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# Changing the Balance in Western Water Law? Montana's Reservation System*

## ABSTRACT

*Western water law is in transition. States have adopted a variety of approaches to incorporate public, non-consumptive water uses with existing uses. Montana's water reservation system seeks a balance between existing and emerging water uses within the general framework of the prior appropriation doctrine. Water reservations are similar to, but fundamentally different from, prior appropriation rights. The implementation of the water reservation system in the Upper Missouri basin highlights the challenges and conflicts inherent in trying to find, and manage, this new balance.*

In the past two decades, the evolution in western water law has been well recognized.[1] While some have called this a revolution, even declared its death without mourning,[2] virtually everyone recognizes the continued validity of the prior appropriation doctrine, albeit in a modified form. For those who own water rights, the appropriation system is sacred and arguably should remain untouched. Against the sacredness of existing rights, however, a new balance is being struck with public non-consumptive rights playing an increasing role. Western states have adopted a variety of strategies to incorporate these changes, including the

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1. *See generally.* Norman K. Johnson & Charles T. DuMars, *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29 NAT. RESOURCES J. 347 (1989); A. Dan Tarlock, *The Changing Meaning of Water Conservation in the West*, 66 NEB. L. REV. 145 (1987); Charles F. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317 (1985); John M. Volkman & Kai N. Lee, *Within the Hundredth Meridian: Western States and Their River Basins in a Time of Transition*, 59 U. COLO. L. REV. 551 (1988).

2. Charles F. Wilkinson, *In Memoriam: Prior Appropriation 1848-1991*, 21 ENVTL. L. v (1991).

public trust doctrine,[3] changing public interest criteria,[4] and preserving in-stream flows.[5] In spite of these changes, the basic principle of the doctrine, first in time, first in right, has been maintained. Montana's water reservation system[6] illustrates the adjustments and problems that occur when seeking this new balance.

In the West, states allow private property rights to be created in water under the appropriation doctrine.[7] The priorities created under the prior appropriation doctrine give the earlier diversions the more secure property right. Western states' constitutions frequently have provisions stating that water belongs to the state or is held in trust for the people of the state.[8] The intent is not for the state to deny access to water users, but to facilitate development by giving secure title to those who divert water and apply it to a beneficial use. Most states manage the process through a permit system.[9] Beneficial uses originally included those important to economic development, with little consideration given to other uses. Only in recent times have aesthetics, recreation, and environmental concerns gained public acceptance as beneficial uses. These newer beneficial uses are an assertion of public rights, requiring a new balancing of public-private rights and making it necessary to modify existing state law.

Western states have modified existing water law in a variety of ways. For example, many are redefining beneficial uses and modifying

3. *See* National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709, 712 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983). *See also* Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233 (1980); Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980). *But cf.* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

4. Douglas L. Grant, *Public Interest Review of Water Allocation and Transfer in the West: Recognition of Public Values*, 19 ARIZ. ST. L.J. 681 (1987); Ronald B. Robie, *The Public Interest in Water Rights Administration*, 23 ROCKY MTN. MIN. L. INST. 917 (1977). The meaning of "public interest" is not the same for all states and has changed over time.

5. A. Dan Tarlock, *Appropriation for In-stream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 UTAH L. REV. 211; A. Dan Tarlock, *Recent Developments in the Recognition of In-stream Uses in Western Water Law*, 1975 UTAH L. REV. 871; A. Dan Tarlock, *The Recognition of In-stream Flow Rights: "New" Public Western Water Rights*, 25 ROCKY MTN. MIN. L. INST. 24-1 (1979).

6. MONT. CODE ANN. § 85-2-316 (1993).

7. Frank J. Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 NAT. RESOURCES J. 1, 7 (1965).

8. *But cf.* Sporhase v. Nebraska, 458 U.S. 941, 953 (1982) (holding that water is an article of commerce).

9. *See, e.g.*, CAL. WATER CODE § 1701 (West 1971).



the requirements for a diversion.[10] Contemporary definitions of beneficial use have expanded beyond traditional consumptive applications designed to foster economic development by individuals to include broader public concerns related to recreation, water quality, biodiversity, and aesthetics.[11] One important implication of this broadened definition of beneficial use is the emergence of in-stream uses as a means of realizing these public goals. Another implication is a modification of the diversion requirement, which was traditionally the means by which a valid right was established. To establish and protect in-stream flows, many states exempt water from appropriation.[12] Another common mechanism states use is to authorize state agencies to appropriate water to manage in-stream flows.[13] In addition, in the permit process, a few states now consider in-stream and environmental values in approving permits.[14] In all cases, states have modified existing laws and practices to accommodate changing public values. In some cases, these modifications have embodied innovative, even controversial, changes.[15]

10. *See* ARIZ. REV. STAT. ANN. § 45-151A (1994); CAL. WATER CODE § 1243 (Supp. 1994); IDAHO CODE § 42-1501 (1990); KAN. STAT. ANN. § 82a-707(b) (1984); NEV. REV. STAT. § 533.030 (Supp. 1993); N.D. CENT. CODE § 61-04-06.1(4) (1985); OR. REV. STAT. ANN. § 536.300 (1988); TEX. WATER CODE ANN. § 11.023 (West 1988); WASH. REV. CODE ANN. § 90.54.020(1) (1992).

11. *See, e.g.*, MODEL STATE WATER CODE § 2-3-05 (American Society of Civil Engineers) (3d draft 1993) (includes the following beneficial uses: aesthetic, agricultural, commercial, domestic, ecological, industrial, municipal, navigational, power generation, recreation, and waste assimilation).

12. *See, e.g.*, ALASKA STAT. § 46.15.145a (1991); OR. REV. STAT. ANN. §§ 538.010 to 538.300 (1988); N.D. CENT. CODE § 61-04-31 (1985); S.D. CODE ANN. § 46-5-38 (1987); UTAH CODE ANN. § 73-6-1 (1989) (the Utah Governor, on approval of the state engineer, can suspend the right to appropriate if the water is needed in the future for agriculture or other uses).

13. *See, e.g.*, ARIZ. REV. STAT. ANN. § 45-151A (1994); COLO. REV. STAT. § 37-92-102(3) (1990); IDAHO CODE § 42-1503 (1990); KAN. STAT. ANN. § 82a-703a (1989); NEB. REV. STAT. § 46-2107 (1988); OR. REV. STAT. ANN. § 536.325 (1988); WASH. REV. CODE ANN. § 90.22.010 (1992).

14. *See, e.g.*, MONT. CODE ANN. § 85-2-311 (1993). *See also* Douglas L. Grant, *Public Interest Review of Water Rights Allocation and Transfer in the West: Recognition of Public Values*, 19 ARIZ. ST. L. J. 681 (1987).

