

A Primer on the Interstate Allocation of Water in Idaho and Washington

Idaho Washington Aquifer Collaborative (IWAC)

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1. THE INTERSTATE ALLOCATION OF WATER

A. Overview

State and federal water law is designed, by and large, to allocate and administer water rights within state boundaries. A separate body of law governs the allocation of water between states.

If you imagine a water resource common to two states as a pie, interstate allocation divides that pie into two pieces. Each state, in turn, allocates its portion of the pie to individual water users within the state. In other words, interstate allocation of water, by and large, operates at the macro level. With some exceptions discussed below, it addresses disputes between states, not disputes between individual water users located in different states.

The effect of an interstate allocation of water is to require one state (typically the upstream or up-gradient state) to deliver water on an aggregate basis to the neighboring state. In order to meet this obligation, the upstream state may have to curtail uses of that water within that state. Which individual users are curtailed in order to meet the upstream state's obligation to the downstream state is a matter of state law (mostly) within the upstream state. Once the water arrives in the downstream state, the water is allocated according to the rules of allocation within the downstream state. As a result, it is entirely possible that a senior water right in an upstream state could be curtailed, while a junior water right in the downstream state receives its full share.

Interstate allocation can take various forms, outlined below.

Macro-level approaches (applicable to states and only indirectly to individual water users)

- (1) *Equitable apportionment.* If two or more states cannot agree on the allocation of a shared water resource, one state may initiate litigation directly in the U.S. Supreme Court. This brute force approach to interstate allocation serves as the underlying threat motivating most of the other approaches discussed below. These cases are tried first by a special master and ultimately decreed by the U.S. Supreme Court under the doctrine of "equitable apportionment."
- (2) *Compacts.* If states are able to reach an agreement regarding the allocation of a common water resource, they may enter into a "compact." Compacts must be approved by the U.S. Congress. Once approved, they are legally enforceable agreements. Typically, they are fairly rigid, mathematical allocations of water without a mechanism for consideration of new information or changed conditions. But they could contain more flexible terms.
- (3) *Congressional allocation.* The third approach is for Congress to unilaterally allocate the water resource among the states through legislation. These are very rare (having occurred only twice).
- (4) *Informal agreements.* More recently, states have begun to explore a less formal approach to water allocation based on memorandums of understanding and other mechanisms not entailing congressional approval. The advantage of this approach is that it is simpler, more flexible, more cooperative, more efficient, more incremental, and more adaptive. On the other hand, by and large, they are not enforceable. The goal of this approach may be the development of a better information base that will facilitate

the cooperative development of creative management strategies in both states aimed at maximizing the efficient utilization of the resource while protecting other values. Because this approach often does not entail an explicit allocation of the water between the affected states, this is sometimes referred to as the “less is more” approach.¹

Micro-level approaches (directly applicable to individual water users)

- (5) Export restrictions. States sometimes attempt unilaterally to restrict the diversion of water in that state where it will be transported out-of-state to serve uses elsewhere. These restrictions may apply both to new appropriations and to transfers of exiting rights for use outside of the state. Such restrictions may expressly target out-of-state uses, or they may come in the form of restrictions on out-of-basin use. Across-the-board, unilateral bans on out-of-state uses are unconstitutional under the “dormant commerce clause” of the U.S. Constitution. Some limited restrictions on export in the context of conservation efforts, however, are permissible. Export restrictions that would otherwise violate the Commerce Clause may be allowed by a compact or equitable apportionment. There may also be questions about whether a compact or equitable apportionment implicitly prohibits transfers across state lines.
- (6) Interstate water markets and the administration of water rights transferred across state lines. As a practical matter, it is rare for a water right acquired in one state to be transferred to a use in another state. With tightening supplies and an emerging interstate water market, however, this is likely to occur more frequently in the future. Of course, any such transfer would be subject to any applicable export restrictions imposed by the exporting state or by compact. Transfer of the place of use across a state line is fairly straightforward. In contrast, transfer of the point of diversion across a state line is problematical.
- (7) Private enforcement of priority across state lines. Intersate allocation litigation ordinarily involves actions by state governments. However, individual parties have been known to bring litigation to establish priority relationships across state lines. For example, a senior user in one state may sue to enjoin diversions by a junior in another state, as in *Bean v. Morris*, 221 U.S. 485 (1911). This approach has seldom been employed. Presumably, it would be available only in the absence of any other applicable interstate allocation. For instance, if a decree, compact, or congressional allocation were in place, individual water users would probably not be allowed to enforce priorities across state lines because doing so would upset the established allocation.

Each of these approaches is discussed below.

¹ James H. Davenport, *Less is More: A Limited Approach to Multi-State Management of Interstate Groundwater Basins*, ABA Water Law Conference (Feb. 21, 2008). Mr. Davenport is special counsel for the Colorado River Commission of Nevada.

B. The law of interstate allocation

(1) Equitable apportionment

In the past, state-versus-state conflicts have focused on water supply for agricultural and other private consumptive water needs. In coming years, however, we may expect to see more and more interstate battles fought over water needed to meet new urban demands, to meet water quality and other instream needs, and to avoid jeopardy to endangered species.

For over a hundred years, the axiom “first in time is first in right” has reigned as the central governing principle of Western water law. One might think, then, that this principle would govern disputes between states as well as between people. It does not. One of the more curious incongruities in Western water law is that the rule of first in time does not govern the allocation of water between western states. Priority of use between the states is a factor to be considered, but only one. As Justice Douglas noted, “But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible.” *Nebraska v. Wyoming*, 325 U.S. 589, 599, 618 (1945).

The law of interstate allocation did not arise until the 20th century. In the 1800s, water resources were not sufficiently developed to generate significant cross-border conflicts. Beginning in the early 1900s, however, depletions in some interstate streams became so severe that states took each other to court. Curiously, some of the early interstate water conflicts developed not in the parched West, but on the East Coast as major cities tapped the rivers in neighboring states to satisfy their growing populations.² Indeed, disputes over water in the Eastern United States are becoming increasingly common today.³

The U.S. Supreme Court has the power to entertain and decide disputes on any subject (not just water) between two or more states pursuant to the Constitution’s grant of original jurisdiction. U.S. Const. art. III, § 2, cl. 2. Such litigation is most unusual in that it is initiated directly in the U.S. Supreme Court, bypassing the lower federal district and appellate courts. As a practical matter, the Supreme Court is not equipped to conduct a trial of such matters. Consequently, it appoints a special master to conduct the trial. Trials before the special master are lengthy, complicated, and expensive—often lasting over a decade. The special master hears evidence, rules on motions, and proposes a

² *E.g.*, *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (This case contains Justice Holmes famous statement: “A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it.”); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931).

³ In *South Carolina v. North Carolina*, 552 U.S. 804 (2007) (per curium), the Court granted South Carolina leave to file an original action challenging an interbasin diversion of water by North Carolina from the Catawba River into the Yadkin-Pee Dee Basin. In an unusual move, the Court allowed Duke Energy and another water user to intervene. *South Carolina v. North Carolina*, 558 U.S. 256 (2010) (Alito, J.). Ultimately, the case was settled. *South Carolina v. North Carolina*, 562 U.S. 1126 (2010) (per curium).

In *Virginia v. Maryland*, 540 U.S. 56 (2003) (Rehnquist, C.J.), the Court ruled that Maryland may not prohibit a Virginia county from diverting water from the Potomac River. This was not, strictly speaking, an equitable apportionment case in that it did not allocate all the water in the river. Rather, it was a challenge to a particular water diversion. However, the Court invoked its authority to ensure that “water is equitably apportioned between the States.” *Virginia v. Maryland*, 540 U.S. at 609.

recommended decree. The Court pays significant deference to the special master’s recommendation, but reserves the right to render the final judgment.⁴

The Supreme Court will not automatically take jurisdiction over any dispute between states. Rather, it has construed the Constitution and 28 U.S.C. § 1251(a)(1) as making original jurisdiction actions discretionary with the Court. The Court has said that the party initiating the suit must demonstrate “real or substantial injury or damage.” *Colorado v. New Mexico*, 459 U.S. 176, 188 n.13 (1982), *appeal after remand*, 467 U.S. 310 (1984).

