprise." Hundley, *supra* note 232.

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

242. *See* WESTERN STATES WATER COUNCIL, INDIAN WATER RIGHTS IN THE WEST 93-95 (1984) [hereinafter INDIAN WATER RIGHTS]. This study was prepared for and published by the Western Governors' Association.

243. Letter from Laurence Linser, Deputy Director, Arizona Dep't of Water Resources, to Norman Johnson (Dec. 19, 1989) (on file at the Western States Water Council office).

244. *See* INDIAN WATER RIGHTS, *supra* note 242, at 95.

served rights issue. In the eighty or so years since *Winters* was decided, more questions have been asked than answered about the reserved rights doctrine. Controversies abound relating to the nature and characteristics of reserved rights, how they should be measured, and who should have jurisdiction to administer them once they are quantified.[245] The resolution of these questions will have important implications relative to the eventual impact of reserved rights on state issued water rights. Thus, such questions have been the source of significant conflict.

To appreciate the nature of these conflicts, one must understand the differences between reserved water rights and appropriative rights. Reserved rights do not depend on state defined beneficial uses, but upon the implied intent of Congress, which is often difficult for the judiciary to determine.[246] While appropriative water rights are for a specific quantity of water to be used at a specific time and place, reserved rights are rarely stated in terms of a definite place or time of use.[247] The abandonment and forfeiture characteristics of appropriative rights (use-them-or-

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245. For a discussion of some Indian reserved water rights issues see Note, *Indian Reserved Water Rights*, *supra* note 232, at 1690-1701; Getches, *supra* note 232, at 407-12.

246. For a discussion of the difficulty faced by the courts in determining whether the reserved rights doctrine applies to ground water and whether Congress intended to reserve water to provide for instream flows on Forest Service land see *infra* text accompanying notes 262-80.

247. Shortly after the U.S. Supreme Court affirmed the Wyoming Supreme Court's opinion in *In re* Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 753 P.2d 76 (Wyo. 1988) [hereinafter *Big Horn Adjudication*], *aff'd*, Wyoming v. United States, 109 S. Ct. 2994 (1989), the Wyoming State Engineer observed:

> The Wyoming Supreme Court decision and various lower court decisions are . . . very general. Huge blocks of water have been granted without regard to points of diversion, sources [of supply], or [other] questions about [quantification and use].
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> This moves us . . . to . . . all of the administrative questions. How as State Engineer do I structure [things]? How do I take this Wyoming Supreme Court decree and begin to administer those water rights for the tribes? Now that the quantification has taken place, how do the tribes move forward in implementing and making use of this very valuable resource to benefit the tribes?

Address by Jeff Fassett, Wyoming State Eng'r, Western States Water Council Quarterly Meeting (July 14, 1989) [hereinafter Fassett Address] (included as part of the minutes on file at the Western States Water Council office).

lose-them) are not shared by reserved rights, which continue to exist inchoate whether or not they are used.[248] The priority date of a reserved right is not always clear.[249]

Further, different restrictions apply to the transfer of Indian reserved water rights than apply to appropriative rights. This issue is of paramount importance. Native Americans view a firm water supply as the key to the continued viability of their reservations. They seek to develop water for on-reservation use for agricultural, industrial, and municipal needs.[250] In addition, some seek to lease or otherwise transfer reserved rights off-reservation to generate funds for economic development.[251] Whereas state water right transfer law is generally clear, significant questions exist with respect to the transfer of Indian reserved water rights.[252]

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248. *See, e.g.*, Winters v. United States, 207 U.S. 564, 577 (1908); United States v. Hibner, 27 F.2d 909, 911-12 (D. Idaho 1928).

249. The priority date is usually thought to be the date of the treaty creating an Indian reservation, United States v. Walker River Irrigation Dist., 104 F.2d 334, 338-39 (9th Cir. 1939), or the date of withdrawal for non-Indian reservations, Arizona v. California, 373 U.S. 546, 596 (1963), but may be earlier for some Indian reservations, United States v. Adair, 478 F. Supp. 336, 350 (D. Or. 1979), United States v. Gila Valley Irrigation Dist., Globe Equity No. 59 (D. Ariz. June 29, 1935).

250. *See generally* AMERICAN INDIAN RESOURCES INST., SOURCEBOOK ON INDIAN WATER SETTLEMENTS (1989).

251. *See generally* G. WEATHERFORD, M. WALLACE & L. STOREY, LEASING INDIAN WATER: CHOICES IN THE COLORADO RIVER BASIN (1988).

252. *See* P. SLY, RESERVED WATER RIGHTS SETTLEMENT MANUAL, 132-35 (1988). Arguments in favor of the transferability of Indian reserved rights are often economic. Such transfers would help Indians and Indian tribes become more self-sufficient by creating a stream of revenue to capitalize water development projects, or for other purposes, and would help facilitate settlement of Indian water right claims. *See generally* Shapiro, *An Argument for the Marketability of Indian Reserved Water Rights: Tapping the Untapped Resource*, 23 IDAHO L. REV. 277 (1986-87).

Arguments against off-reservation use are based on the scope of the reserved rights doctrine and on the Indian Non-Intercourse Act 25 U.S.C. § 177 (1988). Reserved rights quantified based upon practicably irrigable acreage on a reservation must, it has been argued, be appurtenant to the irrigable lands, or at least to the reservation where the lands are located. *See generally* Palma, *Considerations and Conclusions Concerning the Transferability of Indian Water Rights*, 20 NAT. RESOURCES J. 91 (1980).

Legally, the Indian Non-Intercourse Act requires that Congress approve any transfer of Indian trust property including, presumably, Indian reserved water rights. However, some argue that Congress may have authorized tribal corporations chartered under the Indian Reorganization Act, 25 U.S.C. § 477, to transfer

In short, there are many differences between reserved water rights and appropriative water rights. These differences help explain the conflicts between reserved rights and rights created under western state water law. Yet reserved rights must eventually be integrated with appropriative rights.[253]

In recent years efforts have been made to settle conflicts through negotiation rather than litigation. Successful negotiations have occurred in Montana, Colorado, California, Arizona, Idaho and Nevada, although some of the negotiated settlements have yet to be implemented.[254] Other negotiations are pending. Nevertheless, the number of pending cases in the West where these conflicts are at issue indicates that much needs to be done to resolve federal-state conflicts over reserved rights.

IV. Methods To Reduce Conflicts: The Prospects For Accommodation

In large part, the following methods to reduce federal-state conflicts in water resources represent the synthesis of western state experience, and are illustrated with case histories. Six basic approaches are examined: (1) urging federally regulated entities to comply with state law, despite a federal agency's position that such compliance is not necessary; (2) seeking favorable interpretations of federal law through litigation; (3) developing and implementing comprehensive procedures to improve and enhance consultation and coordination between federal and state agencies; (4) attempting to amend federal laws to require the desired deference to state water law authority; (5) urging amendments to state law to improve recognition and protection of all legitimate federal interests in water resource allocation and management; and (6) executing agreements to clearly define state and federal roles with regard to specific federal acts and programs. The following dis-

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water rights off-reservation.

In *Big Horn Adjudication*, *supra* note 247, 753 P.2d 76, the Wyoming Supreme Court left intact the district court holding "that '[t]he Tribes can sell or lease any part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off of the Reservation.' " 753 P.2d at 100. The U.S. Supreme Court affirmed in Wyoming v. United States, 109 S. Ct. 2994 (1989).

253. To appreciate some of the challenges involved with this integration process see *supra* note 247 and accompanying text. *See also* F. Trelease, *supra* note 129, at 117-74.

254. P. Sly, *supra* note 252, at 25-33.

cusses each of these approaches to federal-state relations.

A. *Bypassing Federal Agencies*

Confronted with perceived intransigence from federal agencies, state water managers sometimes elect simply to go around the federal agencies and work directly with members of the regulated community. This is done in an effort to convince the members of the regulated community that they should comply with state laws regardless of the federal agency's position. The Arizona Department of Water Resources took such an approach when the EPA determined that state permits were not required for Superfund sites located in Arizona.[255]

Given EPA's position, the Arizona Department of Water Resources chose to go directly to the responsible parties at the Superfund sites and convince them that they should comply with state law. As a result, the responsible parties applied for the necessary state permits.[256] Further, EPA agreed to a consent decree containing language which will help avoid further problems in Arizona.