15. *See generally* IN-STREAM FLOW PROTECTION IN THE WEST (Lawrence T. MacDonnell et al. eds., 1989) [hereinafter IN-STREAM FLOW]. *See also* Richard Ausness, *Water Rights, the Public Trust Doctrine, and the Protection of In-stream Uses*, 1986 U. ILL. L. REV. 407; Brian E. Gray, *A Reconsideration of In-stream Appropriative Water Rights in California*, 16 ECOLOGY L.Q. 667 (1989); John S. Harbison, *Waist Deep in the Big Muddy: Property Rights, Public Values, and In-stream Waters*, 26 LAND & WATER L. REV. 535 (1991); Joseph Q. Kaufman, *An Analysis of In-stream Water Rights in Oregon*, 28 WILLAMETTE L. REV. 285 (1992); Lori Potter, *The Public's Role in the Acquisition and Enforcement of In-stream Flows*, 23 LAND & WATER L. REV. 419 (1988); Charles C. Reynolds, *Protecting Oregon's Free-Flowing Water*, 19 ENVTL. L. 841 (1989); Stephen J. Shupe, *Legal Implications of In-stream Flows and Other Nonconsumptive Uses*, *in* WESTERN WATER LAW IN TRANSITION (1985).

Montana's water reservation system is an interesting case in point. This statutory system allows public entities to reserve water for future consumptive needs and for in-stream uses.[16] Also, the system is significant because it is the only way to acquire in-stream rights for specified beneficial uses, including water quality, recreation, and fish and wildlife.[17] In addition, these flows can be reserved without the usual prior appropriation requirement that the water be diverted or impounded. The reservation process also allows the water to be appropriated or claimed now for a future use. Thus, the claimant has a current priority date, even if the water is not actually developed until a later time. These rights are established under a reservation process and clearly differ in significant ways from water rights established under the prior appropriation doctrine. The balancing of these newly created reserved rights with other rights will be an on-going challenge.

The challenge is more complex than accommodating the diverse private and public interests of a single state. State decisions impact the interests of other states, the federal government, and Indian tribes.[18] For example, federal environmental laws, federal power over commerce, and congressional control over federal property can lead to conflicts with states.[19] Also, Indian water rights may have priority over rights created under state law.[20] Similarly, a state's water quantity laws cannot unconstitutionally restrict interstate movement,[21] and a downstream state's water quality laws may impact an upstream state's water

16. MONT. CODE ANN. § 85-2-316 (1993).

17. Although it is possible to lease water for any beneficial use, including instream flows, such leases do not constitute a permit or establish a water right. MONT. CODE ANN. § 85-2-141(9) (1993).

18. *See generally* D. Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, and the Prospects for Accommodation*, 21 ENVTL. L. 1 (1991); Michael C. Blumm, *Unconventional Waters: Quiet Revolution in Federal and Tribal Minimum Flows*, 19 ECOL. L.Q. 445 (1992); Aaron H. Hostyk, *Who Controls the Water? The Emerging Balance Among Federal, State, and Indian Jurisdictional Claims and Its Impact on Energy Development in the Upper Colorado and Upper Missouri River Basin*, 18 TULSA L.J. 1 (1982).

19. *See generally* Michael C. Blumm, *Federalism, Hydroelectric Licensing and the Future of Minimum Streamflows after California v. Federal Energy Regulatory Commission* [110 S.Ct. 2024], 21 ENVTL. L. 113 (1991); Scott W. Reed, *Fish Gotta Swim: Establishing Legal Rights to In-stream Flows Through the Endangered Species Act and the Public Trust Doctrine*, 28 IDAHO L. REV. 645 (1992).

20. Winters v. United States, 207 U.S. 564, 577 (1908); Arizona v. California, 373 U.S. 546, 600 (1963).

21. *See Sporhase*, 458 U.S. at 953; City of El Paso v. Reynolds, 597 F. Supp. 694, 707 (D.N.M. 1984). *But cf.* Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568, 569-70 (9th Cir. 1985) (Congress can consent to restricting commerce allowing states to limit the movement of water).



management.[22] In the Montana example, the reservation system could be impacted by these other sovereign interests.

The following sections will briefly describe Montana's water reservation system, contrasting it with the conventional prior appropriation doctrine. The reservation doctrine is relatively new; its implementation in the Missouri River Basin will serve as a vehicle for examining its potential strengths and weaknesses and the challenges of integrating these rights within the prior appropriation framework. Any evaluation would be incomplete without examining potential conflicts between other sovereigns which share management of a watershed. The reservation doctrine was intended to balance public/private and in-stream/off-stream water uses; the degree to which it will be successful is open to question.

### *The Prior Appropriation Doctrine and Montana's Reservation System*

Protection of Montana's water resources emerged as a major political agenda in the 1970s.[23] Several factors precipitated this, most of them tied to increased industrial demand, especially energy, and potential agricultural developments.[24] Although concern focused on potential conflicts between consumptive uses, in-stream flows were also getting attention. In addition, potential conflicts between upstream and downstream states, particularly in the Missouri Basin, were becoming more obvious. As one study subsequently noted:

> A feeling prevalent in Montana is that water flowing out of the state will be claimed by downstream states whose use . . . is expanding more rapidly than Montana's . . . . It is also feared that, given the political power of lower basin states, Montana could find it difficult to defend its claimed right to future use of instate water in a national political arena.[25]

These pressures contributed to Montana's concerted effort to document and protect existing water rights and uses, including in-stream flows.

22. *See* Arkansas v. Oklahoma, 503 U.S. 91 (1992). Because Indian tribes can also be treated as states for purposes of the Clean Water Act, a tribe's water quality laws may similarly impact an upstream state's water management. 33 U.S.C. § 1377(e) (1988).

23. *See* MONT. CODE ANN. § 85-2-601 (1993) (the Legislature passed a moratorium suspending all new major permit applications in the Yellowstone Basin, pending a systematic evaluation of existing and future requirements).

24. *See* J. Guhin, *The Law of the Missouri*, 30 S.D. L. REV. 346 (1985); H. Loble, *Interstate Water Compacts and Mineral Development (With Emphasis on the Yellowstone River Compact)*, 21 ROCKY MTN. MIN. L. INST. 777 (1975).

25. Wright Engineers & Frank Trelease, *Introduction* to A Water Protection Strategy for Montana (Montana Department of Natural Resources and Conservation, Sept. 1982).

Within this context, the State legislature passed the 1973 Water Use Act.[26] The Act was significant for a number of reasons. First, a centralized system for administering and regulating water rights was authorized.[27] Second, the Act recognized, for the first time, certain in-stream flows as a beneficial use, including flows to maintain fish, wildlife, and recreation.[28] Third, a process for reserving water for future needs was established. Under this provision, public entities may apply to the Board of Natural Resources and Conservation (BNRC) to reserve waters for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water.[29] These two developments, the recognition of in-stream flows as a beneficial use and the establishment of future reservations, are key elements of the state's water reservation system.

A number of features distinguish reserved rights from traditional prior appropriation water rights. Under the prior appropriation doctrine, an applicant must show the proposed use is beneficial. In contrast, a reservation can only be granted if "needed" or if constraints restrict an applicant's ability to perfect a water permit.[30] Need is established by showing a reasonable likelihood that future in-state or out-of-state competing water uses would consume, degrade, or otherwise affect available water.[31]

Under the prior appropriation doctrine, establishing valid rights requires intentional diversions or withdrawals. Historically, the diversion requirement helped stabilize property rights by giving potential users notice that water was already appropriated. Water left in streams was then considered unused and available. Water was implicitly viewed as wasted until it was diverted and "put to use." In contrast, the reservation process allows parties to establish a water right without actually diverting or "developing" it.

