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RECENT DEVELOPMENTS

INTERSTATE TRANSFERS OF WATER: SOUTH DAKOTA'S DECISION TO MARKET WATER FOR COAL SLURRY OPERATIONS

I. INTRODUCTION

Western energy development, particularly western coal development, will be largely dependent upon an adequate water supply.¹ The many potential uses for water in western energy development include coal washing, synthetic fuel production, oil shale conversion, and coal slurry pipeline systems.² However, increased demand for western water from higher consumptive uses in agriculture, industry, and energy production has outstripped local surface and groundwater sup-

1. See Note, *Interstate Transfer of Water: The Western Challenge to the Commerce Clause*, 59 TEX. L. REV. 1249 (1981); see also Clyde, *Legal Overview: Current Problems in Water Acquisition*, 1978 INST. ON WATER ACQUISITION FOR MIN. DEV. 1. Clyde makes the following observation:

Significant amounts of water will have to be committed if coal and oil shale are going to play their assigned role in meeting our energy needs. In some areas like the Northern Great Plains, it appears that Nature will make sufficient water available for energy development, but there are legal constraints, both there and elsewhere which are causing legal shortages.

Id.

2. See generally Student Symposium, *The Impact of Limited Water Availability on National Coal Policy*, 11 ST. MARY'S L.J. 704, 706-17 (1980). Though estimates vary slightly, the amount of water needed to mine, wash, transport, and process enough coal to fuel a 1000 megawatt coal-fired generating facility has been estimated to exceed 32,731 acre-feet per 1000 megawatts. *Id.* at 713. The amount of water needed to process one ton of coal by a process of coal gasification may require up to 7000 gallons per ton of coal processed. *Id.* The proposed Energy Transportation Systems, Inc. (ETSI) coal slurry pipeline is estimated to require 240 gallons of water per ton of coal to operate, or 18,240 acre-feet of water annually. *Id.* at 709 (citing *Hearings on Water Availability for Energy Development in the West: Hearings Before the Subcomm. on Energy Production and Supply of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess. 58, 62 (1978) (statement of Alan Merson, Environmental Protection Agency (EPA))). Oil shale conversion is estimated to use in excess of 18,000 acre-feet of water annually for a plant with the capacity to process 100,000 metric tons of oil shale product per day. See Clyde, *supra* note 1, at 1; see also 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 Basins*, 18 TULSA L.J. 1, 5-6 (1982) (an in-depth discussion concerning the current jurisdictional problems associated with western water and its implications for western energy development).

plies, causing shortages.³

One means of alleviating shortages, while continuing to provide water for energy development, is through interstate transfers of water.⁴ This method was chosen by Energy Transportation Systems, Inc. (ETSI) and recently approved by South Dakota to supply necessary water from the Missouri River for use in the proposed ETSI interstate coal slurry pipeline.⁵ Under its contract with South Dakota, ETSI will construct and own a pipeline to transport water from the Oahe Reservoir, located in south-central South Dakota, to a destination point in Wyoming.⁶ There the water will be used as solvent for a coal slurry pipeline extending from Wyoming to Arkansas.⁷ Completion of this pipeline will mark the first instance of an interstate transfer of western water being utilized to facilitate western energy development.

South Dakota's decision to market its water for coal slurry operations was made amidst controversy over the appropriation of state waters for energy uses,⁸ and the decision occurred against a background of tensions among states, Indian nations, and the federal government over the jurisdictional control of western waters.⁹ This Recent Development will examine South Dakota's decision to market its water for the ETSI coal slurry pipeline and explore the impact of that decision on western water law.

3. Note, *supra* note 1, at 1249 (citing 1 U.S. WATER RESOURCES COUNCIL, *The National Water Resources 1975-2000*, SECOND NATIONAL WATER ASSESSMENT 2-81 (1978)); see C. MEYERS & A. TARLOCK, *WATER RESOURCES MANAGEMENT* 20 (2d ed. 1980).

4. Martz & Grazis, *Interstate Transfers of Water and Water Rights—The Slurry Issue*, 23 ROCKY MTN. MIN. L. INST. 33, 33 (1977); see Note, *supra* note 1, at 1249-50; NAT'L WATER COMM'N, *WATER POLICIES FOR THE FUTURE* 317 (1973) (recommendations from Commission's final report to President and Congress concerning national water policy).