However, because EPA maintains its legal position that permits are not required under the Superfund law, the underlying problem remains unresolved. If a responsible party at a Superfund site located in another state chooses not to obtain state permits or to meet the substantive requirements of state law, it may rely on EPA's legal position. Arizona argued that such a position ignores the issue of water rights and the potential adverse effects of ground water pumpage in a given area. Arizona further pointed out that EPA's posture frustrates the state's ability to work with EPA toward resolution of problems for the common good.[257]

It may be concluded, therefore, that while such arrangements with the regulated entities avoid exacerbating conflicts between federal and state interests, they fail to resolve underlying differences that may lead to further conflicts. Nevertheless, in some cases, where federal and state interests are adverse and compromise is infeasible, then such an approach may be the best alterna-

255. *See supra* notes 218-23 and accompanying text.
256. Linser Letter, *supra* note 218.
257. *Id.*

tive. It allows the respective federal and state agencies to maintain their positions, but avoids the conflict that would otherwise result. Such an approach relies on convincing the regulated entities that, despite the federal agency's position, compliance with state law is in their long-term best interests. Such voluntary compliance is uncertain at best, and perhaps should be considered as a temporary resolution, while efforts at more permanent solutions are sought. This is especially so because, from the federal agency's perspective, permit conditions would essentially have to be viewed as unenforceable.

B. Litigation

Litigation is a familiar staple among the tools available to state water managers to resolve conflicts with their federal counterparts. Indeed, while litigation is usually viewed as a last resort, a particular species of litigation, general stream adjudication, is seen as a necessary and desirable action. General stream adjudication enables water rights to be established *inter se*, leading to a settled regime among existing uses. This regime, in turn, facilitates future planning and management.[258]

States have insisted that federal claims be subjected to state court jurisdiction as part of such adjudications, while the federal government has resisted such efforts.[259] After more than a decade of litigation, the states were victorious in this dispute and made clear their intent that such claims be adjudicated in the same forum as all other water right claims in a given stream system.[260] However, resolving the questions regarding the appropriate forum to determine federal claims has not resolved differences concerning the scope of such claims. This proves to be particularly difficult with regard to federal reserved right claims.[261]

For example, in *Cappaert v. United States*[262] the Supreme Court squarely faced the issue of whether the reserved rights doc-

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258. White, *McCarran Amendment Adjudications—Problems, Solutions, Alternatives*, 22 LAND & WATER L. REV. 619, 620 n.2 (1987).

259. *Id.* at 622.

260. *E.g.*, MacIntyre, *Quantification of Indian Reserved Water Rights in Montana:* State ex rel. Greeley *in the Footsteps of San Carlos Apache Tribe*, 8 PUB. LAND L. REV. 33, 58 (1987).

261. *E.g.*, PUBLIC LAND LAW REV. COMM'N, *supra* note 2 at 146-47.

262. 426 U.S. 128 (1976).

trine applied to ground water. Cappaert, a private litigant, drilled wells and began pumping ground water, which in turn resulted in a lowering of the water level in Devil's Hole, a large underground cavern inhabited by an endangered fish species. The federal government brought suit to enjoin the pumping. Seeking to preserve a water level sufficient to maintain the fish, the federal government claimed reserved rights to the ground water in Devil's Hole. The government claimed that Cappaert's pumping should be enjoined accordingly.[263]

The United States argued that the reserved rights doctrine should apply to the ground water in Devil's Hole.[264] On the other hand, Nevada and almost every other western state weighed in on the opposite side.[265] The Ninth Circuit held that the doctrine applied to ground water and enjoined Cappaert from pumping to the extent it would jeopardize the pupfish in Devil's Hole.[266]

When the Supreme Court granted certiorari to review the case, it was assumed that the important issue of whether the reserved rights doctrine applied to ground water was to be considered. Prior to this case, the Supreme Court applied the reserved rights doctrine only to surface water.[267] Nevertheless, to everyone's surprise, the Supreme Court determined that the water in Devil's Hole was actually surface water. The Court, relying in part on principles of Nevada law, held that the federal government could protect its surface rights from depletion resulting from ground water pumping.[268]

Because it was not settled in *Cappaert* or in subsequent cases,[269] this issue was again raised in the recent *Big Horn*[270] liti-

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263. *Id.* at 135.

264. *Id.* at 135-36.

265. *Id.* at 130 n.†.

266. United States v. Cappaert, 508 F.2d 313 (9th Cir. 1974).

267. United States v. Cappaert, 426 U.S. 128, 142 (1976); *see* Note, *Cappaert v. United States: A Dehydration of Private Groundwater Use?*, 14 CAL. W.L. REV. 382, 338-90 (1978).

268. *Cappaert*, 426 U.S. at 142-43.

269. Despite the clear intention of the Court to duck the issue, some commentators argue that the Supreme Court really did what it took considerable liberty to avoid doing. They conclude simply that *Cappaert* broadened the implied reservation doctrine by applying it to ground water and rejected the states' argument that the reservation doctrine was limited to surface water. *E.g.*, W. GOLDFARB, WATER LAW 50 (2d ed. 1988); Smith, *Competition for Water Resources: Is-*

gation in Wyoming. Confronted with precisely the same arguments that were presented in *Cappaert*, the Wyoming Supreme Court held that the reserved rights doctrine did not apply to ground water.[271] An equally divided United States Supreme Court subsequently affirmed the lower court's decision without opinion.[272] Thus, this issue will likely continue to be contested until explicitly settled by the Supreme Court. This experience emphasizes the drawback in attempting to nail down this elusive doctrine in the courts.

The battle over the issue of reserved rights to instream flows in national forests proves that even an apparently clear victory can be slippery. In *United States v. New Mexico*,[273] the United States claimed instream flows on national forest lands for recreation, aesthetic, and wildlife purposes. The Supreme Court denied such claims, siding instead with the states' argument that Congress intended to reserve water rights only for the two primary purposes set forth by the Organic Act of 1897, which created the national forests. These two purposes were to secure favorable conditions of water flows and to furnish a continuous supply of timber for the use and necessities of the people.[274] In so holding, the Court reiterated that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more."[275] The Court further stated that the United States would need to comply with state law to acquire water for purposes other

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sues in Federalism, 2 J. LAND USE & ENVTL. L. 177, 181-82 (1986).

This conclusion, however, simply ignores the language of the opinion. The conclusion apparently rests on the argument that the effect is the same, regardless of whether the water in Devil's Hole is considered surface water or ground water; namely, the private landowner's pumping may be enjoined. However, the distinction made by the Court is vital with respect to the precedent of the case. The case simply does not stand for the proposition that reserved rights attach to ground water. The Court did not address the issue, holding only that reserved rights attaching to surface water can be protected from injury, whether that injury is caused by a diversion of surface water or ground water, a holding which the Court found consistent with principles of Nevada water law.

270. *Big Horn Adjudication, supra* note 247, 753 P.2d 76, *aff'd* Wyoming v. United States, 109 S.Ct. 2994 (1989).

271. *Big Horn Adjudication, supra* note 247, 753 P.2d at 100.

272. Wyoming v. United States, 109 S.Ct. 2994 (1989).

273. 438 U.S. 696 (1978).

274. *Id.* at 718.

275. *Id.* at 700. The court first pronounced this limitation on the scope of reserved rights in Cappaert v. United States, 426 U.S. 128, 141 (1976).

than the primary purposes of the reservation.[276]

The Court's decision was widely seen as a significant narrowing of the reserved rights doctrine and an explicit rejection of claims for instream flows on national forest lands.[277] Nevertheless, a few years later, the United States was again in court claiming instream flows based on "recent advances in the science of fluvial geomorphology," which demonstrated that "minimum instream water flows are necessary to preserve efficient stream channels . . . and 'to secure favorable conditions of water flows.' "[278] Thus, diversions of water within the national forests by private appropriators reduce streamflows and threaten the equilibrium that threatens natural stream channels. A Colorado water court granted partial summary judgment against the United States on the basis of the holding in *United States v. New Mexico* as well as a finding of collateral estoppel.[279]

The United States then appealed to the Colorado Supreme Court, which reversed and remanded for trial. The Colorado Supreme Court held that since it was "not convinced that the federal government, by implication, did not intend to recognize such a[n instream] right so long as it furthers the primary purpose of the Organic Act," the federal government should be allowed to prove its claims.[280] Thus, the consequences which the states feared if the government's claims were upheld in the *New Mexico* case, are again threatened in Colorado because the federal government found a different basis for its argument.

The *Big Horn* case in Wyoming demonstrates another disappointing aspect of litigation. The case began in 1977 and was subsequently divided into three phases. Phase 1 aimed at resolving Indian reserved water right claims. After thirteen years and the expenditure of 8.5 million dollars by the State of Wyoming,[281]

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276. United States v. New Mexico, 438 U.S. 696, 701-03.

277. Note, *Federal Acquisition of Non-Reserved Water Rights, supra* note 232, at 886-89; Johnson, *Reserved Water Rights for Wilderness Area Forest Lands: The Interaction of* United States v. New Mexico *and* Sierra Club v. Block, 9 PUB. L.L. REV. 127, 140 (1988).

278. United States v. Jesse, 744 P.2d 491, 493 (Colo. 1987).

279. *Id.*

280. *Id.* at 502.