While emphasis under traditional prior appropriation doctrine was on consumptive uses of water, beneficial use now includes in-stream as well as off-stream uses. In addition, for the purposes of establishing a

26. Montana Water Use Act of 1973, ch. 452, 1973 Mont. Laws 1121.

27. MONT. CODE ANN. §§ 85-2-101 to -438 (1993).

28. MONT. CODE ANN. § 85-2-311 (1993) (Recognizing the importance of maintaining minimum flows in critical trout streams, Montana authorized the Fish and Game Commission to appropriate available water in portions of 12 streams in 1969. These Murphy Rights were supplanted by more extensive provisions in the 1973 Act).

29. MONT. CODE ANN. § 85-2-316 (1993).

30. MONT. ADMIN. R. § 36.16.105A(c) (1988) (constraints include inability to finance a project in the near-term, lack of increased demand for the water until some time in the future, or the need for additional project planning before water can be applied to a beneficial use).

31. MONT. CODE ANN. § 85-2-316(4)(a)(ii) (1993); MONT. ADMIN. R. § 36.16.105A(1) (1988).



reservation, beneficial use is defined in terms of the public interest.[32] The public interest is broadly conceived and encompasses such criteria as whether the expected benefits are likely to exceed the costs; whether there are reasonable alternatives to the proposed reservation; whether failure to reserve the water is likely to result in an irretrievable loss of a natural resource; and whether there are significant adverse impacts to public health, welfare and safety.[33]

Closely related to the question of public interest is the issue of who is eligible to apply for a reserved right. In contrast to prior appropriation rights, which allow anyone who may beneficially use water to apply, qualified applicants for reservations must be state or political subdivisions or an agency of the state or federal government.[34] Thus, public entities, not private parties, are the only qualified applicants.

In addition to these features, a number of other attributes of these reserved rights differentiate them from prior appropriation rights. For example, instead of priority being based on the date water is first put to use, priority of reserved rights is generally based on the date a notice of intent is filed with the Department of Natural Resources and Conservation (DNRC).[35] In the case of the Missouri Basin, the priority of reserved rights were established by legislative action, and will have a priority date of July 1, 1985.[36] Thus, the reservation process allows water to be "appropriated" or claimed now for a future use, and the claimant has a current priority date, even if the water is not needed or its use is not developed until a later time.

Finally, prior appropriation rights are private property rights and cannot be administratively modified without compensation.[37] In contrast, reservations are conditioned and are subject to periodic administrative review (at least every ten years) to ensure that the objectives of the reservation are being met.[38] If the BNRC finds objectives are not met, they can modify or revoke that right. Thus, all reserved rights may be

32. MONT. CODE ANN. § 85-2-316(4)(a)(iv) (1993).

33. MONT. ADMIN. R. § 36.16.107B(4) (1988).

34. MONT. CODE ANN. § 85-2-316(1) (1993).

35. MONT. CODE ANN. § 85-2-316(9) (1993).

36. MONT. CODE ANN. § 85-2-331(4) (1993). This will occur although the Board Order for the Upper Basin was not issued until July, 1992, and the Lower Basin order is still pending.

37. *See* Trelease, *supra* note 7, at 35. However, courts question the security of these vested rights through application of other doctrines. United States v. State Water Resources Control Board, 227 Cal. Rptr. 161 (1986) (conditioning water rights); *National Audubon Society*, 658 P.2d at 712 (public trust doctrine); United States v. New Mexico, 438 U.S. 696 (1978) (federal reserved water rights). *See generally* Kevin M. O'Brien, *New Conditions for Old Water Rights: An Examination of the Sources and Limits of State Authority*, 33 ROCKY MTN. MIN. L. INST. 24-1 (1988).

38. MONT. CODE ANN. § 85-2-316(10) (1993).

lost due to failure to meet intended objectives. In-stream reservations are subject to additional scrutiny. Specifically, all or a portion of an in-stream reservation may be reallocated to a different use if the following conditions are met:

> -the applicant for reallocation is a qualified reservant;
> -the applicant shows current in-stream flow is not required for its stated purpose; and
> -the applicant shows the need for reallocation outweighs the need shown by the original reservant.[39]

Reallocation evaluations for in-stream uses may take place no more frequently than every five years, and if water is reallocated, the original priority date is retained.[40]

Montana's reservation statute thus allows public agencies to establish prospective rights—that is, a current right for a potential future use, both consumptive and non-consumptive. A mechanism for establishing in-stream flows is also provided. Both the prior appropriation doctrine and reservations cannot adversely affect existing water rights. But in many other respects, these approaches to establishing water rights are distinctive and their successful integration into a single management system will require a balancing act of considerable finesse.

### *Establishing Reservations in the Upper Missouri Basin*

In 1985, the Montana Legislature directed the DNRC to initiate reservation proceedings in the Missouri Basin.[41] A major impetus for this initiative was the 1982 Trelease report, which identified the Missouri Basin as the drainage with the greatest potential for future conflicts, particularly in light of competing demands for maintaining in-stream flows (to accommodate navigation and hydropower) versus depletions of water for consumptive purposes.[42] The study recommended using the reservation process as a means of establishing Montana's claim to the waters of the Missouri.

39. MONT. CODE ANN. § 85-2-316(11) (1993).

40. *Id.*

41. MONT. CODE ANN. § 85-2-603 (1993). The reservation process was initially applied in the Yellowstone Basin. *See generally* J. L. Thomas & Duane Klarich, *Montana's Experience in Reserving Yellowstone River Water for In-stream Beneficial Uses—The Reservation Decision*, 17 WATER RESOURCES BULL. 255 (1981); Dr. Wilson F. Clark, *A Free Flowing Yellowstone: The Reservations Challenge*, 10 MONT. OUTDOORS 29 (1979).

42. Wright Engineers & Trelease, *supra* note 25, at VII-6.



The experience of establishing reservations on the Missouri illustrates the complexities of developing and implementing this statute. These complexities include both the process of establishing reservations and the impacts of balancing these rights with others. The process for establishing a water reservation can be summarized in five steps.

> 1) Eligible parties submit applications to reserve water for existing or future off-stream and in-stream uses;
> 2) An applicant must demonstrate the purpose and need for the reservation. The application requirements are quite extensive and include an analysis of need; determination of the amount of water necessary; documentation that public interest criteria are met; and presentation of management plans for diversionary water uses;[43]
> 3) Applications are reviewed by the DNRC, a process which includes preparation of an EIS and a series of public hearings and comment periods;
> 4) Other aspects of the reservation process conform to general procedures outlined for acquiring a water permit in that there is public notification of all water rights holders and users who may be affected by, or interested in, the reservation applications.[44] Objections to the application may be filed[45] and, if objections are found to be valid, contested case hearings are held where applicants and objectors can testify and present evidence;[46]
> 5) At the conclusion of this process, the Board of Natural Resources and Conservation can issue an order reserving water (as requested or in a modified form) or it may deny the application.[47]

In order to make the process manageable on the Missouri, the river was divided into two major sections: the Upper Basin (upstream from the Fort

43. MONT. ADMIN. R. § 36.16.105, 106 (1988).

44. MONT. CODE ANN. § 85-2-307 (1993).

45. MONT. CODE ANN. § 85-2-308 (1993). A valid objector must have legal standing—that is, their property, water rights, or interests would be adversely affected. MONT. CODE ANN. § 85-2-308(3) (1993).