5. Several significant changes in the state's water laws were made by the second special session of the 1981 South Dakota Legislature. These changes were made as a result of the passage of South Dakota House Bill 1002, which authorized the South Dakota Conservancy District to market water for energy industry use. See An Act to authorize, facilitate, and effectuate the marketing by the South Dakota conservancy district of water for energy industry use and to declare an emergency, 1982 S.D. Sess. Laws 4 [hereinafter cited as Water Marketing Act].

6. See Agreement for South Dakota Conservancy District to Assign a Water Right to Energy Industry Use to ETSI Project 2 (Dec. 23, 1981) (copy on file in *Tulsa Law Journal* office) [hereinafter cited as ETSI Agreement].

7. See Clyde, *supra* note 1, at 1. The proposed ETSI coal slurry pipeline will extend 1030 miles from the coal fields of the Powder River Basin in Wyoming to a destination point within Arkansas. The pipeline will carry up to 25,000,000 tons of coal per year and will use up to 15,000 acre-feet of water annually. *Id.*

8. See Note, *supra* note 1, at 1249; Martz & Grazis, *supra* note 4, at 33.

9. See Hostyk, *supra* note 2, at 1; Simms, *National Water Policy in the Wake of United States v. New Mexico*, 20 NAT. RESOURCES J. 1, 13 (1980); Trelease, *Uneasy Federalism—State Water Laws and National Water Uses*, 55 WASH. L. REV. 751, 757 (1980).

II. BACKGROUND ON WATER LAW

A. *Doctrine of Prior Appropriation*

Because the issues surrounding interstate water transfers primarily concern the western water doctrine of prior appropriation, a cursory understanding of the principles underlying the doctrine is essential in analyzing South Dakota's sale of water. The doctrine of prior appropriation had its beginning during the California gold rush when the "49'ers" staked out claims to nearby water supplies in order to wash the gravel from the gold.¹⁰ The doctrine was gradually adopted by seventeen western states and territories, and its principles were thereafter codified into state statutes.¹¹

Under the doctrine of prior appropriation, a vested water right is acquired when there has been an actual diversion of water from a river or lake with an intent by the appropriator to use the water in a manner recognized under state law as "beneficial."¹² Additional appropriations can then be made only if the river or lake has sufficient capacity to support this new use without diminishing the amount of water allotted to the prior vested right.

Therefore, as between appropriators, a prior appropriation results in an exclusive right to the use of that quantity of water.¹³ More impor-

10. Trelease, *supra* note 9, at 752.

11. Those 17 states that have adopted the prior appropriation doctrine are Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. See Note, *supra* note 1, at 1249 n.6. The evolution and codification of the doctrine in these states is outlined in F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW, LEGAL STUDY No. 5 (1971) 22, 28-29 (prepared for the National Water Commission). Codification of the basic principles comprising the prior appropriation doctrine is usually found in a combination of water conservancy statutes. See *infra* notes 12-13. However, due to the importance of water in the arid west, some western states have adopted the doctrine's principles in their state constitutions. See, e.g., ARIZ. CONST. art. XVII, §§ 1-2; COLO. CONST. art. XVI, §§ 5-6; WYO. CONST. art. VIII, § 2.

12. The doctrine's principle that an appropriation of state water have a beneficial use is specified in the statutes of the western states. See ARIZ. REV. STAT. ANN. § 45-141 (1956); CAL. WATER CODE § 1240 (West 1971); COLO. CONST. art. XVI, § 6; IDAHO CODE § 42-104 (1977); KAN. STAT. ANN. § 82a-703 (1977); MONT. CODE ANN. §§ 85-2-101(3), 85-2-104 (1982); NEB. REV. STAT. § 46-204 (1978); NEV. REV. STAT. § 533.030 (1979); N.M. STAT. ANN. § 72-1-2 (1978); N.D. CENT. CODE § 61-04-01.2 (Supp. 1981); OKLA. STAT. tit. 82, § 105.2A (1981); S.D. CODIFIED LAWS ANN. § 46-5-5 (1967); TEX. WATER CODE ANN. § 5.023(b) (Vernon 1972); UTAH CODE ANN. § 73-1-3 (1980); WASH. REV. CODE ANN. § 90.03.010 (1962); WYO. STAT. ANN. § 41-3-101 (1977).