In theory, the dispute must be serious enough that it could cause the states to enter into war with each other, if they were sovereigns. *Missouri v. Illinois*, 200 U.S. 496, 519-21 (1906).

When the Court exercises its original jurisdiction over a controversy between two States, it serves “as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force.” *North Dakota v. Minnesota*, 263 U.S. 365, 372–373, 44 S.Ct. 138, 68 L.Ed. 342 (1923). That role significantly “differ[s] from” the one the Court undertakes “in suits between private parties.” *Id.*, at 372, 44 S.Ct. 138; see Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 705 (1925) (When a “controversy concerns two States we are at once in a world wholly different from that of a law-suit between John Doe and Richard Roe over the metes and bounds of Blackacre”). In this singular sphere, “the court may regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice.” *Kentucky v. Dennison*, 24 How. 66, 98, 16 L. Ed. 717 (1861).

Kansas v. Nebraska, 135 S. Ct. 1042, 1051-52 (2015) (Kagan, J.).⁵

The Court’s jurisdiction is equitable in nature. *Kansas v. Nebraska*, 135 S. Ct. at 1051. The Constitution provides no guidance on how to resolve these matters, so the Court has written on a blank slate in creating the body of federal common law of water allocation known as equitable apportionment.⁶ Presumably, Congress has the power to shape the rules of equitable apportionment

⁴ William D. Olcott, Comment, *Equitable Apportionment: A Judicial Bridge Over Troubled Waters*, 66 Neb. L. Rev. 734, 736 (1987).

⁵ *Kansas v. Nebraska* was a compact enforcement case, not an equitable apportionment case. The Court recognized, however, the connection between the two. “This Court’s authority to apportion interstate streams encourages States to enter into compacts with each other. . . . But in doing so, we remain aware that the States bargained for those rights in the shadow of our equitable apportionment power—that is, our capacity to prevent one State from taking advantage of another. Each State’s ‘right to invoke the original jurisdiction of this Court [is] an important part of the context’ in which any compact is made.” *Kansas v. Nebraska*, 135 S. Ct. at 1052 (quoting *Texas v. New Mexico*, 462 U.S. 554, 569 (1983)).

⁶ Of course, the principles of equitable apportionment assume that there has been no congressional apportionment of the waters through legislation (discussed below at section 1.B(3) at page 426). “Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an ‘equitable apportionment’ for the apportionment chosen by Congress.” *Arizona v. California*, 373 U.S. 546, 546 (1963).

through legislation. (See footnote 13 at page 10 discussing Congress' power to unilaterally allocate interstate water.) In any event, it has never legislated on the subject.

The Court has made clear that whether the headwaters of a river arise in one state or another is “essentially irrelevant.” *Colorado v. New Mexico*, 467 U.S. 310, 467 (1984). As a practical matter, equitable apportionment litigation is typically initiated by a downstream state seeking to curtail water diversions by an upstream state. In theory, however, an upstream state could initiate an equitable apportionment proceeding in order to resolve interstate rights in a predictable way before a downstream state sought to upset existing or planned uses in the upstream state.

Although all cases to date have originated in the context of disputes over rivers, the principles of equitable apportionment apply equally to the allocation of an interstate aquifer. For instance, in a 2001 decision, the Supreme Court awarded damages to Kansas because Colorado allowed ground water pumping that depleted surface flows in the Arkansas River to which Kansas was entitled under a 1949 compact. *Kansas v. Colorado*, 533 U.S. 1 (2001). Although this was a compact case, not an equitable apportionment case, it built on a long history of equitable apportionment of that river.⁷ Likewise, the case of *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015) (Kagan, J.) involved the Republic River Compact in which ground water counted toward the water consumption allowed under the compact.

The first interstate equitable apportionment case was *Kansas v. Colorado*, 206 U.S. 46 (1907). Kansas sued Colorado charging that extensive irrigation in Colorado was drying up the Arkansas River and restricting the ability of Kansas farmers to launch new irrigation projects. Each state argued from the perspective of the water rights system with which it was familiar. Kansas, a largely riparian rights state, argued that Colorado's use of water was unreasonable. Colorado, a prior appropriation state, argued that, by its Constitution, it owned all the water and could allocate it on the basis of first in time.

In deciding the case, the Supreme Court had no precedent to go on; a case like this had never arisen before. The Court noted that the Constitution granted it the authority to resolve disputes between the states, and set out to write a new body of interstate allocation law now known as “equitable apportionment.”

Had the case arisen today, it is likely that the parties would have documented the environmental consequences of a dried-up Arkansas River. But there was no mention of dead fish or the environment in this 1907 decision. Instead, the Court focused its attention on the benefits of irrigated farming. The Court determined that it would be inequitable to cut off the water already being used by Coloradans simply to provide more water to Kansas. But the Court did not rule in Colorado's favor simply because its uses were “senior” to uses in Kansas. Rather, the Court engaged in a balancing act to determine what allocation of water was “fair” to each of the disputants and concluded that the status quo was “fair.” Thus, the Court allowed Colorado to continue its diversions for the time being, with the proviso that Kansas could institute a new suit if Colorado increased its depletions.

In the first case to arise between two prior appropriation states, *Wyoming v. Colorado*, 259 U.S. 419 (1922), the Court found it appropriate to apply the rule of priority in time to allocate water between the two states. However, in subsequent litigation between prior appropriation states

⁷ *Kansas v. Colorado*, 206 U.S. 46 (1907), *prior history*, 185 U.S. 125 (1902), *subsequent history*, *Colorado v. Kansas*, 320 U.S. 383 (1943), *and*, *Kansas v. Colorado*, 514 U.S. 673 (1995).

(*Nebraska v. Wyoming* in 1945 and *Colorado v. New Mexico* in 1982⁸) the Court has declared that the rule of priority is only one factor to be considered.

Over the years, the Supreme Court has heard just over a dozen cases in which decrees were sought allocating water on interstate streams.⁹ No hard and fast rules have emerged from this history of litigation. To the contrary, the Supreme Court has ruled on an *ad hoc* basis, considering whatever evidence on the issue of equity it found appropriate at the time.

Justice Douglas, writing for the Court in *Nebraska v. Wyoming*, summed up the law this way:

Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.

Nebraska v. Wyoming, 325 U.S. 589, 618 (1945) (Douglas, J.).¹⁰

⁸ *Nebraska v. Wyoming*, 325 U.S. 589, 599, 617-18 (1945); *Colorado v. New Mexico*, 459 U.S. 17613 (1982), *appeal after remand*, 467 U.S. 310 (1984).

⁹ Arkansas River *Kansas v. Colorado*, 206 U.S. 46 (1907), *prior history*, 185 U.S. 125 (1902), *subsequent history*, *Colorado v. Kansas*, 320 U.S. 383 (1943), *and*, *Kansas v. Colorado*, 514 U.S. 673 (1995), 1949 compact enforced in, *Kansas v. Colorado*, 533 U.S. 1 (2001).

Bois de Sioux *North Dakota v. Minnesota*, 263 U.S. 365 (1923).

Catawba River *South Carolina v. North Carolina*, 558 U.S. 256 (2010) (Alito, J.) (allowing intervention); *Carolina v. North Carolina*, 562 U.S. 1126 (2010) (per curiam) (dismissal following settlement).