281. Telephone conversation between Jane Caton, Wyoming Assistant Attorney General, and Norman Johnson (Apr. 10, 1990) [hereinafter Caton phone conversation]. The other parties in the litigation also incurred substantial expendi-

phase 1 resulted in a 4-4 affirmance by the Supreme Court upholding the 3-2 decision of the Wyoming Supreme Court.[282] Despite this decision, important questions still remain unresolved.[283]

For example, while the Wyoming Supreme Court granted large blocks of water to the tribes, it did so without regard to points of diversion or sources, and did not specify how the water could be used. In this context, Wyoming administrators face many questions in terms of the tribes' water rights.[284] To give the state time to set up a mechanism to carry out the decision on behalf of the tribes, the state and the tribes reached an agreement in which the tribe received payment for deferring certain water uses for the period of one year.[285] Further, all the major parties recognize that negotiations must continue to resolve outstanding questions left unresolved by the courts.[286] Moreover, one issue has resulted in further court proceedings, namely the question of whether the tribes may change their reserved rights from agricultural to instream uses.[287]

As these examples demonstrate, federal and state agencies have expended considerable time, effort, and expense in litigating questions regarding the scope and administration of reserved rights. Yet productive answers have largely eluded them. The fact that the doctrine lends itself to the exercise of creative minds, adds to the problem of resolving the dimensions of the reserved rights doctrine on a case-by-case basis.[288] One example is the federal claim to instream flows to provide flushing flows on national forests in Colorado, notwithstanding the Supreme Court's deci-

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tures, probably equalling those of Wyoming.

282. Wyoming v. United States, 109 S.Ct. 2994 (1989).

283. Caton phone conversation, *supra* note 281.

284. Fassett Address, *supra* note 247.

285. *Id.*

286. *Id.*; *see also* Address by John Washakie, Chairman of the Shoshone Business Council, Meeting of the Legal Comm. of the Western States Water Council (July 13, 1989) (included as part of the minutes on file at the Western States Water Council office).

287. *In re* General Adjudication of All Rights To Use Water in the Big Horn River System and All Other Sources, No. 4993 (Wyo. 5th Jud. Dist., Oct. 4, 1990) (reprint and recommendations of Special Master).

288. *See* F. TRELEASE, *supra* note 129, at 111-38; Address by Ralph Tarr, Solicitor, U.S. Dep't of the Interior, Western States Water Council Quarterly Meeting (Jan. 13, 1989) [hereinafter Tarr Address] (included as part of the minutes on file at the Western States Water Council office).

sion in *New Mexico*. Some have proposed that reserved rights also be claimed for purposes of energy development on federal lands.[289] One commentator asserts that implementation of the Endangered Species Act in the West resulted in creation of related federal "regulatory property rights" in water that would vest in the federal government for the protection of endangered species.[290] Congress has neither made, nor has any court upheld, such claims. However, the persistence of such arguments testifies not only to the imagination of law professors and the federal bar, but also to the vagaries of the judicially created doctrines that underlie federal claims to water rights in the West.[291]

Thus, federal claims to water have provided fertile ground for conflict and litigation. Since Congress has become reluctant to enter the fray,[292] it seems probable that litigation involving federal-state relationships in water resources will continue to be prevalent. However, given the drawbacks that follow from resorting to the courts, other alternatives should be considered.

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289. *See* Tarlock and Fairfax, *Federal Proprietary Rights for Western Energy Development: An Analysis of a Red Herring?*, 3 J. ENERGY L. & POL'Y. 1 (1982).

290. Tarlock, *supra* note 1, at 13. According to Professor Tarlock, western states encourage reliance on this theory by their success in limiting the scope of the reservation doctrine. *Id.* at 15-17. The theory contemplates that appropriate federal agencies would be granted water rights sufficient to assure protection of endangered species, which water rights would be exempt from the substantive requirements of state water law. *Id.* at 26. Such water rights could result in a demand for reservoir releases. *Id.* at 13. Moreover, they could conceivably be transferred for related purposes as are other water rights. Professor Tarlock does not discuss this aspect, but it could be considered a logical consequence of his theory of proprietary rights that would be subjected to state procedural law. Application of this theory would not only override state law, but also conflicting interstate compacts. *Id.* at 24-25.

Assuming federal agencies may take action to prevent the exercise of state water rights which would conflict with the preeminent federal purpose under the Constitution, this result does not lead to a basis for the assertion of property rights by the federal government. *See* White, *The Emerging Relationship Between Environmental Regulations and Colorado Water Law*, 53 U. COLO. L. REV. 597, 619 (1982).

291. *See* Waring & Samuelson, *Non-Indian Federal Reserved Water Rights*, 58 DEN. L.J. 783 (1981).

292. *See* Trelease, *supra* note 232, at 478.

C. *Comprehensive Procedures To Enhance Coordination and Consultation Between Federal and State Agencies*

Urging fundamental and comprehensive changes in federal-state relationships has historically been an unproductive effort. George Busbee, former Governor of Georgia, speaking to other governors said, "Begging Congress or the Administration to pay attention to federalism is, in my opinion, a waste of time. Governors and legislators are not treated much differently from the 'National Association of Ball-Peen Hammer Producers,' - except that [they] have a PAC and you don't."[293]

Despite Governor Busbee's advice, governors attending the 1988 National Governors' Association meeting responded to the call of their chairman, John Sununu, when he asked for a return to federalism and a new division of authority between federal and state governments.[294] One governor urged the establishment of a constitutional convention to restore states' rights and the Association released a list of recommendations calling for relief from 163 different federal rules and regulations.[295]

Experience in the area of western water laws and policies mirrors the history of federal-state relationships in many other areas. The federal budget crisis led the federal government to reduce financial support for western water development and protection.[296] One example is the phasing out the construction grants program for sewage treatment plants.[297] Other examples include the federal retreat from financing water development projects, with the concomitant insistence on state and local financing and cost sharing,[298] and the federal refusal to appropriate money for the nonfederal dam safety programs[299] or to maintain its financial

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293. Salt Lake Tribune, Feb. 22, 1988, § A, at 2.

294. *Id.*

295. *Id.*

296. Jeffreys, *How Markets for Water Would Protect the Environment*, in HERITAGE FOUNDATION STATE BACKGROUNDER 3 (1989).

297. *Id.*

298. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, ASSESSMENT '87 . . . A NEW DIRECTION FOR THE BUREAU OF RECLAMATION 1 (1987).

299. Letter from Robert K. Dawson, Associate Director for Natural Resources, Energy and Science, to Craig Bell (Oct. 2, 1987) (on file at the Western States Water Council office).

commitment to basic water data collection.[300] These changes have resulted in a shift of greater responsibility to the states. In turn, states have enhanced their water policy and planning processes to assume what have traditionally been federal responsibilities.[301]

As this trend continues, the opportunities for state initiative and innovation could resolve many of the challenges presented.[302] However, while significantly reducing financial support, the federal government expanded the exercise of its regulatory muscle.[303] This threatens to debilitate the states in their new responsibilities and to stifle the initiative and innovation that states are uniquely suited to apply to current problems.[304]

One commentator describes the prospects as follows:

> Given prevailing constitutional, political, and fiscal trends, states and localities may eventually confront the worst of all possible worlds. In the past the Supreme Court protected them from excessive federal incursions, and federal influence came mostly through grants and subsidies. Now that those political and legal defenses have eroded and federal budget constraints have grown, federal mandates and preemption may become the principal form of intergovernmental interaction.
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> What is described as the new cooperative federalism may even prove to be more akin to cooptive federalism.[305]

Thus, the governors called for relief from so many federal laws and regulations.[306]

While it may be difficult to change existing laws and regula-

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300. WESTERN STATES WATER COUNCIL, 1989 ANNUAL REPORT 36-37 (1990).

301. *See* R. SMITH, TRADING WATER: AN ECONOMIC AND LEGAL FRAMEWORK OF WATER MARKETING 1-3 (1988); STATE WATER PLANS: SIXTH ANNUAL WESTERN STATES WATER COUNCIL WATER MANAGEMENT SYMPOSIUM PROCEEDINGS (T. Willardson ed. 1989). Decreased federal assistance is not, of course, the only reason for states assuming greater responsibility. For a discussion of this trend, see authorities cited *supra* note 1.

302. Begley, Hager, Wright, Springen, Hutchison, de la Pena & Murr, *supra* note 78, at 70-72.

303. *See* Getches, *supra* note 1, at 13; Association of State and Interstate Water Pollution Control Administrators, Clean Water Act: State Program Management Needs—Fiscal Years 1988-1992 (1989) (on file at the Association of State and Interstate Water Pollution Control Administrators' office).

304. *See* Getches, *supra* note 1, at 14.