46. MONT. CODE ANN. § 85-2-309 (1993).

47. MONT. CODE ANN. § 85-2-326(3) (1993). Board decisions may be appealed to the district court, under provisions of the Administrative Procedure Act. MONT. CODE ANN. § 2-4-702 (1993).

Peck Dam to the headwaters) and Lower Basin. The reservation process was applied to the Upper Basin first. Even with the split, the Upper Missouri section encompasses a vast and diverse territory. It drains 42,000 square miles, including 436 miles of Class I (blue ribbon) and Class II (high value) fisheries, and 150 miles of wild and scenic rivers. It flows through a landscape that varies from its mountainous headwaters to the semi-arid plains in central and eastern Montana.[48]

By the application deadline of July 1, 1989, DNRC had received 40 applications, totaling 559 individual reservation requests. These included requests from 18 conservation districts, 18 municipalities, and the U.S. Bureau of Reclamation, all of whom were requesting rights for off-stream use.[49] Applications for in-stream flows were submitted by the Fish, Wildlife, and Parks (FWP), primarily for fisheries and wildlife purposes, on 283 stream segments; Department of Health and Environmental Science (DHES), for water quality protection; and the U.S. Bureau of Land Management, for fisheries and wildlife. The EIS sub-divided the Upper Basin into four sub-basins[50] and analysis of impacts and alternatives were addressed within the context of specific sub-basins.

The reservation process brought the issue of in-stream flows versus consumptive uses of water to the forefront. Although Montana generally has abundant water resources, this does not offset or preclude local or regional scarcity. Agriculture is an important component of the state's economy, and water for irrigation is a major use of water in the state.[51] Tourism is also an important component of the state's economy.[52] Tourists are attracted to Montana for many reasons, but the state's scenic beauty and recreation opportunities are clearly key. Many of these attractions are directly or indirectly linked to water.[53] The importance

48. Liter Spence, *In-stream Flow on the Mighty Mo*, 21 MONT. OUTDOORS 3-4 (July/Aug. 1990).

49. Montana Department of Natural Resources and Conservation (DNRC), Draft Environmental Impact Statement, Missouri River Basin (June 1991) [hereinafter Draft EIS]. *See also* DNRC, Final Environmental Impact Statement, Missouri River Basin (Jan. 1992) [hereinafter Final EIS].

50. Draft EIS, *supra* note 49, at 11. The four sub-basins are the Headwaters (which includes the Madison, Gallatin, and Jefferson Rivers), the Upper Missouri River, The Marias/Teton Rivers, and the Middle Missouri River (down to Fort Peck Dam).

51. Montana Department of Natural Resources and Conservation, Montana Water Use in 1980 (Mar. 1986).

52. University of Montana Institute for Tourism and Recreation Research, The 1993 Outlook for Travel and Tourism in Montana (1993); University of Montana Institute for Tourism and Recreation Research, 1990 Non-Resident Travel in Montana: An Economic Report (1991). In 1990, non-resident travelers to Montana spent 760 million dollars that resulted in 1,688 billion dollars of total economic impact. In 1992, it was estimated that non-residents accounted for $900 million in direct spending.

53. Brian Morris, *When Rivers Run Dry Under a Big Sky: Balancing Agricultural and Recreational Claims to Scare Water Resources in Montana and the American West*, 11 STAN. ENVTL. L.J. 259, 260-62 (1992).



of fishing and hunting is perhaps the most obvious example. Estimates indicate that spending for hunting and fishing approaches $226 million a year, with the potential to draw more than $521 million annually.[54] Adequate levels of in-stream flows are essential for fish and wildlife preservation and for other water-based recreational activities. Many of these uses are difficult to quantify, but they are increasingly recognized as vital to the state's future well-being.[55]

In developing the EIS for the Upper Basin, differences between sub-basins relative to the value of in-stream flows became apparent. One study, commissioned by DNRC, surveyed people's perceptions about water uses and estimated the value of these flows for recreation. It found:

> -survey respondents were divided about the importance of irrigation, as 46% agreed that irrigation was the most important water use; 42% disagreed, and 11% had no opinion;
> - total recreational expenditures for all sub-basins were between $57.9 and $81 million annually. These figures varied significantly by region, with the Headwaters and Upper Missouri sub-basins capturing the vast majority ($35 to $62 million) of those expenditures.
> - this geographic disparity was also reflected in other measures of recreation value.[56]

Overall, the study estimated that the total net economic value of water-based recreation in the Upper Basin was significant, totaling $144 million per year.[57] In addition, the research suggested that low flows

54. *See, e.g.*, Matthew J. McKinney et al., *The Protection of In-stream Flows in Montana: A Legal-Institutional Perspective*, *in* IN-STREAM FLOW, *supra* note 15, at 287. The Montana Department of Fish, Wildlife, and Parks has conducted a series of studies on the economic value of elk, deer, and antelope hunting and fishing.

55. *See, e.g.*, Bonnie G. Colby, *The Economic Value of In-stream Flows—Can In-stream Values Compete In the Market for Water Rights?*, *in* IN-STREAM FLOW, *supra* note 15, at 87 (illustrates non-market approaches being used to estimate the value of in-stream flows).

56. J. Duffield et al., In-stream Flows in the Missouri River Basin: A Recreation Survey and Economic Study (1990) (prepared for DNRC as discussed in Draft EIS, *supra* note 49, at 107). The survey of 8,000 basin and non-basin Montana residents and 1,000 non-Montanans used a contingent valuation method to estimate the value of water for recreationists—angler and non-angler alike.

57. Draft EIS, *supra* note 49, at S-5. Colby notes that, while substantial progress has been made in assessing the value of in-stream flows for recreation, measurable recreation values are only a small portion of the total value generated by these flows. Colby, *supra* note 55, at 97.

affected the number and quality of recreation trips, and thus had a direct impact on an important and growing economic sector.[58] The value of recreational uses, together with the importance of hydropower generation, meant that in-stream flows assumed greater significance in evaluating reservation requests.

The prominence of reservation applications for in-stream use made for a lively comment period. During July, 1991, DNRC had sent notices about the Upper Basin reservation applications to about 11,000 water rights holders. Subsequently, more than 500 objections were received.[59] Contested case hearings were held in February, 1992, along with five public hearings.[60] After a proposed board order was prepared, BNRC held another hearing to allow objectors and applicants to react to the proposed order. From the general discussion of issues related to the contested case hearings and from material contained in the Draft and Final EIS, it appears there was considerable controversy over consumptive versus in-stream uses.[61]

The draft EIS considered four alternatives relative to reservation applications. These included:

1) no action—meaning no reservations were granted;

2) consumptive use—which emphasized the use of water for irrigation (granting all reservation requests from conservation districts) and municipal purposes, and gave municipal, irrigation, and in-stream uses first, second, and third priority, respectively;

3) in-stream use—which gave priority to municipal and in-stream uses and gave third priority to irrigation projects defined as at least marginally feasible;

4) combination—which resembled option 2 in terms of priorities, except irrigation projects were included only if they were at least marginally economically and financially feasible. In addition, some projects were excluded or reduced in size.[62]

As a result of comments on the draft, the Final EIS included two additional alternatives for Board consideration:

5) water quality—which included only reservations for in-stream flows;

58. Draft EIS, *supra* note 49, at 110.

59. Montana DNRC Water Resources Division, Water Reservation Update 2-3 (Oct. 1992) [hereinafter Water Reservation Update].