Chicago River *Missouri v. Illinois*, 200 U.S. 496 (1906).

Colorado River *Arizona v. California*, 373 U.S. 546 (1963), *decree entered*, 439 U.S. 419 (1979), *decree modified*, 460 U.S. 605 (1983).

Columbia & Snake Rivers *Idaho v. Oregon*, 462 U.S. 1017 (1983) (dealing with anadromous fish).

Connecticut River *Connecticut v. Massachusetts*, 282 U.S. 660 (1931).

Delaware River *New Jersey v. New York*, 283 U.S. 336 (1931), *decree amended*, 347 U.S. 995 (1954).

Laramie River *Wyoming v. Colorado*, 259 U.S. 419 (1922), *decree modified*, 260 U.S. 1 (1922), *new decree entered*, 353 U.S. 953 (1957).

North Platte River *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *decree modified*, 345 U.S. 981 (1953), *settlement entered*, *Nebraska v. Wyoming and Colorado*, 534 U.S. 40 (2001).

Potomac River *Virginia v. Maryland*, 540 U.S. 56 (2003) (Rehnquist, C.J.). This was not, strictly speaking, an equitable apportionment case. Rather, it was a challenge to a particular water diversion.

Vermejo River *Colorado v. New Mexico*, 459 U.S. 176 (1982), *appeal after remand*, 467 U.S. 310 (1984).

Walla Walla River *Washington v. Oregon*, 297 U.S. 517 (1936).

¹⁰ *Nebraska v. Wyoming* concerned a dispute between Nebraska, Wyoming, Colorado and the United States regarding the waters of the North Platte River. The United States claimed it owned all of the

More recently, however, considerations of water conservation and efficiency have moved to the forefront. In the most recent case, Colorado sued New Mexico, charging that New Mexico was wasting water taken from the Vermejo River. *Colorado v. New Mexico*, 459 U.S. 176 (1982), *appeal after remand*, 467 U.S. 310 (1984). Although the water uses in New Mexico were longstanding and therefore “senior” to Colorado’s potential uses of the river in the future, Colorado asked the Supreme Court to consider the inefficiency of New Mexico’s irrigation system. The Special Master appointed by the Court to hear the facts found that “the heart of New Mexico’s water problem is the Vermejo Conservancy District” which he considered a failed reclamation project that “quite possibly should never have been built.” The Court nevertheless determined that Colorado should not be able to force New Mexico to improve the efficiency of the project to free up water for Colorado’s use, because Colorado had not demonstrated any stronger water conservation program of its own.

This important case demonstrates the possibility that, in the future, water may be allocated between states based on each state’s level of commitment to promoting water conservation and efficiency. The case should serve as a warning to all Western states to countenance wasteful water use practices at their peril.

(2) Compacts

An interstate compact is an agreement by two or more states that has been approved by Congress for the purpose of allocating the rights to the use of a natural resource such as water among the compacting states. The federal Constitution tacitly authorizes such agreements between states: “No State, shall without the Consent of Congress, . . . compact with another State, or with a foreign Power” U.S. Const. art. I, § 10, cl. 3.

Typically, Congress invites the states to initiate negotiations, with the expectation that whatever accommodation is achieved will receive subsequent congressional approval. Upon approval by Congress a compact becomes a law of the United States. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (White, J.). Thereafter, the compacting states act to incorporate the terms of the compact into their respective state laws. This dual codification aids in the enforcement of the compact’s terms. The federal codification ensures that states cannot back out, and eliminates any potential for a dormant commerce clause attack on the allocation. State codification ensures that every affected individual water user will be subject to the benefits and burdens of the compact.

Compacts are typically implemented through the creation of administrative compact commissions. These compact commissions “create political institutions that help break down barriers that have prevented more effective water management” and have been described as “the greatest contribution to interstate water resource management.”¹¹

Violations of compact provisions carry heavy consequences. In 2001 the Supreme Court awarded monetary damages and pre-judgment interest to Kansas, based on Colorado’s violation of its

unappropriated water in the river, and that its entitlement was derived not from appropriation but from its underlying ownership of the lands and waters—all acquired by cessions from foreign governments—which entitled it to an apportionment free from state control. The Court rejected the federal assertion, noting that the water rights in the North Platte Project all had been obtained in compliance with state law. *Nebraska v. Wyoming*, 325 U.S. at 614.

¹¹ Karl Erhardt, *The Battle Over “The Hooch”*: *The Federal-Interstate Water Compact and the Resolution of Rights in the Chattahoochee River*, 11 *Stan. Envtl. L. J.* 200, 216 (1992).

compact with the state. *Kansas v. Colorado*, 533 U.S. 1 (2001). The Court noted that “it is the State’s prerogative either to deposit the proceeds of any judgment in the ‘general coffers of the State’ or to use them to ‘benefit those who were hurt.’” *Kansas v. Colorado* at 10. See also, *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (White, J.) (Court not limited to prospective relief, may also award money damages for past breach of Compact). In *Kansas v. Nebraska*, 135 S. Ct. 1042, 1056 (2015) (Kagan, J.), the Court found that “Nebraska showed reckless indifference as to compliance” with the compact and ordered Nebraska to partially disgorge benefits it derived by failing to deliver sufficient water. It ordered payment of \$1.8 million, saying that this “relatively small disgorgement award suffices here,” because Nebraska had taken action to correct the problem after the 2006 breach. *Kansas v. Nebraska*, 135 S. Ct. at 1058.

The first interstate compact allocating water in the West was the Colorado River Compact of 1922. Since then, interstate compacts have been frequently employed by states sharing common water resources.

To date, about two dozen interstate compacts have been authorized to allocate the waters of interstate streams among the states. The allocations are based either on an agreement to share the waters of the interstate stream on a percentage basis, or upon the agreement of one or more upper basin states to deliver a fixed amount of water to one or more lower states.¹²

Compacts are thought to be permanent and inflexible allocations of water. One commentator, however, has offered an interesting argument suggesting that under some circumstances a state might succeed in revoking its ratification of a compact where it finds itself “shackled” by outdated assumptions. Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. Colo. L. Rev. 105 (2003).

(3) Congressional apportionment (aka congressional allocation)

On rare occasions, two to be exact, the U.S. Congress has unilaterally allocated water among states. Unlike congressional approval of interstate compacts, this action may occur over the objection of affected states. Congress has the power to do so under its commerce power,¹³ and its actions override those of the states under the supremacy clause, which renders “congressional action the supreme law of the land, bind[ing] even unwilling states to the terms of congressional acts.” Joseph L. Sax, *et al.*, *Legal Control of Water Resources* 731, 737 (2nd ed. 1991).

The most notable congressional apportionment (also known as congressional allocation) came in the form of the Boulder Canyon Project Act enacted by Congress in 1928.¹⁴ The Act established a

¹² Two useful sources on the law of compacts are Frankfurter and Landix, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685 (1925); and Zimmerman and Wendell, *The Interstate Compact Since 1925* (Council of State Governments, 1951).

¹³ It had long been thought that Congress lacked the power to allocate water among states. Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. Colo. L. Rev. 105, 173-74 (2003). In 1963, however, a sharply divided Supreme Court held that Congress has this power and exercised it in the Boulder Canyon Project Act. *Arizona v. California*, 373 U.S. 546, 565-66 (1963).

¹⁴ Boulder Canyon Project Act of 1928, ch. 42, 45 Stat. 1057 (1928) (codified at 43 U.S.C. §§ 617(a)-717(t)). The Act became effective after further state and federal actions in 1929, and is sometimes referred to as the Boulder Canyon Project Act of 1929.

comprehensive scheme for apportioning the waters of the Colorado River among Arizona, California, and Nevada. Although the Act did not contain an express allocation of water, the U.S. Supreme Court ruled in 1963 that the intent of Congress was to make such an allocation. *Arizona v. California*, 373 U.S. 546 (1963).