305. Conlan, *Federalism After Reagan*, 6 THE BROOKINGS REVIEW 30 (1988).

306. *See* Salt Lake Tribune, Feb. 22, 1988, § A, at 2.

tions, it should be feasible to improve coordination and consultation between federal and state governments. This in itself would do much to resolve many of the conflicts that have developed in a process where state officials are confronted with an attitude that they are little more than another special interest group before federal agencies.[307] The Federal Energy Regulatory Commission (FERC) has displayed the clearest examples of this attitude.[308] However, FERC does not stand alone in this regard. Other examples may be illustrative.

Section 404 of the CWA requires a permit from the Army Corps of Engineers for water projects affecting wetlands.[309] As previously described in this Article, numerous conflicts have developed between the Corps and project developers with respect to conditions included in these permits that inhibit developers' abilities to exercise state granted water rights.[310] Moreover, the permit process itself sometimes frustrates the ability of the state to make decisions regarding projects which are subject to section 404 scrutiny. Governor Romer of Colorado made the following comment about the process in the context of the Two Forks Project near Denver:

> (I am) placed in the decisionmaking chain, but only with the authority to recommend approval or denial of the specific project

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307. *See* Elving, *They're Really Listening in the White House Office of Intergovernmental Affairs*, GOVERNING, December 1989, at 22; Conlan, *supra* note 305, at 29. Conlan concludes that the ability of state and local governments "to defend their interests . . . had reached a low point" at the time of the Supreme Court's 1985 decision in Garcia v. San Antonio Metropolitan Transit System, in which the Court held "that it would no longer adjudicate disputes pitting Congress' power to regulate interstate commerce against claims of state sovereignty." *Id.* at 28. He further states:

> During the past three decades state and local governments have greatly increased the size and sophistication of their lobbying presence in the nation's capital. Over the years, this 'intergovernmental lobby' had its share of important victories, from enactment of general revenue sharing to securing and protecting federal funding for Medicaid. Yet the need to develop such a lobbying presence, in part to compensate for the political changes described above, may well constitute a sign of weakness rather than strength. Given the doubling of all interest groups in Washington since 1960, the state and local sector has, at best, only kept pace with its frequent competitors.

Id. at 29.

308. *See supra* notes 137-69 and accompanying text (§ III(C)(1)).

309. 33 U.S.C. § 1344 (1988).

310. *See supra* text accompanying notes 207-15.

> (permit) . . . That process does not give me the authority to change the recommended solution and to see that it happens. I would have no hesitancy . . . to take an alternative approach . . . But I do not have that power . . . This decision should be a Colorado decision, not a federal decision . . . .[311]

States have also been disappointed in their role under section 518 of the Clean Water Act (CWA), which allows Indian tribes to be treated as states for certain purposes under the CWA.[312] This program was accompanied by the congressional requirement that EPA, in promulgating regulations implementing the section, consult with affected states sharing water bodies with Indian tribes. Congress also required EPA to provide a mechanism for the resolution of any unreasonable conflict that may arise as the result of the states and Indian tribes setting different water quality standards on common bodies of water.[313] The states periodically remind EPA of its responsibility to consult with them. Such consultation is important in light of the potential effects of the implementation of this program, particularly on the many reservations which contain substantial non-Indian populations within their exterior boundaries.[314]

In response to expressions of state concern, EPA designated an additional state representative to provide input to one of the working groups drafting section 518 regulations. This meant that three state officials were involved in one of the four section 518 work groups.[315] States also had the opportunity to review and comment on draft rules, as proposed in the *Federal Register*.[316] Finally, EPA sponsored two meetings and invited the states and tribes to attend, thereby providing an opportunity for input. EPA felt that these efforts went beyond the statutory requirements of section 518 and that the agency's consultation efforts "have been

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311. *Quoted in* Western Governor's Ass'n, White Paper on Federal Water Policy Coordination 9 (May 11, 1989) (unpublished paper prepared for the Western Governors' Association, on file at the Western States Water Council office).

312. 33 U.S.C. § 1377(a).

313. 33 U.S.C. § 1377(b).

314. *E.g.*, WESTERN STATES WATER COUNCIL, 1987 ANNUAL REPORT 40 (1988).

315. Letter from Rebecca Hanmer, EPA Acting Assistant Administrator for Water, to Craig Bell (Sept. 29, 1988) [hereinafter Hanmer Letter] (on file at the Western States Water Council office).

316. *Id.*

adequate and appropriate."[317]

The states' response maintained that the statutory requirement to "consult affected states" in promulgating regulations meant something more than the participation by three state officials in one of the four section 518 work groups.[318] Likewise, it meant something more than allowing the states the usual opportunity to comment on draft rules proposed in the *Federal Register*.[319] Similarly, the states felt that the meetings came too late in the process to afford meaningful input. The states therefore reiterated their request that, in accordance with section 518, EPA take steps necessary "to consult all states affected by the treatment of Indian tribes as states under the Act."[320]

It is no surprise that EPA and the states would have widely different views as to what constitutes sufficient consultation with the states. Yet this divergence of views should not be passed over lightly. States have valuable experience in assuming delegation of programs under the CWA.[321] That experience would have been useful in promulgating regulations for Indian tribes to assume such delegation. Further, given the potential for real conflicts, it would have been in the interest of everyone, including EPA, to maximize the opportunities for consultation with the states and tribes, rather than to minimize them.

The above are but a few examples which underscore the fact that communication between federal agencies and their nonfederal counterparts is often inadequate, and often occurs after too much momentum has been built towards a policy decision.[322] George O. Griffith of the While House Intergovernmental

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317. *Id.*

318. WESTERN STATES WATER COUNCIL, 1988 ANNUAL REPORT 33 (1989).

319. *Id.*

320. WESTERN STATES WATER COUNCIL, *supra* note 314 at 40.

321. For a list of dates when states received approval for delegation, see 3 R. CLARK, *supra* note 6, at 381-82.

322. Elving, *supra* note 307, at 24; Western governor's Ass'n, *supra* note 311, at 9-10. In fairness, we should note that state governments have been criticized for failing to adequately consult with federal agencies:

> Federal agencies are obviously important actors in water management in Colorado and in other states, and clearly state governments do not exercise overall primacy, nor are they able to coordinate federal agencies. In spite of the importance of federal agencies, they are often left out of state government planning and problem-solving exercises. There is little overall

Office recently put it this way: "The more difficult job is moving [participation by state and local officials] back in the process, penetrating policy development early enough to really make a difference. . . . When the decision's been made is a terrible time to try to do anything."[323] To correct this situation, comprehensive and fundamental changes in the states' role in the development and implementation of federal policies must be affected.

The Reagan Administration made an attempt to do so by way of an executive order issued October 28, 1987. The preamble stated its purpose: "to restore the division of governmental responsibilities between the national government and the states that was intended by the framers of the Constitution."[324] It was to affect "regulations, legislative comments, or proposed legislation and other policy statements or actions that have substantial direct impacts on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."[325]

To avoid preemption and to foster state administrative discretion to the extent permitted by law, executive departments and agencies were to follow certain criteria when formulating and implementing policies with federalism implications.[326] For exam-

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recognition of federal agency roles in some, but not all, state government forums. The resulting disorder is expensive and disruptive. Providing the intergovernmental coordination needed for local-state-federal water management actions is one of the principal challenges facing the nation today in water resources management.

Grigg, *Adapting to Federalism in Water Management*, COLORADO WATER, March 1990, at 2.

323. *Quoted in* Elving, *supra* note 307, at 24.

324. Exec. Order No. 12,612, 3 C.F.R. 252 (1987).

325. *Id.* at 253.

326. The order provided the following guidelines: (1) to the extent practicable, the states should be consulted before any action was implemented which might limit the policy making discretion of the states; (2) federal action limiting such policy making discretion should be based on clear constitutional authority and address problems of national scope; (3) with respect to national policies administered by the states, the national government was to grant the states the maximum administrative discretion possible; (4) when undertaking to formulate and implement policies that have federalism implications, executive departments and agencies were to encourage states to develop their own policies to achieve program objectives, refraining from establishing uniform national standards, instead deferring to states. *Id.* at 254.