60. The procedures for contested case hearings are contained in MONT. CODE ANN. §§ 2-4-601 to -623 (1993).

61. Final EIS, *supra* note 49, at 41-132.

62. Draft EIS, *supra* note 49, at S-2.



6) municipal—which included reservations for municipal and all in-stream uses, but no new irrigation projects.[63]

The Final EIS found that the consumptive use alternative had the greatest impact on the existing environment.[64] Consumptive use, particularly irrigation, had clear benefits, but was burdened by higher costs. Municipal developments had benefits that substantially exceed costs because of the small amount of water consumed and because of its high value. Given the improved methods of valuing in-stream flows, and the importance of hydropower, the in-stream alternative offered the highest net benefit. In the final order establishing water reservations above Fort Peck Dam, the Board gave first priority to municipal uses, but gave second priority to in-stream uses throughout the entire Upper Basin. Irrigation and other off-stream uses were assigned lower priority.[65]

### *Complications of Implementing Reservations*

The reservation doctrine, as adopted in Montana, is a unique approach to incorporating in-stream flows into future water planning and management decisions. The economic value of this water has become increasingly evident, as linkages between in-stream flows and recreation, water quality, and protection of fish and wildlife habitat are refined and included in development decisions. Experiences with the Missouri indicate there is a lot of confusion about the process, procedures, and intent behind reservations. As yet, there are many unanswered questions. For example, reservations have proceeded in spite of the fact that the state-wide adjudication process is still at least a decade from completion, and the legal availability of water is often in question. The Upper Missouri Basin section contains 28 of the State's 85 sub-basins; all are in various stages of being adjudicated, but none of the 28 has a final decree determining existing rights.[66] However, claims by existing users, if verified, would account for much of the flow in the Missouri and its tributaries.[67] Since reservations cannot adversely affect senior water rights, it remains unclear how much water is, in fact, legally available.

63. Final EIS, *supra* note 49, at S-2 to S-3.

64. These impacts include everything from water quantity and quality, land use, and fish and aquatic habitat to agriculture and social effects. They were assessed on a sub-basin level as well as on an overall basis. *Id.*

65. Water Reservation Update, *supra* note 59, at 4.

66. Draft EIS, *supra* note 49, at 55.

67. Draft EIS, *supra* note 49, at 54-66. These users include irrigators, Montana Power Company (with seven main-stream dams), Bureau of Reclamation (with six storage and reclamation dams), Corps of Engineers, four Indian tribes, and assorted federal agencies.

The reservation process provides a means whereby existing in-stream flows can be maintained or protected. But there are critical limitations. The most obvious issue is that in-stream appropriations can be made only on available water: but there are many streams and basins in Montana where water is fully "appropriated," particularly during critical periods (June- August) when both in-stream and off-stream consumptive pressures are likely to be most pronounced. As junior or subordinate rights (to all existing, often consumptive uses), reservations would also be least effective during periods of below average precipitation, when they would be most needed to protect fish and aquatic habitat, water quality, or other resources. In other words, in-stream reservations cannot address situations where the primary threat to in-stream values is severe dewatering, either from senior consumptive uses or a drought, or both.[68] These limitations highlight a major shortfall of the reservation system as a means of protecting in-stream flows: it simply maintains the status quo. Other difficulties are found within the reservation system as well. One notable issue is that in-stream flows are less secure reservations than other types, as they are subject to modification, and even reallocation. Other reservations are transferable, but only if the entity holding the right initiates the transfer. In contrast, in-stream flow reservations may be reallocated if the Board finds that all or part of the reservation is not required for its purpose and that the need for reallocations outweighs the need of the original reservant.[69] Similarly, the ten-year review provision for all reservations makes them less secure than other rights or permits acquired under the prior appropriation doctrine.[70] While these provisions allow for flexibility (and may encourage more generous in-stream flow awards), they also make these rights potentially more volatile. To date, no party has formally petitioned for a reallocation of in-stream flow reservations.[71]

In contrast to the insecurity created by reevaluation, the reservation system establishes preferences between reservations with

68. McKinney et al., *supra* note 54, at 292.

69. MONT. ADMIN. R. § 36.16.118(3) (1988) (applicants requesting changes in, or transfers of, a granted reservation must also adequately meet the original decision criteria outlined by BNRC).

70. Montana Board of Natural Resources and Conservation, In the Matter of the Ten-Year Review of the Yellowstone Basin Water Reservations Notice of Conclusion of Review Process (Dec. 1990). To date, only the reservations on the Yellowstone have been subject to the 10-year review. That process was completed in December, 1990, with no petitions for reallocation of in-stream flows.

71. *See* Sweet Grass County Conservation District, Narrative to the Montana Board of Natural Resources during its Ten-Year Review of the Yellowstone River Water Reservations (Nov. 23, 1988) (the conservation district requested that BNRC consider reallocating some in-stream reservations, but no formal motion to that effect has been filed).



same priority dates. For example, all reservants in the Upper Missouri were given the same priority date (July 1, 1985), but not all approved reserved rights are equal. The order of preference was municipal, in-stream (non-consumptive), and agriculture. This pattern of preferring in-stream over consumptive uses was also evident in the Upper Yellowstone Basin, when the Board gave preference to in-stream rights over irrigation.[72] These preferences were reversed in the Lower Yellowstone, and similar outcomes may result in the Lower Missouri reservation process, which is still pending.[73] Preferences have been used in other states when simultaneous permit applications are made for a water permit,[74] but nothing of the magnitude of Montana's system has been done and in-stream uses do not receive such high preference anywhere else.

Aside from a number of procedural concerns, the emergence of in-stream flows as a significant use for reservations has fueled an already heated debate within the State.[75] Most objections, as documented in the Draft and Final EIS and Board Order, concerned in-stream flow reservations and their potential adverse affects, including granting in-stream reservants standing in the adjudication process. It is notable that the BNRC Final Order for the Upper Missouri Basin has been appealed to District Court, and the majority of these appeals challenge in-stream reservations granted to FWP.[76] While the Final Order is being appealed, the Legislature closed the Teton, Jefferson, and Madison River basins to any additional permits to appropriate or reserve water.[77] The Legislature also closed the Upper Missouri Basin to further applications until final

72. Clark, *supra* note 41, at 33.

73. *Id.*

74. *See, e.g.*, N.D. CENT. CODE § 61-04-06.1 (1975).