The only other congressional apportionment to date involved a division of the waters of the Truckee and Carson Rivers and Lake Tahoe between Nevada and California. Although technically enacted as a congressional apportionment, Congress acted on an agreement worked out between the states which had originally taken the form of a compact.

(4) Informal agreements

As an alternative to formal interstate compacts, states may elect to enter into less formal, cooperative agreements or understandings. Just as with an interstate compact, these agreements could take all manner of approaches to allocation of the resource. They could allocate water according to a formula. The formula might or might not include variables that change over time. More likely, however, there might be mere targets or no allocation at all. Instead, the agreement might establish procedural mechanisms aimed at promoting cooperation and/or dispute resolution. Or it might simply approach the subject incrementally, for instance, requiring some steps by each side (such as data gathering, the adjudication of water rights, the promotion of conservation, and the development of cooperative solutions like aquifer recharge). The agreements might even provide for changes in state law governing water rights, for instance, to promote greater efficiency and conservation. They could also address issues outside of water law, such as zoning and land use policy.

The key difference between this approach and an interstate compact is that it is easier and more flexible. Notably, this informal approach does not require congressional ratification or any special form of approval by the states. Thus, depending on what it sought to accomplish, it might take the form of something as informal as a memorandum of understanding between state agencies (or even a handshake of the governors). It also has the flexibility to incorporate other entities, such as local governments, tribes, water users, environmental groups, and other non-governmental organizations.

The downsides to this approach include the following:

- It lacks the strong enforcement mechanisms that come automatically with an interstate compact. This approach relies in large part on each state's commitment to making the process work. Of course, states may build in whatever enforcement mechanisms they wish in the form of a contract. But questions remain about their enforceability. The ability of states to wiggle out of such informal agreements is both a strength and a weakness. It gives states a chance to take their cooperation a step at a time, without making an ironclad commitment. And the fact that either state might walk away (and, perhaps seek an equitable apportionment instead) gives all parties an incentive to stay engaged.
- These agreements could be subject to challenge as a violation of the compact clause of the Constitution, which prohibits states from compacting without the approval of Congress. The more formal and substantive the agreement, the greater the risk of such a challenge.
- These agreements could also be challenged as a violation of the so-called dormant commerce clause, which precludes states from restricting interstate commerce.

However, if the agreement was crafted in terms of promoting water conservation, it would probably survive the test established in *Sporhase v. Nebraska*. (See discussion below in section 1.B(5) at page 12).

(5) **Unilateral restrictions on export: the dormant commerce clause**

From time to time, states have sought to bar water rights that serve out-of-state water uses. Federal constitutional constraints severely constrain such “water hoarding.”

The so-called dormant commerce clause of the U.S. Constitution has been interpreted to restrict the ability of states to regulate commerce. The leading case is *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.).¹⁵ The U.S. Supreme Court held that water was an article of interstate commerce, and that a state therefore may not unreasonably restrict its interstate use.¹⁶ The Court then struck down parts of Nebraska’s water export statute which violated the “dormant commerce clause” of the U.S. Constitution. U.S. Const. art. I, § 8, cl. 3. Specifically, the Court voided Nebraska’s absolute ban on water exports to “non-reciprocating” states, but upheld those provisions reasonably relating to the “conservation” of water. Thus, so long as restraints on exportation are expressed in terms of legitimate state concerns (which the Court found to include conservation), a limited preference for in-state use may not constitute an unconstitutional burden on commerce. In Nebraska’s case, the Court commended the state’s objective “to conserve and preserve diminishing sources of groundwater,” ruling that “[t]he purpose is unquestionably legitimate and highly important” and that this purpose was “advanced” by the conservation requirements imposed on exporters of water. 458 U.S. at 954-55. Accordingly, for Idaho to make the restrictions on export stick, it was necessary to add the water conservation test to the requirements for all new and transferred water rights.

See discussion of Idaho’s export restrictions in section 1.C(2) at page 15.

(6) **Transfer of water rights across state lines**

In theory, water may be moved across state lines either by appropriation of new rights in one state for use in another or by transfer of existing rights to a place of use in another state. Both are rare. They will be more common in the future, however, as supplies tighten and water markets become more sophisticated. If used properly, they could contribute to greater efficiency of use in the management of a common resource. There is not much track record and considerable uncertainty as to how such appropriations or transfers would be accomplished and administered.

Given the limited availability of unappropriated water and the benefit of a senior priority date, most interstate transfers will probably entail transfers of existing rights. Most interstate transfers involve retaining the point of diversion in the original state and moving the water (via pipeline or other delivery system) to a place of use in a new state.

¹⁵ See also, *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983); *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984); and *Linsey v. McClure*, 136 F.2d 65 (1943); see also, *American Trucking Ass’n v. Michigan Public Service Comm’n*, 545 U.S. 429 (2005).

¹⁶ For a fuller discussion see, Christopher H. Meyer, *Sporhase v. Nebraska: A Spur to Better Water Resource Management*, 1 The Environmental Forum 28, Environmental Law Institute (1983); Steven E. Clyde, *State Prohibitions on the Interstate Exportation of Scarce Water Resources*, 53 U. Colo. L. Rev. 529 (1982); Frank J. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. Colo. L. Rev. 347 (1985).

Suppose, for example, that an Idaho municipality sought to expand its service area into another state. Recently, for example, the City of Moscow explored delivering water pumped from its wells in Idaho to customers immediately across the state line in Washington. Presumably, as a matter of Idaho water law, the city would not need to seek a transfer of its municipal water rights to do this, assuming that the new service territory falls within the predictably expanding municipal service area.¹⁷

If, however, a transfer application were required for a new place of use outside of Idaho, the water right holder would need to address the factors set out in Idaho's water export statute (see discussion in section 1.C(2)(a) at page 15) and, if applicable, Idaho's out-of-basin rules (see discussion in section 1.C(2)(b) at page 16). That, presumably, would be the end of the matter. Unlike transfers involving a transfer of the point of diversion to outside of the state, relatively few administration issues would be presented. So long as the diversion remains in Idaho, IDWR would retain ample authority to monitor and administer the right. One issue that might arise would be ensuring that the use was not improperly enlarged or used for unauthorized purposes in the new out-of-state location. Presumably, IDWR could condition the right to require reporting of use in the neighboring state.

It is far more complex and problematical to move both the point of diversion and place of use from one state to another. Suppose, for example, that the developer of a new subdivision or commercial/industrial facility in Idaho purchased existing water rights used in Washington and sought to transfer those rights across the state line. If the water flowed from a stream in Washington into a river in or bordering Idaho (or if the water could be diverted from an aquifer common to both states), the developer might seek a new point of diversion in Idaho. Thus, the transfer might then seek to change the point of diversion to the other side of the Snake or to a well in Idaho.

Assuming the transfer survived any applicable water export rules in Washington and was approved by that state, how would such a right be administered in Idaho? This has never been attempted in these states. The authors are advised that IDWR is skeptical that such a transfer (involving moving an out-of-state point of diversion to a location in Idaho) would be recognized in Idaho.¹⁸ One can only ponder how such a transfer might work. The discussion that follows illustrates the difficulties of administration.

Presumably, the holder of the transferred right could call upon Washington water authorities to curtail junior users in that state if those uses injured the right now diverted in Idaho. This, however, might trigger factually complex defenses from the Washington users in which they contend that the injury is caused not by them but others in Idaho.