13. Western states have also incorporated in their statutes the "first in time" right to appropriate water under the doctrine. See ARIZ. REV. STAT. ANN. § 45-141 (1956); CAL. WATER CODE § 1450 (West 1971); COLO. CONST. art. XVI, § 6; IDAHO CODE § 42-106 (1977); KAN. STAT. ANN. § 82a-707 (1977); MONT. CODE ANN. § 85-2-401 (1981); NEB. REV. STAT. § 46-203 (1978); NEV. REV. STAT. § 533.090 (surface water), § 533.357 (groundwater) (1979); N.M. STAT. ANN. § 72-1-2 (1978); N.D. CENT. CODE § 61-04-06 (Supp. 1981); OKLA. STAT. tit. 82, § 105.2(B) (1981); S.D.

tantly, in regard to interstate transfers of water, this doctrine allows a vested water right to operate similarly to an interest in real property. Although an appropriative right is usufructuary in character, representing a right to water use and not ownership,¹⁴ the acquired right is exclusive and may be sold or conveyed.¹⁵ The only limitation to the transfer of an appropriative right is that the new holder's proposed use be in harmony with the doctrine's primary requirement that the water have a "beneficial use."¹⁶

The prior appropriation doctrine was formally recognized by the federal government with the passage of the Desert Land Act.¹⁷ This Act severed the water rights from future grants of homestead property in the west and mandated that the severed water rights be acquired by the homesteader in conformity with state or local doctrine.¹⁸ With the passage of the Desert Land Act, Congress recognized that the western states were to have jurisdiction and control over western water rights. Yet, at the same time, the federal government changed its former policy of encouraging the settlement of the west to a new policy of federal retention and control over western lands.¹⁹ The federal government began to challenge the power claimed by the western states to allocate and control water rights connected with western federal lands.

As a result of this federal-state confrontation, the Supreme Court, in *Winters v. United States*,²⁰ recognized the existence of a federally

CODIFIED LAWS ANN. § 46-5-7 (1967); TEX. WATER CODE ANN. § 5.027 (Vernon 1972); UTAH CODE ANN. § 73-3-1 (1980); WASH. REV. CODE ANN. § 90.03.010 (1962); WYO. CONST. art. VIII, § 3.

14. McCormick, *The Adequacy of the Prior Appropriation Doctrine Today*, in WATER RESOURCES AND THE LAW 34 (1958); see also *Wyoming v. Colorado*, 259 U.S. 419, 434 (1922) (jurisdictional dispute between states over the right to grant use of waters of an interstate stream for the benefit of their citizens).

15. McCormick, *supra* note 14, at 34.

16. *Id.*

17. Desert Land Act, ch. 107, 19 Stat. 377 (1877) (codified at 43 U.S.C. §§ 321-339 (1976)); see also *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935).

The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation.

Id.

18. Desert Land Act, 43 U.S.C. §§ 321-339 (1976); see also *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935) (discussing land and water reservations made pursuant to the Desert Land Act).

19. Trelease, *supra* note 9, at 757.

20. 207 U.S. 564 (1908). This case dealt with the rights of the Indians of the Fort Belknap Reservation in Montana to appropriate water from the Milk River for agricultural purposes. The Court declared that state water law could not adversely affect the right of the Indians to use the Milk River water for agricultural purposes. On this point, Justice McKenna stated, "The power of

reserved water right for western federal lands.²¹ This federal water right, when combined with the prior appropriation doctrine, allowed the federal government to reserve and control western water and exempt it from appropriation under state law in specific instances involving federal lands.²² Supreme Court decisions after *Winters* favored expansion of the federal water right concept.²³ This expansion caused apprehension among western states that western state water law would be gradually replaced by federal water law. However, two decisions by the Supreme Court in 1978 halted this seemingly expansive trend and reestablished a state role in western water law.

In *California v. United States*,²⁴ the Court heard arguments concerning a state's jurisdictional powers within the framework of federal reclamation laws. In a split decision, the Court held that states may impose any condition or control upon the appropriation or distribution of state waters that are part of a federal reclamation project, if such conditions or controls are not plainly inconsistent with stated congressional objectives.²⁵

In a related case, the Court considered a remaining question concerning the amount of water the federal government could exempt from state water law through the assertion of a federally reserved water

the Government to reserve the waters and exempt them from appropriation under state laws is not denied and could not be." *Id.* at 577 (citing *United States v. Rio Grande Ditch & Irrigation Co.*, 177 U.S. 690 (1899)).

21. 207 U.S. at 577.

22. *C. MEYERS & A. TARLOCK*, *supra* note 3, at 201; *see F. TRELEASE*, *supra* note 11, at 106-10.

23. *See Arizona v. California*, 373 U.S. 546 (1963). The Court reviewed the power of the Secretary of the Interior to apportion the water in the lower Colorado River Basin captured by the federal Boulder Dam project. In the majority opinion, Justice Black stated that pursuant to congressional authority, the federal government had the power to control the actual distribution of water from the project despite the objections of several states. The impact of *Arizona v. California* was later indicated by the Court.