75. *Cf.* Thomas & Klarich, *supra* note 41; Clark, *supra* note 41; Schneider, Montana's Yellowstone River (Montana Geographic Series No. 10); D. Sweetman, Protecting In-stream Flows in Montana: Yellowstone River Reservation Case Study (1980) (In-stream Flow Information Paper No. 10) (documenting some of the controversy over in-stream flows that accompanied the Yellowstone reservation process).

76. In the Matter of Water Reservation Application Nos. 72155-41A and 72580-41A, Cause No. DV-92-11466 (5th Dist. 1992); In the Matter of Water Reservation Application No. 72155-41A, Cause No. DV-92-11467 (5th Dist. 1992); In the Matter of Water Reservation Application No. 72155-41A, Cause No. 8665 (5th Dist. 1992); In the Matter of Water Reservation Application Nos. 69903-410 et al., Cause No. DV-9232 (9th Dist. 1992); In the Matter of Water Reservation Application Nos. 72580-00-41A et al., Cause No. DV-92-11468 (5th Dist. 1992); In the Matter of Water Reservation Application No. 72155-41A, Cause No. DV-92-11469 (5th Dist. 1992); Dep't of Health and Environmental Sciences v. BNRC, Cause No. 92-1265 (1st Dist. 1992).

77. MONT. CODE ANN. § 85-2-330 (1993). Such closures are authorized in highly appropriated basins or sub-basins. MONT. CODE ANN. § 85-2-319 (1993).

decrees are issued for all the sub-basins.[78] Under stipulations in the Final Order, these closures have the effect of suspending all reservations except those granted to municipalities. While closing the basins to new permits ensures that the status quo is maintained, it also highlights the somewhat tenuous status of in-stream reservations and the questionable legal standing of specific public entities (like FWP) in future adjudications.

Because the Board decision on the Missouri is recent (issued in July, 1992), the full implications are only starting to emerge.[79] The Board clearly sought flexibility and accommodation as much as possible. It is also apparent that in-stream flows have assumed greater (basin-wide) importance. This strategy makes sense, given that a major purpose of the reservations on the Missouri is to assert and legitimize Montana's claim to water. These in-stream purposes have assumed even greater importance, in light of the recent drought and the increasingly explicit conflict between upper and lower basin states over the management of the Missouri. It is notable that, although Draft and Final EIS were widely circulated, virtually no comments were received from downstream states or users, and the debate often focused on intra-state conflict over in-stream versus consumptive (mainly irrigation) uses.[80]

### *Conflicts With Other Sovereigns*

The relative quiet from downstream states may prove misleading, however, as the implicit balancing of future and in-stream water uses embodied in Montana's reservation statute does not fully account for other sovereigns who may have an interest in Montana's water. Indian tribes, other states, and the federal government cannot be ignored.[81] These sovereigns share responsibility with Montana for the management of a common resource. Sharing control over water leads to friction over both water quantity and water quality. Indian reserved rights are one area of potential water quantity conflict,[82] as are disputes between states[83] and federal/state jurisdictional issues.[84]

78. MONT. CODE ANN. § 85-2-343 (1993).

79. Missouri River Basin Final Order of the Board of Natural Resources and Conservation Establishing Water Reservations above Fort Peck Dam (July 1, 1992).

80. Final EIS, *supra* note 49, at 41-132.

81. *See generally* A. Dan Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights*, 22 LAND & WATER L. REV. 631 (1987).

82. *See Winters*, 207 U.S. at 577; *Arizona*, 373 U.S. at 600.

83. *See Sporhase*, 458 U.S. at 953; *City of El Paso*, 597 F. Supp. at 707; *Arkansas*, 112 S. Ct. at 1056.

84. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529 (1976) (Wild Free-Roaming Horses and Burros Act was found to preempt state law); *see generally* O. P. Matthews, *The Supreme Court, the Commerce Clause, and Natural Resources*, 12 ENVTL. MGMT. 413 (1988).



Indian reserved water rights are different from the reserved rights created under Montana law. Tribal reserved rights were established at the time reservations were set aside, and they retain this priority date even if the water has never been used or developed by the tribe.[85] Generally, the right consists of enough water to irrigate all the practicably irrigable acres on the reservation.[86] Several Indian tribes in Montana are negotiating with the State to quantify their rights, but in most cases, the quantity of these rights remain an unknown.[87] The problem with unadjudicated Indian rights is the same as discussed above with regard to unadjudicated state rights, as these rights will have a priority over rights established under Montana's reservation statute. Future consumptive rights and in-stream rights can never be secure as long as existing rights are unknown.

A bit more complicated are the rights of other states especially when the commerce clause is involved or states are asking for an equitable apportionment. When water supplies are limited, states may attempt to give preferences in use to their citizens or restrict the access of non-citizens by banning exports. But the U.S. Constitution prohibits states from using economic protectionism except under limited exceptions.[88] The commerce clause is a guarantee of a free market, and setting aside water for in-stream and future uses could be seen as interfering with these free market principles.[89]

Montana has attempted to get around these problems by setting up criteria to be used in out-of-state transactions.[90] If these are addition-

85. *See generally* Robert S. Pelcyger, *The Winters Doctrine and the Greening of the Reservations*, 4 J. CONTEMP. L. 19 (1977); Harold A. Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 BRIG. YOUNG U. L. REV. 639; Richard B. Collins, *The Future Course of the Winters Doctrine*, 56 U. COLO. L. REV. 481 (1985); Stephen J. Shupe, *Water in Indian Country: From Paper Rights to Managed Resource*, 57 U. COLO. L. REV. 561 (1986).

86. Arizona v. California, 373 U.S. at 600-01.

87. *See* Mary McNally, *The 1985 Fort Peck-Montana Compact: A Case Study, in* INDIAN WATER IN THE NEW WEST (T. McGuire et al. eds., 1993). The Fort Peck Tribes and Northern Cheyenne are the only two tribes to date to successfully complete negotiations with Montana.

88. *Sporhase*, 458 U.S. at 953; *City of El Paso*, 597 F. Supp. at 707 (recognizing some restrictions on the movement of water). The Supreme Court in a hazardous waste case suggested "caps" could be used to restrict movement as long as in-state and out-of-state users were treated equally. Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992).

89. *See generally* Douglas L. Grant, *The Future of Interstate Allocation of Water*, 29 ROCKY MTN. MIN. L. INST. 977 (1983); Richard S. Harnsberger et al., *Interstate Transfers of Water: State Options After Sporhase*, 70 NEB. L. REV. 754 (1991); Frank Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. COLO. L. REV. 347 (1985); Richard A. Sims & Jennifer Davis, *Water Transfers Across State Systems*, 31 ROCKY MTN. MIN. L. INST. 22-1 (1985).

90. MONT. CODE ANN. § 85-2-316(4)b (1993). The statute seems to limit reservations to

al criteria, different from those used within the state, then they are problematic. Under commerce clause analysis, statutes that are discriminatory in their language (facially discriminatory) are almost always invalid.[91] Even if no facial discrimination is found, statutes with a discriminatory effect must pass a balancing test.[92] Discrimination as used here means in-state and out-of-state interests are treated differently with in-state interests benefiting and out-of-state interests being burdened. One questionable area in terms of the Montana reservation statute language is the "clear and convincing" standard of proof required for out-of state applicants.[93] This test is more stringent than is required for an in-state user, and thus may constitute facial discrimination under a commerce clause analysis.