The order also set up special requirements prerequisite to the preemption of

ple, national standards were to be avoided. When national standards were required, consultation with appropriate officials and state organizations was to take place in developing those standards.[327]

The order further specified that when an agency proposed to act through adjudication or rule making to preempt state law, the department or agency "shall provide all affected states notice and an opportunity for appropriate participation in the proceedings."[328] The order also set up special requirements for legislative proposals designed to avoid preemption of state law.[329] In the area of agency implementation, the order required appropriate officials to determine which proposed policies had sufficient federal implications to warrant the preparation of a "federalism assessment." Upon such a determination, an assessment was required to accompany any submission concerning the policy that was made to the Office of Management and Budget (OMB).[330] The assessment must identify the extent to which the policy imposed additional costs or burdens on the states, including the likely source of funding for the states and the ability of the states to fulfill the purpose of the policy. It must also identify the extent to which the policy would affect the state's ability to discharge traditional state government functions. Finally, the executive order required the OMB to take such action as necessary to ensure that the policies of the executive departments were consistent with the order. In the last paragraphs of the order, it specified that the order was intended only for the internal management of the executive branch and did not create any right or benefit enforceable by law against the United States.[331]

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state law based on the fundamental requirement that such preemption only be exercised when the statute contained an explicit preemption provision, or where that result was compelled according to firm evidence, or when the exercise of state authority directly conflicted with the exercise of federal authority. Any regulatory preemption of state law was to be restricted to the minimum level necessary, and as soon as the executive department foresaw the possibility of a conflict between state law and federally protected interests, then that agency was required to consult, to the extent practicable, with appropriate officials and organizations representing the states in an effort to avoid such a conflict. *Id.* at 255.

327. *Id.* at 254.

328. *Id.* at 255.

329. *Id.*

330. *Id.* at 255-56.

331. *Id.* at 256.

It subsequently became clear that the agencies themselves were not about to voluntarily submit to this imposition. When the order was brought to the attention of the EPA officials responsible for implementing section 518, they had no knowledge of the order, and declined to prepare an assessment, despite the section's clear implications with regard to the states' governing powers within their borders.[332] The order therefore provided only brief encouragement to the states.

Given the resistance by federal agencies to such an approach, correction of the imbalance will require something stronger than an unenforceable executive order. Relying on the voluntary efforts of federal agencies to consult with states proves to be largely fruitless. Moreover, the current requirements for consultation are inadequate in this regard. However, unless states are brought into the process as policies are being developed, and before the momentum towards a policy decision has gone too far, hopes are in vain for improvement in basic federal-state relationships.

D. Enacting and/or Amending Federal Laws

Another way to resolve conflicts between federal and state laws is to pass federal laws which remove the basis for the conflicts. However, from the states' perspective, the history of attempts to enact such laws is not encouraging.

As discussed in the background Section of this Article, a series of federal land laws reflected congressional deference to state law in the acquisition of water rights associated with western settlement. When Congress passed its major program of storage and distribution of water, the Reclamation Act of 1902, the United States became a water user. Section 8 stated that the Secretary of the Interior would "proceed in conformity with" the laws of the states "relating to the control, appropriation, use, or distribution of water use in irrigation."[333] Subsequently, many related acts carried essentially the same provision.[334]

Agencies of the federal government also complied with state laws as a matter of policy.[335] For example, the National Park Ser-

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332. *See* Hanmer Letter, *supra* note 315.
333. 43 U.S.C. § 383 (1988).
334. F. TRELEASE, *supra* note 129, at 77.
335. *Id.* at 78.

vice acquired all of its water rights under state law, although not instructed by statute to do so.[336] In addition to directing settlers and developers to resort to state law for acquisition of water rights, Congress also protected vested water rights acquired under such laws. As a result of such provisions in federal laws, western congressional delegations felt secure that they had protected the authority of states to determine water uses within their borders. Furthermore, water rights created pursuant to that authority would not be threatened by federal actions.

However, the Supreme Court, in the *First Iowa* case,[337] accomplished a free-handed construction of statutory language by determining that provisions in the FPA only required the applicant to show evidence, satisfactory to the Federal Power Commission, of steps taken to secure state approval. Actual compliance was necessary only with regard to those laws that the Commission considered to be consistent with the purposes of the federal license. The Court found that a dual system regulating power projects would be cumbersome and complicated, and that a state could undermine the effectiveness of the federal act.[338] This ruling was recently reaffirmed by the Court in the so-called *Rock Creek* case arising in California.[339] The Federal Energy Regulatory Commission relies on these Supreme Court decisions for its position that applicants need not comply with state law, resulting in numerous conflicts with state water law.[340]

Initially, the savings clauses contained in the Reclamation Act met the same fate. In *Fresno v. California*,[341] the Supreme Court in dicta stated:

> Section 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others . . . . Rather, the effect of Section 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made.[342]

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336. *Id.*

337. First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946).

338. F. TRELEASE, *supra* note 129, at 83.

339. California v. Federal Energy Regulatory Comm'n, 110 S.Ct. 2024 (1990).

340. *See supra* notes 136-69 and accompanying text (§ III(C)(1)).

341. 372 U.S. 627 (1963).

342. *Id.* at 630.

In a companion case, *Dugan v. Rank*,[343] water right holders, whose water was captured by a project dam, were informed that the only remedy available was a suit for money damages. Together, these two cases so emasculated section 8 that the situation was described as follows:

> The decision empowers the Bureau to seize the water it desires, leaving the state powerless to enforce its laws and leaving private [appropriators] with an action in the Court of Claims. The decision thus reverses 64 years of administrative interpretation and practice.[344]

Savings clauses in other federal laws were similarly construed.[345] However, in a case arising in California, states urged the Supreme Court to reconsider the meaning of section 8 of the Reclamation Act. In *California v. United States*,[346] the Bureau of Reclamation applied to the California State Water Resources Control Board for permits to appropriate water for the New Melones Project. The Board granted the permits, subject to several conditions restricting both the appropriation and distribution of water.[347] The United States sued to overturn the conditions, arguing that according to established case law, the Board had no authority to impose conditions on the federal right to store and use water. The United States prevailed in the district court and before the Ninth Circuit Court of Appeals.[348] However, the Supreme Court granted certiorari and reversed the ruling below. The Court relied on the history of federal-state relations, which demonstrated a "purposeful and continued deference to state water law by Congress,"[349] the Court concluded that Congress intended this policy of deference to be incorporated in the Reclamation Act by enacting section 8. Under that section, state law applied in two ways:

> First . . . the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law

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343. 372 U.S. 609 (1963).

344. Meyers, *The Colorado River*, 19 STAN. L. REV. 64 (1966).

345. *See* F. TRELEASE, *supra* note 129, at 85.

346. 438 U.S. 645 (1978).

347. United States v. California, 694 F.2d 1171, 1173, 1182-85 (9th Cir. 1982) (excerpts from California State Water Resources Control Bd. Decision 1422).

348. United States v. California, 403 F. Supp. 874 (E.D. Cal. 1975), *aff'd with modification*, 558 F.2d 1347 (9th Cir. 1977), *rev'd sub nom.*, 438 U.S. 645 (1978).

349. California v. United States, 438 U.S. 645, 653 (1978).

> . . . . Second, once the waters were released from the Dam, their distribution and individual landowners would again be controlled by state law."[350]

However, the Court qualified its holding by stating that state law cannot be applied if it is contrary to "clear congressional directives."[351]

In the wake of *California v. United States*, several courts upheld specific state laws which apply to federal reclamation projects, particularly in California.[352] California's attorney in the case said:

> [T]he main impact of the *California [v. United States]* decision may be in resolving the major jurisdictional dispute between federal and state water agencies, thus allowing these agencies to concentrate on increasing the efficient utilization of the West's sparse water resources. Indeed, in California itself, federal and state agencies have agreed on coordinated operation of the federal and state projects.[353]

He notes, however:

> [T]his is not to suggest that all federal/state conflicts have ended and that no differences remain. To the contrary, much has yet to be decided. The courts have yet to fully clarify the kind of congressional "directives" that will be held to preempt state laws under the *California [v. United States]* decision.[354]

California v. United States not only constituted a major victory for the reclamation states, but also gave them hope that similar provisions in other federal statutes might be reinterpreted in light of the Supreme Court's decision. This hope supported the successful effort of the states in urging the Supreme Court to review the *Rock Creek* case. Now that the Court has ruled against the states on the merits, proposed legislation has been introduced to remedy the situation.[355]

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350. *Id.* at 665-67.

351. *Id.* at 672-78.

352. Walston, *Federal-State Water Relations in California: From Conflict to Cooperation*, 19 PAC. L.J. 1299, 1320 (1988).

353. *Id.*

354. *Id.*

355. *See* 132 CONG. REC. S4449 (daily ed. Apr. 17, 1986) (remarks of Sen. Baucus).