Putting aside those evidentiary issues, it may be that the holder of the transferred right will have no motivation to seek such administration. Suppose, for example, the water was originally diverted from a tributary of the Snake River in Washington and is now diverted from the Idaho side of the Snake. Juniors in Washington might then begin to divert from the tributary in a manner that would have interfered with the water right where it was before the transfer. But the current user may not care, because there is plenty of water physically available in the Snake River. Essentially, the Washington

¹⁷ On the other hand, there is a separate question as to whether Idaho cities have the authority—as a matter of municipal law—to serve customers outside of the state. A bill to clarify that they do have this authority was considered by the Legislature in 2009, but was not enacted. S.B. 1002 (2009).

¹⁸ Telephone conference between Phillip J. Rassier, then Chief Counsel, IDWR and Christopher H. Meyer (Aug. 25, 2009).

juniors would be stealing water from downstream Snake River water users (including Idaho water rights for hydropower and instream flow). What remedies would the downstream Idaho water right holders have? Could they curtail the junior Washington pumpers? Should the right be conditioned to clarify how administration in Washington would occur?

Suppose that the holder of the transferred right diverts more water in Idaho than is allowed under the Washington right. If the point of diversion has moved to Idaho, Washington would have no jurisdiction to curtail the unlawful diversion. Plainly, Idaho could curtail the unlawful diversion, if it wished to. But suppose for some reason it did not. Could the State of Washington (or individual Washington or Idaho water users) initiate administrative or judicial proceedings in Idaho to curtail the illegal use? Presumably the answer is yes, but there is no precedent for this.

What if other water users in Idaho began to interfere with the new water right? For example, suppose the Washington right was transferred to a well on the Idaho side. Suppose further that the holder of the Washington right then complained to IDWR that other Idaho pumpers were interfering with their new well in Idaho. How would IDWR respond to such a call? Assuming that IDWR determined it had authority to protect the Washington right against Idaho juniors, would IDWR simply integrate the Washington priority date into the administration of priorities in Idaho? What if this “slotting in” resulted in Idaho rights now being curtailed? Should the right be subordinated to all Idaho rights existing at the time of the transfer into Idaho? Should the Washington right be allowed to limit further development of water rights in Idaho? This example illustrates the inherent difficulty in allowing one state to approve an out-of-state transfer of the point of diversion without administrative involvement by the other state.

These questions are offered simply to identify some of the issues that might be raised in such a point-of-diversion transfer. These examples also shed some light on why IDWR may be reluctant to allow this “can of worms” to be opened.

(7) Private curtailment of water rights in other states

In a handful of cases brought by private parties, federal courts have enforced priorities of water rights across state lines. The most notable is the decision by Justice Holmes in *Bean v. Morris*, 221 U.S. 485 (1911). In this case, the holder of a water right in Wyoming sued an upstream diverter with a more junior priority in Montana. The Court enforced the senior priority of the Wyoming water right holder, enjoining the Montana diverter from interfering with the senior diverter. In reaching its decision, the Court relied on the fact that both states applied the same prior appropriation doctrine and that neither state has adopted legislation suggesting that they would not honor priorities of neighboring states.

This decision is consistent with the result in *Wyoming v. Colorado*, 259 U.S. 419 (1922), in which the Court allocated water between two prior appropriation states on the basis of first in time. But it is inconsistent with the result in *Nebraska v. Wyoming*, 325 U.S. 589, 599, 617-18 (1945) and every equitable apportionment case since, all of which have recognized that priority of use is but one factor to consider, e.g., *Colorado v. New Mexico*, 459 U.S. 17613 (1982), *appeal after remand*, 467 U.S. 310 (1984).

It bears emphasis that this was not an equitable apportionment case brought by one sovereign against another. Rather, it was initiated by private parties. Had there been any sort of allocation in place (whether by compact, decree, or congressional allocation), that would have overridden the result here.

C. Interstate allocation in Idaho

(1) Idaho compacts

Idaho is a party to an interstate compact with the states of Utah and Wyoming on the Bear River located in the southeast corner of the state. The Amended Bear River Compact was ratified by the three states in 1979 and approved by Congress on February 8, 1980. Pub. L. 96-189, 94 Stat. 4; Idaho Code § 42-3402. The compact is actively administered by the Bear River Commission made up of representatives appointed by the governors of the three states and a Federal representative.

Idaho also is a party to the Snake River Compact with the State of Wyoming which allocates 96 percent of the waters of the Snake River for use by Idaho and 4 percent for use by Wyoming upon satisfying certain storage replacement provisions. Act of March 21, 1950, 64 Stat. 29; Idaho Code § 42-3401.

In 1963, Idaho ratified the Columbia River Interstate Compact among the states of Idaho, Montana, Oregon and Washington. 1963 Sess. Laws 818. Not all of the states ratified the compact. Idaho repealed its ratification of the compact in 1975. 1975 Sess. Laws 29. Some discussions have occurred in recent years concerning the prospects for renewing the interstate compact initiative as a way of addressing the numerous fish and water resource issues among the Columbia River states.

(2) Idaho's statutory export restrictions

(a) Out-of-state uses—the Water Export Act

In 1990, the Idaho Legislature enacted detailed legislation specifically dealing with out-of-state uses of water (by either appropriation or transfer of existing rights). 1990 Idaho Sess. Laws ch. 141 (codified primarily at Idaho Code § 42-401, but also §§ 42-203A(5)(f) and 42-222(1)) (“Water Export Act”).

The Water Export Act was intended to bring the state into compliance with *Sporhase v. Nebraska ex rel. Douglas*, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), which set constitutional standards under the federal commerce clause for the circumstances under which states may restrict water exports to other states. (See discussion in section 1.B(5) at page 12.) The Water Export Act included two primary elements.

First, it added a requirement applicable to *all* water right applications (not just those out-of-state): The applicant for any new water right appropriation or transfer must show that the proposed use is consistent with (or not contrary to) “the conservation of water resources within the state of Idaho.” Idaho Code §§ 42-203A(5)(f), 42-222(1). The Water Export Act then makes this provision and all the other requirements of section 42-203A(5) applicable to any water export application. Idaho Code § 42-401(3).

Second, the Water Export Act repealed earlier measures aimed particularly at water use in Oregon, and replaced them with a set of rules applicable to all appropriations and transfers for use of water out-of-state. Such out-of-state uses were required to follow special procedures and to satisfy six additional tests aimed generally at evaluating the relative availability of water in the sending and receiving states. Idaho Code § 42-401(3). The six tests are described as “factors” that the IDWR Director is instructed to consider:

- (a) The supply of water available to the state of Idaho;

- (b) The current and reasonably anticipated water demands of the state of Idaho;
- (c) Whether there are current or reasonably available anticipated water shortages within the state of Idaho;
- (d) Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho;
- (e) The supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
- (f) The demands placed on the applicant's supply in the state where the applicant intends to use the water.

Idaho Code § 42-401(3).

It is unclear how these factors would be applied or what sort of evidence the applicant would be expected to provide. They appear to be intended to give the Director very broad discretion. For the applicant, the result is to significantly increase uncertainty and transaction costs.

Out-of-state water bank rentals were made subject to the same five tests in 1992. 1992 Idaho Sess. Laws ch. 101, § 1 (codified at Idaho Code § 42-1763).

(b) Out-of-basin uses (aka basin-of-origin protection)

The Idaho Water Code contains two provisions providing basin-of-origin protection.

The first was enacted in 1980 and cosmetically amended in 1987. S.B. 1353, 1980 Idaho Sess. Laws ch. 186; 1986 Idaho Sess. Laws ch. 347 (codified at Idaho Code § 42-226). It applies only to new appropriations of ground water for use outside the "immediate ground water basin as defined by the director." It is also limited to large appropriations. It applies only to applications seeking water for irrigation of 5,000 acres or more or for a total volume of 10,000 acre-feet per year. Such a permit application requires special approval by both IDWR and the Idaho Legislature, based on "due consideration to the local economic and ecological impact of the project or development."