It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona v. California*, . . . the Federal Government had the authority both before and after a State is admitted into the Union "to reserve waters for the use and benefit of federally reserved lands." . . . The federally reserved lands include any federal enclave.

United States v. District Court for Eagle County, 401 U.S. 520, 522-23 (1971) (citation omitted); *see also Hostyk*, *supra* note 2, at 11 (expansion of reserved rights doctrine to include federal non-Indian reservations).

24. 438 U.S. 645 (1978).

25. *Id.* at 672-79. This case restored state jurisdictional authority over state water in two respects. First, the Secretary of the Interior would now be required to appropriate, purchase, and condemn all water rights for a federal project within the bounds of state law. *Id.* at 665. Secondly, once the water is released from the dam or waterway, the water would once again be subject to state authority in the absence of an express contrary congressional intent. *Id.* at 667.

right. The Court, in *United States v. New Mexico*,²⁶ held that a federal water right must be limited to that quantity of water necessary to fulfill the purpose of the reservation.²⁷ Although these cases limited the expansive trend of the federal reserved water right concept, they did not change the possibility that western water law may still be preempted by specific congressional action in favor of "federal project law."²⁸ The continued possibility of federal preemption under specific congressional authority has created an atmosphere of "uneasy federalism" for the states.²⁹

One noted authority on water law has stated that federal preemption of state water law is most probable where a state asserts a water policy which conflicts with a federal water project or policy.

Conflicts between federal and state law can arise when the United States builds a type of project or makes a use of water in a way not authorized by state law, when it allocates water to beneficiaries of its projects in ways that differ from the state pattern, or when federal laws prevent private users from obtaining or exercising state rights.³⁰

The framework of "uneasy federalism" and the principles underlying the prior appropriation doctrine provide a background for insight into controversies that may arise from South Dakota's decision to market its water for coal slurry operations.

26. 438 U.S. 696 (1978). At issue was the assertion of a federal water right in the waters of the Rio Mimbres River for the benefit of the Gila National Forest located in the state of New Mexico. The United States claimed a reserved water right for aesthetic, recreational, and wildlife preservation purposes. New Mexico asserted that the federal government's powers to withdraw land for such purposes did not extend to the associated water rights as well.

27. *Id.* at 698. Justice Rehnquist stated that, in addition to this restriction, water used for aesthetic, recreational, or wildlife preservation purposes was not to be considered a necessary use that must be made in order to fulfill the purpose of the federal water reservation. *Id.* at 715.

28. See Trelease, *Water Law, Policies, and Politics: Institutions for Decision Making*, in WESTERN WATER RESOURCES: COMING PROBLEMS AND THE POLICY ALTERNATIVES 199, 212-13 (1980).

The states have been very jealous of their water laws and very resentful of federal encroachment into this area. Yet when they deny water to a coal slurry pipeline they may be inviting exactly the federal intervention they fear. There is a real danger that the Congress will simply override their laws, that the federal government will supersede state water law with federal project law. . . . What is likely, however, is a federal project that would solve the pipeline company's problem by supplying water to it with complete disregard for state water law, state water policy, state coal development policy, and state land use plans.

Id.

29. See Trelease, *supra* note 9, at 755; see also Trelease, *supra* note 28, at 212-16 (noting the states' resentment of federal encroachment upon their water laws).

30. F. TRELEASE, *supra* note 11, at ix.

B. *South Dakota's Move Toward Interstate Transfers*

In the late 1970's, ETSI began to consider options for acquiring the large amounts of water necessary for a coal slurry pipeline project. Wyoming was initially considered by ETSI as the state most likely to allow appropriation of water for coal slurry operations.³¹ The ETSI plan called for water to be appropriated from the Madison underground aquifer which lies under portions of eastern Wyoming and western South Dakota. Progress toward implementing the ETSI plan seemed likely when the Wyoming legislature amended its water appropriation statutes to specifically allow ETSI to appropriate up to 20,000 acre-feet of Wyoming water annually.³²

This proposal to deplete the water from the underground Madison aquifer caused apprehension in South Dakota, since large numbers of western South Dakota farmers and ranchers depend upon water from the Madison formation to support their operations, as well as their small, rural communities. Officials in South Dakota believed that if Wyoming experienced extensive energy development, and was allowed to deplete the waters found in the Madison aquifer, the economy of South Dakota would be threatened.³³

In response to this prospect of economic decline, the South Dakota Legislature, in a special session, enacted emergency legislation that restructured the state's water conservancy statutes.³⁴ One section of the legislation condemned Wyoming's proposed use of the Madison aquifer and stated the need for providing the western part of South Dakota with a steady and reliable source of water.³⁵ Another section of the legislation gave South Dakota's conservancy district the authority to grant water rights pursuant to contractual agreements with energy in-

31. The coal to be used for the ETSI coal slurry pipeline will come from mines located in the Powder River Basin in Wyoming. See Clyde, *supra* note 1, at 1.