However, as states move to secure a legislative remedy, they will do well to remember the experience in the area of reserved rights. Soon after the federal government threatened to apply the reserved rights doctrine to non-Indian lands, western delegations reacted by introducing legislation to reverse the doctrine.[356] Between 1956 and the publication of the 1971 study by the National Water Commission, fifty such bills had been introduced.[357] However, no congressional or even committee action was ever taken on any of these bills.[358]

The purpose of the bills was to remove the cloud over western appropriations created by the uncertainties of the reserved rights doctrine. It should be noted, however, that these bills did not address Indian water rights, although this application of the doctrine represented the biggest potential for conflicts with western water rights.[359] The federal establishment steadfastly opposed these bills, arguing that reserved rights constituted valuable federal assets which were all the more attractive because of the economic advantage of not having to pay compensation to persons whose rights were impaired by the exercise of such federal rights.[360]

For its part, the National Water Commission in 1973 also recommended the enactment of the "National Water Rights Procedures Act."[361] Seeking to integrate federal water rights and the state water right administration, this Act espoused a basic principle: The United States should be required to adopt a policy of recognizing and using the laws of their respective states relating to the creation, administration, and protection of water rights. This was to be accomplished,

> (1) by establishing, recording, and quantifying existing non-Indian and federal water uses in conformity with state laws, (2) by protecting non-Federal vested water rights held under State law through the elimination of the no-compensation features of the reservation doctrine and the navigation servitude, and (3) by providing new Federal procedures for the condemnation of water rights

356. F. TRELEASE, *supra* note 129, at 130-31.
357. *Id.* at 131.
358. *Id.*
359. *Id.* at 133.
360. *Id.* at 133-34.
361. NATIONAL WATER COMM'N, *supra* note 1, at 461-68.

and the settlement of legal disputes.[362]

Exceptions to this general policy applied in the case of Indian water rights, and where state law conflicts with the accomplishment of a federal program or purpose.[363]

The National Water Commission hoped to establish federal-state partnerships in which federal powers would be protected and state interests would be furthered through integration of federal rights within state administration, and eliminate the no-compensation features of the reservation doctrine. However, no bill was ever introduced based on the recommendations of the Commission.[364] Furthermore, given the history of such generic legislation in the area of federal-state conflicts in water resources, it seems unlikely that such legislation can be successful.

Another approach would be to amend federal laws to address specific areas of conflict. However, here too, success may be elusive.

Section 101(g) of the CWA represented an attempt by Congress to respond to the concerns of western water interests regarding the potential conflicts between environmental laws and state water management. It reads as follows:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is further the policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.[365]

The precise effect of the language of the statute is unclear. However, considering that it is only an expression of policy, this statute does not mean that states are given a veto over federal agency actions otherwise authorized by the CWA.[366] Rather, all other things being equal, federal agencies are encouraged by the provi-

362. *Id.* at 461.
363. *Id.* at 462.
364. *See* Trelease, *supra* note 232, at 483.
365. 33 U.S.C. § 1251(g) (1988).
366. Tarlock, *supra* note 1, at 19.

sion to accommodate state as well as federal objectives in carrying out their respective responsibilities under the CWA.[367]

A similar effort was made in 1982 to amend the Endangered Species Act to include a section similar to that of section 101(g) of the CWA.[368] In the end, Congress chose to impose a duty of cooperation on the Department of the Interior, by stating: "It is further declared to be the policy of Congress that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species."[369]

One commentator suggested that there remains a "slim statutory basis to argue that a federal agency has abused its discretion under the above provisions."[370] However, it seems clear that these statements leave open the possibility that the exercise of state-created water rights may be conditioned upon, or even precluded by federal agencies carrying out their respective responsibilities under these acts.[371]

The current controversy in Congress over water rights for wilderness areas also demonstrates the difficulty of obtaining congressional approval to limit the scope of federal power. This controversy can be seen vividly in the context of the debate over the El Malpais National Monument.

On December 17, 1987, the Senate amended and passed H.R. 403, establishing the El Malpais National Monument in north central New Mexico.[372] On December 18, the House concurred with Senate amendments.[373] On the floor, Senator Jeff Bingaman of New Mexico stated,

> Section 509 of the bill expressly reserves water to fulfill the purposes of the new monument, conservation area, and wilderness area . . . .
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> . . . .
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> Congress . . . intends that the relationship that exists between

367. *Id.*
368. *Id.*
369. 16 U.S.C. § 1531(c)(2) (1988); *see* Tarlock, *supra* note 1, at 19.
370. Tarlock, *supra* note 1, at 19.
371. White, *supra* note 290, at 619.
372. H.R. 403, 100th Cong., 1st Sess. (1987).
373. 133 CONG. REC. H11,763-69 (daily ed. Dec. 18, 1987).

federal and state water law which incorporates the well-settled reserved water doctrine be continued.[374]

Bingaman added,

this reserved water right is subject to valid existing rights, for the doctrine allows only the reservation of waters which are unappropriated at the time of designation, and gives them a priority date of the date of passage of this legislation . . . .

. . . .

[The bill is not intended as] a precedent, nor as indicative of Congress' intent in enacting any other legislation, past or present.[375]

New Mexico's senior Senator, Pete Dominici, confirmed his colleague's interpretation:

This federal water right does not preempt the water law of the State of New Mexico . . . . For instance, the water right would be perfected pursuant to the procedural requirements of the law of the State of New Mexico.

. . . .

[S]ection 509 does not . . . reflect the intent or will of Congress regarding water rights in other wilderness areas.[376]

However, Senator William Armstrong of Colorado argued that the bill

creates the first express Federal reserved water right for wilderness purposes . . . without requiring the Federal Government to go through State water adjudication to perfect the right. Neither the quantity nor the purposes of the Federal water right are defined. In addition, the language imposes federal instream flow rights incongruous with the historic priority water diversion systems of the West. . . .

[H]ow can such a right be incorporated into the State water administration system without major disruption of the existing private water rights?[377]

Senator Armstrong introduced legislation whereby Congress

374. 133 CONG. REC. S18,249 (daily ed. Dec. 17, 1987).
375. *Id.*
376. *Id.* at S18,251.
377. *Id.* at S18,249-50.

would expressly disavow reserved rights for wilderness areas.[378]

The House bill was originally silent on the water rights issue, but Representative Larry Craig of Idaho, among others, urged Congress to address the issue: "Congress and not the Courts, should decide whether various land designations create a federally reserved water right."[379] He referred, however, to quite different language in S. 1675 and S. 1335, which respectively create the Hagerman Fossilbeds National Monument and the City of Rocks National Reserve. Craig pointed out that

> each explicitly specify [sic] that there is no federal water right for the specific land withdrawal from the public domain. Under these bills, if the United States wishes to acquire a water right, it may do so under the substantive and procedural requirements of the laws of the State of Idaho.[380]

Representative George Miller supported approval of the El Malpais bill, but he did not support the water rights language in H.R. 403, which he said is "superfluous," as it only "preserves the status quo."[381] Miller stated:

> This method of recognizing the need for water to fulfill the original reservation purposes is not intended to be a statement by Congress that this is the only method for reserving needed water either for future reservations or in interpreting past designations.[382]

Miller's House Interior Committee previously rejected a water rights amendment to the Montana wilderness legislation similar to the language in H.R. 403.[383] According to Miller, "[n]o existing users of water are threatened by water rights for wilderness because of their relatively late priority date and the fact that by definition they involve no diversion or consumption of water."[384]

Thus, the two senators from New Mexico agreed that the language in question would neither serve as a precedent, nor disrupt state law, while their colleague from Colorado expressed the opposite view. On the House side, one representative urged Con-

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378. S. 2001, 101st Cong., 2nd Sess. (1989).
379. 133 CONG. REC. H11,767 (daily ed. Dec. 18, 1987).
380. *Id.*
381. *Id.* at H11,768.
382. *Id.* at H11,769.
383. *Id.*
384. *Id.*

gress to deal explicitly with the issue of reserved rights, while another thought it entirely superfluous to do so. It is likely that this diversity in congressional thinking regarding the issue of reserved rights for wilderness areas also would attend any proposal for legislation to resolve conflicts in federal-state relationships in water resources. Thus, such legislation would be difficult to attain and could well be counterproductive in the process. Case-by-case negotiation and compromise may be a more viable alternative.

E. Amending State Law

If federal legislative solutions are out of reach, amending state laws is another way to avoid areas of conflict. Frank Trelease, who authored a 1971 study and recommendations for the National Water Commission, urged the Commission to adopt the following recommendation to the states: "To promote cooperation and comity in the field of federal-state relations in the law of water rights, they should . . . improve state water law to eliminate federal objections and make it suitable for use by the federal government and adequate to accomplish federal purposes."[385] This appears to be the only recommendation forwarded by Trelease which has been implemented.[386]

The Commission's report, published in June 1973, found that "state laws in many instances are inadequate to protect important social uses of water."[387] Specifically, the Commission concluded that "appropriation doctrines of the West make it virtually impossible . . . to preserve instream values."[388]

Whatever may be said regarding the merits of these statements at the time, they clearly are not true now.[389] Legal mechanisms now exist in virtually every state to protect the public interest in the allocation and use of water resources, and enable establishment and maintenance of instream flows.[390] Moreover, states act in numerous ways to facilitate transfers of water rights

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385. F. TRELEASE, *supra* note 129, at 234.