The second basin-of-origin protection was added in 2003 as part of the "local public interest" legislation. H.B. 284, 2003 Idaho Sess. Laws ch. 298. It is codified in multiple places: Idaho Code §§ 42-203A(5)(g) (appropriations), 42-222(1) (transfers), 42-240(5) (exchanges), 42-1763 (water bank). It provides that when water is moved from one basin to another, the Director must determine that the move "will not adversely affect the local economy of the watershed or local area in which the source of water originates" (*i.e.*, the basin of origin).

(3) Interstate allocation in the Spokane – Coeur d'Alene area

(a) The Spokane River and the SVRP aquifer

The Spokane Valley Rathdrum Prairie Aquifer underlies the Spokane River and areas north of Coeur d'Alene Lake in Washington and Idaho. The aquifer is known as the Spokane Valley Aquifer in Washington and the Rathdrum Prairie Aquifer in Idaho. It is referred to collectively as the Spokane Valley Rathdrum Prairie Aquifer or SVRP Aquifer.

In 1978, the SVRP Aquifer was designated as a "sole source aquifer" providing drinking water for over 400,000 people in this region, including the cities of Spokane, Spokane Valley, Liberty Lake,

Post Falls, and Coeur d'Alene. The aquifer also feeds the Spokane River in Washington, which is experiencing difficulties in meeting minimum flow requirements during the summer months. These instream flows are needed to protect water quality, fisheries, and recreation.

A peculiar geologic feature of the aquifer is that the Spokane River is perched above the aquifer in Idaho, but not in Washington. Thus, ground water diversions from the SVRP in Idaho have no impact on river flows within Idaho. But they are believed to reduce river flows where the aquifer is hydraulically connected to the river downstream in Washington.

(b) Allocation between Washington and Idaho

Unlike other interstate water conflicts, the tensions over water allocation on the Spokane River are not driven by unmet consumptive water rights in the downstream state. By and large, surface water rights on the Spokane River in Washington are being met. Rather, the conflict is driven by water quality and instream flow needs in Washington. This includes, notably, concerns over meeting the TDML (total maximum daily load) requirements imposed under the Clean Water Act. It also includes concerns about maintaining fisheries and white water recreational opportunities.

There are four possible forums for resolving these disputes:

- Washington could initiate an original jurisdiction lawsuit before the U.S. Supreme Court seeking an equitable apportionment of water. These suits are specifically provided for in the U.S. Constitution. Such a lawsuit would be tried before a Special Master appointed by the Supreme Court. The U.S. Supreme Court, however, would have the last say. This is considered the most “brute force” approach. It typically results in a fairly arbitrary division of water between the states. Since there is little clear precedent (other than general equitable principles), outcomes are hard to predict and therefore dangerous from both sides’ perspectives
- The two states could resolve their differences by entering into a formal interstate compact, pursuant to the U.S. Constitution. This would require the approval of the U.S. Congress. It appears that Idaho and Washington are not interested in pursuing this approach, potentially because of a concern that Congress might widen the scope of the discussion to address issues beyond those contemplated by the states (such as endangered species). To date, state leaders have insisted that they prefer to resolve these water allocation issues without federal involvement (other than funding of studies).
- The states could seek a congressional allocation of water between the two states via federal legislation. However, this approach would entail the same federal involvement that appears to be unacceptable in the context of interstate compacts. At least as of mid-2008, this approach does not appear to be on the table.
- The two states could enter into a less formal agreement (something short of a congressionally-approved compact). Such an agreement might take any form, from a contract to a memorandum of agreement. It would not necessarily set out a fixed formula for allocation. Instead, it might establish procedural mechanisms, set out broad criteria and goals, provide for additional fact-finding, and the like. To date, the two states have expressed a strong preference for this approach. This is reflected in the cooperative effort in the SVRP Study. Of course, were this approach to fail, either state

could always fall back to the first option (equitable apportionment litigation). Thus, the first option remains a hammer driving the parties to make the cooperative approach work.

(c) The bi-state aquifer study

In the mid-1990s, the State of Washington imposed a de facto moratorium on new ground water appropriations in the Spokane Valley Aquifer.

In 2001, two applications were filed seeking huge ground water appropriations from the Rathdrum Prairie Aquifer in Idaho for proposed energy facilities.¹⁹ In 2002 IDWR denied the applications as being inconsistent with the “conservation of water” test. Idaho Code §§ 42 203A(5)(f), 42-222(1). Nevertheless, concern was aroused by these cases over the extent of water available.

In 2003, IDWR declined a request to impose a moratorium on new water appropriations in Idaho.

In the same year, the U.S. Geological Survey, IDWR, the Washington Department of Ecology, the University of Idaho, and Washington State University launched the Bi-State Aquifer Study to evaluate the SVRP. The \$3.5 million study resulted in the creation of a ground water model showing the hydrological connection between the SVRP and the Spokane River. Thus, for the first time, questions about how the river and aquifer interact may be answered with a high degree of scientific certainty.

On May 8-9, 2007, the USGS and the other participants released reports on the Bi-State Aquifer Study in two days of meetings in Spokane Valley. One report (Scientific Investigation Report 2007-5044) described the ground water model. The other (Scientific Investigation Report 2007-5041) described the hydrogeologic conditions and water budget.

At the risk of oversimplification, the studies concluded that the SVRP aquifer is very productive and is in hydrologic balance. In other words, withdrawals from the aquifer are in overall balance with natural inputs. In other words, ground water declines that are experienced from time to time are driven by short-term climatic conditions (*e.g.*, drought), rather than ground water mining.

On the other hand, the study confirms that ground water pumping in both states reduces Spokane River flows in Washington. At this point, however, there appears to be reason for cautious optimism that the parties can build on the model and on cooperative efforts to date to find solutions to those problems. It is Idaho’s position that there is not an overall water shortage in the basin. Rather, there are timing issues, notably in July and August, when the Spokane River drops below instream flow targets. This suggests that practical, on-the-ground solutions merit exploration.

Examples of possible strategies for improving instream flows in Washington might include the following:

- The City of Spokane could move its production wells further from the river. Today, they are located so close to the river that they are literally pumping river water and contributing to summer instream flow violations. Moving the diversion points, say, six

¹⁹ Application for Water Right No. 95-09086 by Kootenai Generation LLC; Application for Water Right No. 95-09069 by Cogentrix Energy, Inc.

or seven miles away might spread out the impact of diversion over time lessening the impact of peak diversion during this critical time.

- Additional water could be released from Lake Coeur d'Alene during the summer. This is a simple solution from a Spokane-oriented perspective. But it would have very significant downside impacts on interests around Lake Coeur d'Alene. There are also constraints related to lake level agreements and requirements and the interests of Avista in connection with its Post Falls Dam operation. Perhaps more significantly, the high summer temperature of the lake water can be a problem. Some research suggests that releases of high temperature water from the lake may do more harm than good to downstream fisheries.
- It may be that the SVRP could be artificially recharged with river water during periods when flows exceed minimum flow levels. This could entail either direct diversion from the river or, conceivably, pumping from the City of Spokane's production wells (which, as a practical matter) pump river water. Thus, the SVRP could be used as an underground reservoir, recharge of which would increase base flows into the river during the critical summer months.

At this point, ideas like these are only ideas. It is premature to suggest that they will work. And there are other reasons that they would be unacceptable. They are listed here solely to give a sense of the sort of things that might be explored. In any event, much work lies ahead to better understand which strategies could be practical and effective. Then there is the question of how to fund them, and how to mitigate adverse impacts and tradeoffs that may be entailed.

(d) Complicating factors

(i) North Idaho Adjudication

As a practical matter, this adjudication process is likely to force a number of skeletons out of the closet. Indeed, that is its purpose. Water rights that people have held (or claimed) for years may be disallowed. Others will be substantially cut back. At the end of the process, the State will have, for the first time, a comprehensive database of virtually all water uses in the region. This in turn should assist cooperative efforts to manage the water resource system.