A more substantive problem may be the statute's restriction on approving only those waters which could not be transported to an area of shortage within the state.[94] This is a clear preference for in-state uses. For example, if a city outside Montana wanted to import water, Montana might deny application if the Board determined the water could be used in an area where a shortage exists. Possibly, the permit denial could be made even if the water was unappropriated and no one else had applied for a permit. Such an outcome is arguably discriminatory. If this statute is considered facially discriminatory, it is unconstitutional unless a legitimate local purpose is advanced that cannot be served by reasonable nondiscriminatory alternatives.[95] Conservation is an example of a nondiscriminatory alternative which would certainly be more appropriate than restricting exports.

Using the balancing test, this statute is also arguably unconstitutional regardless of whether these provisions are considered facially discriminatory or not. Setting aside water for future economic uses has a discriminatory impact on those outside the state who can show a current demand. In such instances, the Supreme Court balances whether

"[t]he state or any political subdivision or agency thereof or the United States or any agency thereof." MONT. CODE ANN. § 85-2-316(1). This would exclude "other" states and their political subdivisions and agencies, a provision that would be clearly unconstitutional. Because other statutory language contemplates exports, this provision has not been interpreted to exclude other states from making reservations.

91. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); *see generally* Matthews, *supra* note 84, at 417; *but c.f.* Maine v. Taylor, 477 U.S. 131, 151 (1986).

92. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon, 114 S.Ct. 1345, 1350 (1994) (reaffirming the two-part test).

93. MONT. CODE ANN. § 85-2-316(4)(a) (1993). The standard of proof for in-state uses is a "preponderance" of the evidence. *Id.* § 85-2-316(b).

94. MONT. CODE ANN. § 85-2-316(4)(c)(ii) (1993).

95. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988); *see also Chemical Waste Management, Inc.*, 504 U.S. at 339.



the burden imposed on commerce is clearly excessive in relation to the local benefits.[96] The local benefit in this instance is a future one and could be considered speculative; the applicant can show a current need. Thus, under the balancing test for statutes that have a discriminatory impact, the statute appears to be unconstitutional as well. Although protecting water for future demands makes perfect sense to someone in Montana, this kind of economic protectionism is prohibited by the Constitution.[97] The only way Montana can avoid the problem is by treating in-state interests in the same way as out-of-state interests.[98] When the reservations are reviewed periodically as required by Montana law, out-of-state interests cannot be ignored. If the purpose of Montana reservations is to protect in-state economic interests, the utility of the system may be very limited when challenged by those from other states.

The in-stream uses could fare better under commerce clause analysis. The exception to facially discriminatory statutes requires determining whether a significant local benefit exists which cannot be satisfied by nondiscriminatory alternatives.[99] In-stream uses designed to protect the environment would qualify because benefits are locally significant and alternatives do not exist. But because this right is vulnerable to requests for reallocation, out-of-state interests can also make requests which add additional pressure on the ability to preserve in-stream uses.[100] Showing the economic value of in-stream uses for recreation and tourism may be critical in balancing beneficial uses required by the periodic reevaluations, but the economic argument which makes the balancing possible also makes it vulnerable to commerce clause scrutiny.

Economic protectionism is not the only kind of dispute that arises between states when a shortage of water exists. Down-stream states frequently feel they are not getting their fair share. When this occurs, the Supreme Court may be asked to equitably apportion a river or stream.[101] In equitable apportionment cases, the Court will look at many

96. *Pike*, 397 U.S. at 142.

97. *See* U.S. CONST. art. I, § 8, cl. 3.

98. *See* Chemical Waste Management, Inc., 504 U.S. at 339.

99. *Maine*, 477 U.S. at 151.

100. MONT. CODE ANN. § 85-2-316(11) (1993).

101. *See* Kansas v. Colorado, 206 U.S. 46 (1907) (the first equitable apportionment case); *see generally* Harrison C. Dunning, *State Equitable Apportionment of Western Water Resources*, 66 NEB. L. REV. 76 (1987); Richard A. Simms et al., *Interstate Compacts and Equitable Apportionment*, 34 ROCKY MTN. MIN. L. INST. 23-1 (1988); Richard A. Simms, *Equitable Apportionment Priorities and New Uses*, 29 NAT. RESOURCES J. 549 (1989); George W. Sherk, *Equitable Apportionment After Vermejo: The Demise of a Doctrine*, 29 NAT. RESOURCES J. 565 (1989); A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. COLO. L. REV. 381 (1985).

factors which may harm or benefit the states involved.[102] The need to set water aside for future and in-stream uses may be considered in this balancing process.[103] Because Montana is upstream from most of the states which share its watersheds, the downstream states will benefit from keeping the water in-stream and, from a practical point, should never complain about this happening. But, if water is to be taken out of a stream at some time in the future, then the downstream state could argue the reservation was designed to prevent them from current economic development. This could be considered inequitable by the Court and would certainly be a restriction on interstate commerce.[104] Having to consider interests outside the state in balancing uses during reevaluation and dealing with the uncertainty created by equitable apportionment decisions makes the reservation system less than an ideal tool for dealing with conflicts between states.

The potential conflicts are not just limited to other states, as a federal dimension is omnipresent. Most western states have felt that the allocation of water was their exclusive prerogative and often point to the thirty-seven federal statutes deferring to state water allocation law.[105] This position has never been as firm as states would like to believe,[106] with federal control over navigation[107] and power generation[108] influencing the amount of water that can actually be withdrawn under state law. More recently, federal environmental laws[109] and water rights associated with federal property have begun to influence the quantity of water available for appropriation. Under the property clause, Congress has power to make all rules necessary for the proper management of federal lands.[110] Associated with this land base is enough water to carry out the purposes Congress intended when the federal land was reserved.[111] This federal interest is similar to the Indian reserved water right and in many instances has not been quantified either. Because congressional power over federal property cannot be limited by the states, new water rights can be asserted at any time.[112] If this federal right interferes with an unexercised future right under Montana law, the federal right will probably prevail.[113] Montana reserved rights are "contingent" because they are periodically reevaluated, which blunts constitutional arguments over taking property without compensation[114] and could allow additional federal rights to be asserted. Federal interests are not limited to these water quantity issues and have expanded to include water quality.

Because water is an article of commerce, the federal government can regulate water if it chooses to do so. Federal regulation of water quality under the Clean Water Act is an example.[115] Other federal environmental regulations such as the Endangered Species Act[116] also have an indirect impact on water quality. These federal laws preempt contradictory state laws under the supremacy clause.[117] The Clean Water Act creates a partnership between the states, Indian tribes, and the federal government for the management of water quality.[118] Federal minimum standards are set, but states can administer their own programs if they have approval from the EPA.[119] Of interest here are the water quality standards that states and tribes may set. Before a state or the EPA, if they administer the program, may issue a discharge permit, they have to consider the approved water quality standards of downstream sovereigns.[120] If additional volumes of water are kept in streams and rivers as a result of Montana's reservation system, then these water quality standards will be easier to meet. But, future withdrawals may reduce volumes, thus concentrating pollutants enough to violate downstream water quality standards. Indian tribes have just recently begun to

102. Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).