386. All of the other recommendations pertained to enactment of a "National Water Rights Procedures Act." No bill was ever introduced based on the proposed act. *See supra* notes 361-64 and accompanying text.

387. NATIONAL WATER COMM'N, *supra* note 1, at 278.

388. *Id.* at 271.

389. Grant, *supra* note 11, at 717.

390. *See supra* notes 33-68 and accompanying text (§ II(B)(2)).

to enhance efficiency in the use of existing supplies.[391] Most states also require consideration of the public interest in determining whether to approve a transfer.[392] These laws have repeatedly been used to recognize interests expressed in federal laws.[393]

Although several commentators acknowledge this evolution in state water law and policy,[394] it is often not recognized by proponents of federal interests. For example, one Justice Department attorney concludes:

> The states have greeted the federal government's requests for water with very little favor. Several states have demonstrated their distrust of the federal government by narrowly interpreting state law to deny legitimate acquisitions.[395]

She adds that: "Rather than respond to the merits of the federal government's applications for water on a case-by-case basis, the states would rather react with wild accusations and allegations of a federal take-over."[396]

The federal attorney cites two cases to support these conclusions. However, in one of the cases, the state engineer granted the federal claims, even though the attorney general opposed them. More importantly, in both cases the state's supreme court upheld the federal claims.[397] In contrast to these two dubious examples of states' resistance to federal claims, many other examples of cooperation and accommodation could be cited.[398] Rather than basing

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391. *See supra* notes 69-77 and accompanying text (§ II(B)(2)).

392. 1 R. CLARK, *supra* note 6, at 169.

393. *See, e.g.*, State v. Morros, 766 P.2d 263 (Nev. 1988); United States v. Jesse, 744 P.2d 491 (Colo. 1987); Trelease, *Uneasy Federalism—State Water Laws and National Water Uses*, 55 WASH. L. REV. 751, 771-72 (1980); Grant, *supra* note 11, at 711, 717.

394. *See e.g.*, 1 R. CLARK, *supra* note 6; Grant, *supra* note 11.

395. Dunn, *supra* note 5, at 1324.

396. *Id.* at 1337.

397. *Id.* at 1328; State v. Morros, 766 P.2d 263 (Nev. 1988); *In re* Matter of Hallett Creek Stream Sys., 44 Cal. 3d 448, 749 P.2d 324, 243 Cal. Rptr. 887 (1987), *cert. denied* 109 S. Ct. 71 (1988).

398. *See, e.g.*, Walston, *supra* note 352. As a further example, the Director of the Alaska Department of Natural Resources writes as follows:

> In Alaska under AS 46.15.145(a) agencies of the United States are allowed to file for state instream flow water rights. This statute was written expressly to allow the federal government to participate in the instream flow reservation process. The Bureau of Land Management (BLM) filed an application for instream flows for the Beaver Creek Wild and Scenic River

decisions on fact or experience, it is suggested that this attitude reflects earlier sentiments "that only federal executives and judges are to be trusted with the determination and protection of federal property."[399] This attitude may explain the U.S. Justice Department's long fight to prevent state courts from adjudicating reserved rights within state court systems. The results so far clearly show that this attitude was and continues to be unwarranted.[400]

The western states are well aware that it is in their interest to accommodate legitimate federal interests in water resource management. It is clear that failure to do so risks federal preemption.[401] For example, the Solicitor of the Department of the Interior, in discussing his opinion that Congress did not intend to reserve water for wilderness areas pursuant to the Wilderness Act, stated in a recent speech that he hoped states would facilitate acquisition of water for wilderness areas.[402] Speaking particularly to recognition of instream flows for wilderness purposes, he said: "That situation is going to be played out in the very near future and tension will arise to the extent that the purposes of a federal reservation, as Congress may see them, cannot be advanced, because water cannot be acquired under state water law."[403] He cautioned the states not to overplay the hand dealt to them by his decision. Such action would "forc[e] Congress to step in and de-

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and the Department of Natural Resources has granted that instream flow reservation. BLM has told us that it expects to continue to use the state instream flow law and this past summer invited DNR staff to assist its hydrologists in field data collection for the Delta River. We believe this coordinated effort is a good way to integrate instream flow needs of the federal government.

Letter from Gary Gustafson, Director of the Alaska Dep't of Natural Resources, to Craig Bell (Nov. 7, 1989) (on file at the Western States Water Council office).

399. F. TRELEASE, *supra* note 129, at 255.

400. *See, e.g., Big Horn Adjudication, supra* note 247, 753 P.2d 76; address by John Washakie, Chairman of the Shoshone Business Council, Meeting of the Legal Comm. of the Western States Water Council (July 13, 1989) (describing the *Big Horn* case as a major victory by the tribes) (included as part of the minutes on file at the Western States Water Council office); United States v. Jesse, 744 P.2d 491 (Colo. 1987) (allowing federal claim for instream flows on national forests); State v. Morros, 766 P.2d 263 (Nev. 1988) (upholding federal claims to water for wildlife).

401. *E.g.*, MacDonnell, *supra* note 207, at 411.

402. Tarr Address, *supra* note 287.

403. *Id.* at 14.

cide these issues at the federal level."[404]

In his discussion, Solicitor Tarr recognized that both sides tend to overplay their hands at times. He acknowledged that

> [w]e have a few departments in the federal government that get quite interested in the game of how much more water can be acquired, what new theories can be provided to take water for our side. I must say that I see that from some of your state interests at times as well.[405]

This kind of balanced perspective seems vital in improving federal-state relationships. In the contest over jurisdiction to allocate a scarce resource, conflicts will continue to arise and games will be played on both sides. However, federal representatives should recognize that the rules of the game have been changed, so that the interests they seek to protect can be accommodated under state law.

This is not to say that state law is perfect. Some states have gone further than others in their methods to protect the public interest. However, objective observers must concede that the trend toward such protection has been established and will continue.[406] There is considerable public support for protecting instream values, and that support will grow and continue to express itself in state forums.

At the same time, federal interests must not expect more than a level playing field. Their claims should receive the same scrutiny as do those of other claimants. In those instances where legitimate federal interests cannot be accommodated under state law, changes in state law should be considered. However, the ability to accommodate federal interests does not equate to a willingness to uphold all federal claims of interest. Nevertheless, if federal representatives can forget past attitudes and recognize the opportunities now afforded them under state law, a great many conflicts in federal-state relationships can be avoided.

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404. *Id.* at 15.

405. *Id.* at 11.

406. Grant, *supra* note 11, at 717.

F. *Agreements Regarding Implementation of Specific Federal Laws and Programs*

Where conflicts between federal and state interests exist, negotiated agreements can avoid potentially lengthy and expensive litigation, as well as the arduous and uncertain process of amending the law. This is not to say that such negotiations cannot also be time-consuming and expensive. But such negotiated agreements can provide tailor-made solutions that are agreeable to all the parties, a result difficult to achieve through litigation or the legislative process.

Parties in Indian water right disputes have increasingly recognized the advantages to such agreements.[407] Recent successful efforts encourage others to pursue this approach.[408] Although future settlements may prove more difficult in light of increasing pressure on federal budgets and western water resources, such efforts should be commended.[409]

A controversy over implementation of the Endangered Species Act in the Upper Colorado River Basin also resulted in a negotiated settlement of differences.[410] The parties reached an agreement to protect endangered species while allowing water development in the Upper Basin. The chief executive officers of the Department of the Interior, Western Area Power Administration, and the States of Colorado, Wyoming, and Utah signed the agreement on January 21, 1988.[411] It provided for a fifteen year recovery program consisting of a broad range of measures designed to protect endangered and threatened fish. These programs were to be funded by federal appropriations, state contributions, and a one-time, ten-dollar per acre-foot surcharge levied on new water uses.

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407. *See* P. SLY, *supra* note 252, at 12.

408. *See id.* at 25-33.

409. The Western Governors' Association and the Western Regional Council have taken an active role, together with the Native American Rights Fund, the National Congress of American Indians, and the Council of Energy Resources Tribes, in encouraging the federal government to implement reserved rights settlements. *Id.* at 25 n.1.

410. U.S. Dep't of the Interior, Press Release (Cooperative Agreement for Recovery Implementation Program for Endangered Species in the Upper Colorado Basin, Jan. 21, 1988) (copies on file at the Western States Water Council office).

411. *Id.*

The collected money would be used to purchase state water rights to maintain instream flows for the fish and other conservation activities, including construction of fish passageways and hatcheries for native fish stocking.[412] Other elements of the recovery program involve development and maintenance of non-flow habitat; control of non-native species and sport fishing; and research, data management and monitoring activities.[413]

In signing the agreement, Secretary of the Interior Hodel said: "By working together on this problem, we have overcome a major hurdle in the road to recovery of the species. With this recovery program, the needs of the fish will be identified and met while still allowing water development interests to proceed."[414]

Colorado Governor Romer added: "This landmark agreement should serve as a model of what can be accomplished when groups with differing philosophies look for ways to solve a common problem without sacrificing either environmental quality or economic growth."[415] It remains to be seen whether the agreement will fulfill the promise identified by these two public officials.[416] However, given the history of conflict and acrimony in the Upper Basin regarding this issue, the agreement was a major step forward.