Although having more data on the table can cut both ways, on balance it will probably strengthen Idaho's hand vis-à-vis Washington in the context of interstate disputes. One of the things that the Supreme Court looks at in equitable apportionment decrees is the extent to which states have undertaken efforts to conserve and control water, and to prevent waste. The adjudication will count for something on that score. On the other hand, it will put data into the hands of everyone, and some of it could be used to support arguments by Washington against Idaho users.

A key question facing Idaho and Washington is how the pending adjudication of water rights in north Idaho (and the possible future adjudication of rights in Washington) could factor into equitable apportionment litigation between the states. Plainly, if such litigation were to be initiated, the Court would not simply tote up how much water Idaho has adjudicated to its users and award that to Idaho. On the other hand, the adjudication of rights would increase the state's ability to document its need for water. It could also be used to bolster the argument that the state is committed to weeding out paper water rights, enforcing limitations, conditions and mitigation requirements, and generally promoting water conservation. It would appear that these considerations are not lost on Washington, which, as of

this writing, is gearing up toward an adjudication of rights on its side of the border. At this point it is in the “pre-adjudication” phase involving computer modeling, data collection, etc.

(ii) Avista

Avista Corp. is a private utility serving North Idaho. It holds senior water rights in connection with its Post Falls Dam hydropower plant. Its most senior rights on this project are two beneficial use claims with January 1, 1907 priority dates. Water Right No. 95-4518 is a hydropower right for 4,250 cfs. Water Right No. 95-9115 is storage right for 164,440 acre-feet per annum. These rights work in conjunction. The Company also holds two smaller rights for the project with less senior priority dates (Nos. 95-9119 and 95-8003).

These water rights will be adjudicated in the upcoming North Idaho Adjudication. Moreover, Avista’s Post Falls Dam project is now being relicensed by the Federal Energy Regulatory Commission (“FERC”) which has the power to impose conditions affecting water releases.

These conditions (Avista’s water rights and subsequent FERC-imposed license conditions) are a sleeping dog that could substantially complicate the water picture. The Post Falls Dam power facility frequently operates substantially below capacity, yet the company has never placed a “call” on upstream junior water rights and has never expressed any inclination to do so. Such a call could significantly disrupt existing and anticipated future development throughout the Coeur d’Alene area. It could also have significant effects on lake levels in Lake Coeur d’Alene—a highly sensitive subject.

On the other hand, Idaho Power Company was in the same position in the 1970s, holding senior water rights without making a call on juniors. The entire Snake River Basin Adjudication in the lower part of Idaho was driven by a lawsuit in the 1970s which forced Idaho Power Company to assert its hydropower water rights. That litigation was brought by ratepayers who opposed Idaho Power Company’s plan to build a new coal fired power plant. They complained that the company should fully exercise its existing hydropower rights before constructing new facilities. That litigation was ultimately resolved in the so-called Swan Falls settlement, which subordinated a portion of the company’s water rights and mandated the initiating of the Snake River Basin Adjudication to adjudicate all water rights in the basin.

Could such a thing happen with Avista? In theory, it could. However, there are several reasons to think it will not.

- First, Avista has shown no interest in such an assertion. Indeed, doing so would create a public relations nightmare for the company. (Then again, Idaho Power was also forced into asserting its water rights.)
- Second, unlike Idaho Power’s situation, the Post Falls hydropower project is a relatively small component of Avista’s power production system. Thus, not as much is in play.
- Third, Avista’s operations are constrained by long-established rules, policies, and statutes governing lake levels in Lake Coeur d’Alene.
- Fourth, and perhaps most importantly, Avista’s senior rights are not licensed rights, but mere “beneficial use” claims. In other words, there is no piece of paper evidencing a determination of this water right; they are simply assertions by the company that they have always used these rights in this manner. It is entirely possible that when these rights are adjudicated in the upcoming North Idaho Adjudication, they will be deemed

to have been subordinated to other water uses. If such a subordination occurred, however, presumably it would be a subordination to existing Idaho users, not to future Idaho development or to make new water available to solve problems in Washington.

(iii) Coeur d'Alene Tribe

The U.S. Supreme Court ruled in 2001 that the Coeur d'Alene Tribe owns the bed of the southern third of Lake Coeur d'Alene. *Idaho v. United States*, 533 U.S. 262 (2001).

The Tribe's claims were based on a complicated history of treaties and other agreements as well as unilateral reservations and other actions by the United States:

- On June 14, 1867, President Andrew Jackson issued an Executive Order establishing a reservation for the Coeur d'Alene Tribe in an area known as Hangman Valley to the south of Lake Coeur d'Alene. The boundaries are disputed, but it included, at most, a tiny sliver of Lake Coeur d'Alene. The Tribe never accepted this reservation.
- In 1873, following further negotiations, the United States reached an agreement with the Tribe on a new reservation of 598,000. This included most of Lake Coeur d'Alene, the Coeur d'Alene River and the St. Joe River. The agreement also provided compensation to the Tribe. This agreement was reflected in a letter dated November 4, 1873 from the Commissioner of Indian Affairs to the Secretary of the Interior.
- In 1886, the Congress authorized the Secretary of the Interior to negotiate with the Tribe "for the cession of their lands outside the limites of the present Coeur d'Alene reservation."
- In 1887 the Tribe and the United States reached an agreement in which the Tribes ceded all claims outside the proposed reservation in the 1873 agreement. This was not binding on either party, however, until ratified by Congress.
- The Congress thereafter authorized the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell."
- In 1889 the parties reached an agreement whereby the Tribe ceded the northern third of the 1873 reservation to the United States. This included roughly the northern two-thirds of the Lake. The agreement was not binding on either party until ratified by Congress.
- On March 3, 1891, Congress ratified the 1887 and 1889 agreements.
- In 1894, the Tribe agreed to cede to the United States a one-mile wide strip of the reservation running from the mouth of the Coeur d'Alene River to the reservation's eastern boundary (the "Harrison cession").
- In 1908, Congress authorized the conveyance to Idaho of land surrounding three small lakes adjacent to southern extreme of the Lake Coeur d'Alene. This later became Heyburn State Park.

The Supreme Court did not address water rights in the 2001 decision. However, the United States has now made federal reserved rights claims on behalf of the Tribe in the pending Coeur d'Alene Spokane River Basin Adjudication ("CSRBA"), presumably based on their ownership of the lake and other treaty rights.

The Nez Perce and other tribes have made similar federal reserved water right claims in Idaho, all of which have been settled. Speaking practically, one would reasonably expect the same to occur here, after a period of saber rattling by both sides. At the end of the day, the Tribe's interest in maintaining the status quo of lake operations in Lake Coeur d'Alene are not that different from other developers and property owners. While the Tribe's wild card will remain in play for some time, the end game, one might hope, may not result in substantial reallocation of rights or otherwise impair ongoing cooperative efforts between the two states to allocate water and manage the SVRP cooperatively within existing legal structures.

ATTACHMENT A: ABOUT THE AUTHOR

CHRISTOPHER H. MEYER



For more than three decades, Chris has practiced water law, planning and zoning law, constitutional law, natural resources law, road and public access law, constitutional law, and legislative matters. *Best Lawyers in America* has named him “Lawyer of the Year” four times. He is described in the Idaho Yearbook Directory as “centrally located in the world of Idaho public affairs” and “a key figure in Idaho water law.” He serves on the Board of Advisors to the National Judicial College’s “Dividing the Waters” water law program for judges. His clients include Fortune Ten companies, municipal water providers, cities, counties, highway districts, energy companies, food producers, mining companies, and land developers. Before joining Givens Pursley in 1991, Chris taught water law and negotiation at the University of Colorado Law School. Prior to that, he practiced environmental law in Washington, D.C.