103. Colorado v. New Mexico, 459 U.S. 176, 184 (1982).

104. *But cf. Intake Water Co.*, 769 F.2d at 568 (Congress can authorize encumbrances on interstate commerce by approving compacts).

105. *Sporhase*, 458 U.S. at 958.

106. *See generally* James L. Fly, *The Role of the Federal Government in the Conservation and Utilization of Water Resources*, 86 U. PA. L. REV. 274 (1938); Dale D. Goble, *Prior Appropriation and the Property Clause: A Dialog of Accommodation*, 71 OR. L. REV. 381 (1992); Lawrence J. MacDonnell, *Federal Interests in Western Water Resources: Conflicts and Accommodation*, 29 NAT. RESOURCES J. 389 (1989); Frank J. Trelease, *Federal Limitations on State Water Law*, 10 BUFF. L. REV. 399 (1961).

107. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).

108. United States v. Appalachian Electric Power Co., 311 U.S. 377, 424 (1940).

109. *See, e.g.*, Endangered Species Act, 16 U.S.C, §§ 1531-43 (1988).

110. U.S. CONST. art. IV, § 3. This power over federal property is virtually without limitations. *Kleppe*, 426 U.S. at 543.

111. United States v. New Mexico, 438 U.S. 696, 700 (1978) (the purpose of the reservations on national forest lands was limited to water associated with timber harvest and watershed protection).

112. *See, e.g.*, Wilderness Act, 16 U.S.C. §§ 1131-36 (1988); *see also* Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985); Sierra Club v. Lyng, 661 F. Supp. 1490 (D. Colo. 1987) (federal water rights are impliedly reserved in wilderness areas); Sierra Club v. Yeuter, 911 F.2d 1405 (10th Cir. 1990) (Forest Service has discretion on whether to assert the right or not).

113. *Kleppe*, 426 U.S. 529 (under the Supremacy clause of the U.S. Constitution article VI, cl. 2, state laws that conflict with enumerated federal powers can be preempted).

114. U.S. CONST. amend. V.

115. 33 U.S.C. §§ 1251-1376 (1988).

116. 16 U.S.C. §§ 1531-44 (1988).

117. U.S. CONST. art. VI, cl. 2.

118. *See* 33 U.S.C. § 1377(e) (1988).

119. 33 U.S.C. § 1342(b) (1988).

120. *Arkansas*, 112 S. Ct. at 1056.

establish water quality standards and the results of this process are too recent to evaluate.[121] Congressional authorization is clear, as is the federal power to delegate power to regulate water quality.[122] Montana reservations will be subject to future federal regulations which may have a significant impact on these rights.

### *Concluding Remarks*

Developing a balance—between established water uses and emerging demands, between in-stream and off stream uses, between existing rights and future needs—is a daunting task. Montana's reservation system is an example of an innovative process that seemingly fits within existing prior appropriation principles and yet modifies these to accommodate changing demands and requirements. Such accommodation is at the heart of the on-going evolution in western water law, but it is also an uneasy alliance and an uncertain process. Reservations are based in, yet differ significantly from, prior appropriation rights. They adhere to the first in time, first in right principle, but fundamentally change traditional understandings about what constitutes first in time. They build upon the foundation of existing rights, but challenge conventional ideas about how rights are established, and how and when water must be "used." These rights have become an important vehicle for incorporating new beneficial uses—notably in-stream flows—into Montana's water management system. But it is unclear how secure these reserved rights are, or how durable they will prove to be.

Some of the issues concerning reserved rights raised in this paper may be addressed or resolved relatively easily, as the process continues to be implemented and public awareness increases. For example, as the state-wide adjudication proceeds and water rights are clarified, concerns about water availability may be eased, at least in some basins. Furthermore, the value of in-stream flows—for preserving water quality as well as providing recreation and other economic benefits—will likely become more evident in the near future. While this may add fuel to the debate over in-stream versus off-stream uses, it may also become more apparent

121. 33 U.S.C. § 1377(e) (1988); *see generally* M. Chandler, *A Link Between Water Quality and Water Rights*, *in* WATER WARS: THE RETURN OF THE RIPARIAN (1994). In the only case contesting tribal power to establish water quality standards, the tribe won. *See* City of Albuquerque v. Browner, Civ. 93-82 M, slip op. (D.N.M. Oct. 21. 1993). This decision was appealed, but a settlement was reached. A motion to vacate the judgement has been made. Kevin Gover & Jana L. Walker, *Water Quality Regulation on Indian Reservation*, 40 ROCKY MTN. MIN. L. INST. 24-1 (1994).

122. *Arkansas*, 112 S. Ct. at 1056.



that in-stream uses do not necessarily preclude consumptive uses, and that both are essential when planning for the future.

Other issues are likely to be more persistent concerns. For example, the provisions which permit review and reallocation of reserved rights allow flexibility but also reduce certainty and permit on-going challenges from other users. More generally, the potential conflicts with other sovereigns—notably the federal government, Indian tribes, and downstream states—remain significant. Some of these problems could be solved if a compact is negotiated, binding all the parties.[123] Compacts do exist between tribes and states and have been approved by Congress.[124] Compacts have also been made between states and the federal government.[125] Compacts between the states in the Missouri basin have been proposed in the past but have never gone very far.[126] If additional sovereigns are added, such as tribes and the federal government, the negotiation process would take on the patina of an international treaty negotiation. The enormous political issues associated with the Missouri River basin make such an undertaking a remote possibility. Like compacts, federal legislation is also a theoretical possibility, but, for many of the same reasons, a highly unlikely one as well.

A more probable outcome is that Montana's reservation system will continue to be implemented, and it will continue to be challenged. Many of those future challenges could come from a variety of parties who have yet to enter the fray. As a result, the reservation idea will continue to evolve, along with the broader principles of the prior appropriation doctrine.

123. *See generally* Zachary McCormick, *Interstate Water Allocation Compacts in the Western United States—Some Suggestions*, 30 WATER RESOURCES BULL. 385 (1994); George Sherk, *Resolving Interstate Water Conflicts in the Eastern United States: The Re-emergence of the Federal-Interstate Compact*, 30 WATER RESOURCES BULL. 397 (1994).

124. MONT. CODE ANN. § 85-20-201 (1993) (The Fort Peck-Montana Compact) and MONT. CODE ANN. § 85-20-301 (1993) (Northern Cheyenne-Montana Compact) are the two Montana examples. *See generally* Mary McNally, *Water Marketing: The Case of Indian Reserved Rights*, 30 WATER RESOURCES BULL. 963 (1994).

125. *See, e.g.*, Delaware River Basin Compact, 75 Stat. 689 (1961); Susquehanna River Basin Compact, 84 Stat. 1509 (1970).

126. Guhin, *supra* note 24, at 476; *see also* Frank J. Trelease, *A Federal-State Compact for Missouri River Basin Development*, 7 WYO. L. REV. 161, 189 (1953) (for an optimistic view of compact possibilities).