A cooperative approach also resulted in an agreement between the State of North Dakota and United States Department of Interior, concerning the acquisition of land by the U.S. Fish and Wildlife Service (FWS) for a migratory bird habitat.[417] The January 1987 agreement states that its purpose is to establish "a cooperative and mutually supportive relationship."[418] This agree-

412. *Id.*
413. *Id.*
414. *Id.*
415. *Id.*
416. According to Jennifer Hager, an attorney for the State of Wyoming, the U.S. Fish and Wildlife Service is insisting on greater mitigation than that required by the agreement in connection with the proposed construction of Sandstone Reservoir in the Upper Colorado River Basin. She cites demands for instream flows and reservoir releases to assure protection beyond state borders, although the state has no jurisdiction beyond its boundaries. Hager Letter, *supra* note 194.
417. North Dakota and U.S. Fish and Wildlife Service Agreements (Jan. 13, 1987) [hereinafter North Dakota Agreements] (on file at the U.S. Fish & Wildlife Service Regional Director's Office in Lakewood, Colorado).
418. *Id.* The agreement expired on July 1, 1989. North Dakota and the Fish

ment supplemented an earlier agreement which established the terms and conditions for the Governor's approval of the "North Dakota Migratory Bird Habitat Acquisition Plan."[419] The 1987 agreement further states:

> This agreement is intended to launch a new partnership between North Dakota and the [FWS] to improve the development, management and protection of water and wetland resources within North Dakota. This agreement signifies a good faith and vigorous effort to end the institutional and political conflicts over wetland acquisition and management programs. This agreement attempts to resolve specific wetland acquisition and management issues which have been in conflict, so that future wetland acquisition and management programs can proceed with mutual support . . . .
>
> This agreement also recognizes that the water development and wetland preservation activities must be balanced to protect and accommodate North Dakota's agricultural, water, and wildlife resources. This agreement, therefore, is intended to establish the terms, conditions and mechanisms by which mutual cooperation can be established.[420]

The State of Wyoming took a similar approach.[421] However, a different experience resulted in Texas from the acquisition of land by the FWS for a migratory bird habitat.[422] Indeed, the Texas experience represents the antithesis of the cooperative approach adopted in Wyoming and North Dakota.[423]

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and Wildlife Service are in the process of negotiating another agreement. Letter from Patrick K. Stevens, North Dakota Assistant Attorney General, to Craig Bell (Feb. 9, 1990) (on file at the Western States Water Council office).

419. North Dakota Agreements, *supra* note 417.

420. *Id.*

421. WYO. STAT. § 23-1-106 (1977).

422. *See supra* notes 224-31 and accompanying text (§ III(C)(5)).

423. Not all potential conflicts with the Fish & Wildlife Service are covered in the North Dakota Agreements. An Assistant Attorney General for the North Dakota writes:

> The Fish and Wildlife Service has also demonstrated a willingness to acquire easements in attempts to halt projects which are sponsored by the state or by the local entity. In two cases, Hurricane Lake and White Spur, the Fish and Wildlife Service obtained easements along the proposed line of the project. In the Hurricane Lake case, the Fish and Wildlife Service actually purchased an easement on the outlet of a proposed flood control project. Because it was necessary for the project to go through the easement, the Fish and Wildlife Service was able to exact mitigation and require various conditions upon a solely state and local supported project.

While the FWS acquired the desired lands in Texas for its purposes, the nonmonetary costs seem to be significantly higher than the costs for lands acquired in cooperation with the states of North Dakota and Wyoming. This is especially so if the good will of the state and its subdivisions is considered. Litigation was brought challenging the action of the FWS in Texas.[424] Additionally, bills to reverse the effect of the actions have been introduced in Congress.[425] Efforts to reach a cooperative arrangement with the state and local interests may not have avoided litigation, but they certainly would have increased the chances.

Cooperative agreements have great potential to resolve federal-state conflicts. Considering the adverse effects and the drawbacks of the alternatives for resolving such conflicts, efforts to reach agreements are clearly worthwhile.

V. CONCLUSION

Much of the history involving federal-state relationships in water resources has been based on cooperation and achievement in pursuit of mutual objectives. In most instances, potential conflicts are avoided, even when interests do not coincide. Such cooperation has always been vital in the West, where the federal government is a substantial landowner and water developer. Cooperation is even more vital now, given the substantial federal interest in water resource allocation established by a number of federal environmental statutes. However, it is also true that real conflicts exist, and these conflicts represent a significant obstacle to the kind of intergovernmental cooperation that is necessary to optimize the use of western water resources.[426]

Historically, many of the conflicts centered around the inherent emphasis of the traditional appropriation doctrine on off-

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Letter from Rosellen Sand, North Dakota Assistant Attorney General, to Norman Johnson (Oct. 6, 1988) (on file at the Western States Water Council office).

424. Sabine River Authority v. United States No. TX-87-36-CA (E.D. Tex. Aug. 13, 1990) (LEXIS, Genfed library, Dist file). Summary judgment was granted to the United States. *Id.*

425. H.R. 187, 101st Cong., 1st Sess. (1989); H.R. 188, 101st Cong., 1st Sess. (1989).

426. *See* SCARCE WATER AND INSTITUTIONAL CHANGE 11 (K. Frederick ed. 1986); Walston, *supra* note 352, at 1320; *see generally* authorities cited *supra* note 2.

stream utilitarian uses, and the contrasting federal interest in protecting the environment by preserving instream uses.[427] It is a central point of this Article, however, that the appropriation doctrine has evolved so that federal interests can be accommodated. If this is to occur, federal proponents must recognize that western state water laws are not inimical to instream uses. The movement toward the recognition of such uses began over a half century ago,[428] and today a considerable variety of state authority is available for this purpose.[429] As a consequence, state law provides a variety of opportunities to protect federal interests. Federal officials need not resort to the specter of federal preemption to accomplish federal statutory objectives.

In those few instances where federal interests cannot be accommodated under state law, a process of negotiated compromises resulting in formal agreements is the most desirable conflict resolution approach. Of course, litigation will continue to be a tool available to both federal and state interests, and indeed a necessary tool in settling the rights of the United States in relation to all other water right holders in the stream system through the vehicle of a general stream adjudication. Also, refinements in federal and state statutes may be necessary. Further, if states were elevated from the special interest group status they now occupy in the eyes of most federal agencies, the result would be some across-the-board improvements in federal-state relationships. The most important facet of this increased state role is meaningful consultation with state representatives in the development of federal policies before the momentum towards a decision is practically irreversible.

Many of the instances in which states must bypass federal agencies to urge the involved parties to comply with state law would be avoided through increased sensitivity to state interests by federal agencies implementing their statutory mandates. Fur-

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427. *See* Abrams, *Water in the Western Wilderness: The Duty to Assert Reserved Water Rights* 1986 U. ILL. L. REV. 389 (1986); SCARCE WATER AND INSTITUTIONAL CHANGE 7 (K. Frederick ed. 1986).

428. Trelease, *supra* note 393, at 771; Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on New Public Western Water Rights*, 1978 UTAH L. REV. 211.

429. *See e.g.*, Potter, *The Public's Role in the Acquisition and Enforcement of Instream Flows*, 23 LAND & WATER L. REV. 419 (1988); *see also supra* notes 33-68 and accompanying text (§ II(B)(2)).

ther, federal representation should recognize the state's role in planning for its future. This planning may emphasize economic growth and development, outdoor enjoyment and recreation, or both. It can lead to allocation of water to private uses such as irrigation, manufacturing, and power production; or to public uses for recreation, wildlife habitat, and other environmental values. The basic point is that states should decide the mix, because they are clearly in the best position to balance the various interests competing for use of a limited resource.[430]

If, however, federal representatives choose to pursue their interests in disregard of the states' role, then Frank Trelease's warning is pertinent:

> But if there is real ground for . . . us to fear that 'the Feds' will take our future from us and override our plans and our decisions in the name of single-purpose management of the federal lands, I believe Congress would be willing to say that federal supremacy . . . does not require federal domination of water to the exclusion of state desire for multiple-purpose development.[431]

Neither federal nor state domination of water to the exclusion of the other should be necessary. Abundant opportunities exist whereby the interests of both can be protected and enhanced. This should be the goal of both federal representatives and state water managers. To do otherwise would ignore important lessons from the history of federal-state relationships in water resources.

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430. *See* Trelease, *supra* note 393, at 772-75.
431. *Id.* at 775.