LEGAL EMPLOYMENT

GIVENS PURSLEY LLP, Boise, Idaho.

Partner. August 1991 to present.

UNIVERSITY OF COLORADO LAW SCHOOL, Boulder, Colorado.

Associate Professor Adjoint. August 1984 to July 1991. Held this teaching position while serving as counsel to NWF Natural Resources Clinic. Taught seminars in advanced water law, environmental law, and negotiation.

NATIONAL WILDLIFE FEDERATION, Washington, D.C.

Counsel. May 1981 to July 1984.

PROFESSIONAL RECOGNITION

Best Lawyers in America

(www.bestlawyers.com)

Listed since 2007 in four categories: water law, land use & zoning law, natural resources, and environmental law.

- Named “Lawyer of the Year” in Boise, Idaho for land use and zoning law in 2015.
- Named “Lawyer of the Year” in Boise, Idaho for natural resources in 2014.
- Named “Lawyer of the Year” in Boise, Idaho for environmental law in 2013.
- Named “Lawyer of the Year” in Boise, Idaho for natural resources in 2011.

Mountain States Super Lawyers

(www.superlawyers.com)

Listed since 2007 in three categories: energy and natural resources law, land use/zoning, and environmental law.

Chambers USA

(www.chambersandpartners.com/guide/usa/5)

Listed since 2008 in Band 1 (highest ranking) for natural resources and environmental law.

Who's Who Legal - The International Who's Who of Business Lawyers

(www.whoswholegal.com)

One of only ten environmental lawyers recognized in Idaho.

Listed since 2010.

Litigation Counsel of America

(www.litcounsel.org)

Inducted in 2010 as fellow in honorary society composed of less than one-half of one percent of American lawyers.

Marquis' Who's Who in the World, Who's Who in America, and Who's Who in American Law

(www.marquiswhoswho.com)

Martindale-Hubbell

(www.martindale.com)

Listed since 1996 with highest ranking (AV).

Idaho Yearbook Directory (2001)

(www.ridenbaugh.com/catalog.htm)

Described as a "key figure in Idaho water law" and "centrally located in the world of Idaho public affairs."

Listed among top 100 most influential Idahoans.

Dividing the Waters, the National Judicial College, a water law training program for judges.

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EDUCATION

University of Michigan, School of Law

Juris Doctor, 1981

- cum laude

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Degree in economics, 1977

- High distinction (magna cum laude)
- Phi Beta Kappa
- James B. Angell Scholar
- Honors program in economics, class honors
- Osterweil Prize in Economics

LITIGATION

North Idaho Bldg. Contractors Ass'n v. City of Hayden, 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.)
(constitutionality of sewer capitalization fees).

County of Shoshone v. United States, 589 Fed. Appx. 834 (9th Cir. 2014) (road law).

A&B Irrigation Dist. v. State, 157 Idaho 385, 336 P3d 792 (2014) (Burdick, C.J.) (water rights—single fill rule—Basin-wide Issue No. 17).

In the Matter of Certified Question of Law – White Cloud v. Valley County, 156 Idaho 77, 320 P.3d 1236 (2014)
(J. Jones, J.) (defended county in action involving impact fees – White Cloud development).

Hehr v. City of McCall, 155 Idaho 92, 305 P.3d 536 (2013) (Burdick, C.J.) (defended city in action involving impact fees – the Greystone Village case).

Alpine Village Co. v. City of McCall, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.) (defended city in action involving impact fees).

Buckskin Properties, Inc. v. Valley Cnty., 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.) (defended county constitutional challenge to development impact fees).

Idaho Conservation League v. U.S. Forest Service, 2012 WL 3758161 (Aug. 29, 2012) (Lodge, J.) (NEPA and forest management litigation involving mining exploration).

Sopatyk v. Lemhi Cnty., 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.) (defended county’s validation of Anderson Creek Road as a public road).

Mann v. Peters, Case No. CV-2011-57 (Idaho, Fifth Judicial Dist., Aug. 11, 2011) (upholding right to develop an “accessory dwelling unit” on property).

American Independence Mines and Minerals Co. v. USDA, 733 F. Supp. 2d 1241 (D. Idaho 2010) (Lodge, J.) (NEPA, standing, and road law issues).

In Re SRBA, Case No. 39576, Subcase Nos. 63-02779 et al. (Idaho, Fifth Judicial Dist., June 3, 2009), Subcase Nos. 63-02449 et al. (Fifth Judicial Dist., May 20, 2009) (secured partial decrees for each of the City of Nampa’s water rights).

In Re SRBA, Case No. 39576, Subcase Nos. 29-00271 et al. (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff’d*, *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eisemann, J.) (upholding position of *amici curiae* regarding alternative points of diversion in City of Pocatello municipal water rights litigation).

Galli v. Idaho Cnty., 146 Idaho 155, 191 P.3d 233 (2008) (W. Jones, J.) (amicus brief in public access case).

Cove Springs Development, Inc. v. Blaine Cnty., Case No. CV2008-22 (Idaho, Fifth Judicial Dist., June 3, 2008) (Robert J. Elgee, J.) (declaring unlawful and unconstitutional various exaction and comprehensive plan ordinance provisions).

Schaefer v. City of Sun Valley, Case No. CV-06-882 (Idaho, Fifth Judicial Dist. July 3, 2007) (Robert J. Elgee, J.) (declaring unconstitutional Sun Valley’s affordable housing fee).

American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Resources, 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.) (conjunctive management of ground and surface water).

Chisholm v. Idaho Department of Water Resources, 142 Idaho 159, 125 P.3d 515 (2005) (Burdick, J.) (water rights—local public interest).

Davisco Foods Int’l, Inc. v. Gooding Cnty., 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, J.) (land use).

Colorado Water Conservation Bd. v. City of Central, 125 P.3d 424 (Colo. 2005) (Martinez, J.) (article by Christopher Meyer cited by court).

Farrell v. Bd. of Cnty. Comm’rs of Lemhi Cnty., 138 Idaho 378, 64 P.3d 304 (2002) (Schroeder, J.) (public road access—the Indian Creek Road case).

Potlatch Corp. v. United States, 134 Idaho 916, 12 P.3d 1260 (2000) (Schroeder, J.) (rejecting federal reserved water rights for wilderness).

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Nebraska v. Rural Electrification Administration, 23 F.3d 1336 (8th Cir. 1994) (Heaney, J.), aff'g, 1993 WL 662353 (D. Neb. 1993) (scope of environmental trust's authority to litigate).

Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990) (Tacha, J.) (federal reserved water rights – amicus brief).

State v. Morros, 766 P.2d 263 (Nev. 1988) (per curiam) (prevailed in establishing recognition of instream flows under state law).

Catherland Reclamation Dist. v. Lower Platte North Natural Resources Dist., 433 N.W.2d 161 (Neb. 1988) (Fahrbruch, J.) (water rights and state endangered species act).

Hitchcock and Red Willow Irrigation Dist. v. Lower Platte North Natural Resources Dist., 410 N.W.2d 101 (Neb. 1987) (Hastings, J.) (right to build water project).

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BAR MEMBERSHIPS

Member of the bars of Idaho, Colorado, and the District of Columbia.
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PERSONAL

Born September 29, 1952, in Springfield, Missouri.

Married to Karen A. Meyer. One child, C. Andrew Meyer (attending Tulane Law School).

Chris has made his home in Boise, Idaho since 1991. He has lived in fifteen cities in thirteen states: Arkansas, Colorado, Florida, Idaho, Indiana, Iowa, Maryland, Michigan, Missouri, New York, Virginia, Washington, D.C., and Florence, Italy.

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