32. WYO. STAT. § 41-3-115(d) (1977).

33. "The Legislature finds that the proposed use of Madison formation water for widespread energy development in Wyoming presents an immediate threat to ground and surface water supplies and agricultural, domestic, environmental and other beneficial water uses in western South Dakota . . ." Water Marketing Act § 1, 1982 S.D. Sess. Laws 4.

34. *See id.*

35. The South Dakota legislation states:

[P]rolonged and existing drought conditions in western South Dakota require the immediate provision of adequate and potable water supplies to municipalities and individual farms and ranches for human and animal consumption, and the failure to provide such water supplies endangers the economic viability of the agricultural industry in western South Dakota and the economy of the state as a whole . . .

dustry users.³⁶ No limitation was placed on the interstate transfer of South Dakota's water for energy industry use. The emergency enactment of this legislation gives the impression that South Dakota intended to lure ETSI from considering water from the Madison aquifer and to look instead to South Dakota for ETSI's water needs.

The emergency measures of the South Dakota Legislature proved successful; South Dakota and ETSI signed a contractual agreement for water rights just three months after the legislation was passed.³⁷ Under the contract, ETSI will own and construct a pipeline to carry water from the Oahe Reservoir to a point near Gillette, Wyoming where the water will be mixed with powdered coal to form the slurry which will then be transported by pipeline from Wyoming to a destination in Arkansas.³⁸ The contract further provides for an annual appropriation of 50,000 acre-feet of water for use in coal slurry operations.³⁹ The greatest benefit for South Dakota will not be the funds paid by energy industry users for the water rights under the contract, but the fact that the water contract allows the state to tap into the water pipeline for rural and municipal use in western South Dakota.⁴⁰ The contract will thus provide South Dakota with a means of meeting water needs in the more arid regions of the state.

III. IMPACT ON WESTERN WATER LAW

In an energy development context, South Dakota's decision to market its water for coal slurry operations is noteworthy in several respects. First, this will be the first time that western state water will be transferred outside of its state of origin to facilitate western energy production. Secondly, the sale of water rights by South Dakota makes possible the completion and operation of this nation's first interstate coal slurry pipeline. Finally, and perhaps most importantly in a legal context, this sale marks a change in the direction of western state water

36. "The district may sell, grant, convey, assign, lease or otherwise transfer perfected water rights or permits to appropriate water for energy industry use to energy users for such consideration and under such terms and conditions as are fixed by contract or instrument of conveyance." *Id.* § 4, at 5.

37. Additionally, the South Dakota legislation may have caused ETSI to realize a possibility of litigation with South Dakota over the right to use water from the Madison aquifer.

38. *See Clyde, supra* note 1, at 1.

39. ETSI Agreement, *supra* note 6, at 28. Moreover, South Dakota has agreed to honor the terms of this appropriation for 50 years. *Id.* at 29.

40. The terms of the contract provide that South Dakota may tap into the water pipeline at ten points through which it will be able to use up to 4300 acre-feet of water for municipal expansion of South Dakota's western towns and cities. *Id.* at 21-22.

law, in allowing the use of western water resources for energy industry purposes.

Many western states, including Oklahoma, have enacted water embargo statutes which generally prohibit the diversion of water for use in neighboring states.⁴¹ Additionally, two western states have enacted legislation which specifically prohibits the use of state water in coal slurry pipelines.⁴² Such statutes declare a legislative intent that the utilization of water in coal slurry operations should not be considered by the state permit officials as a "beneficial use" of a scarce resource.⁴³ These statutes voice a concern of western water users and environmentalists that the increased use of coal slurry pipelines will siphon away water otherwise needed for agricultural use and damage western underground aquifers.⁴⁴

The South Dakota Legislature faced similar concerns when it enacted the legislation for the sale of its water. However, by enacting a more flexible statutory scheme for energy industry appropriation of state water, South Dakota was able to avert possible damage to the Madison aquifer while acquiring the means to supply the arid regions of the state with an assured and stable source of badly needed water. For those western states with legislation prohibiting the use of state water for interstate transfers or, in particular, banning the use of water for coal slurry operations, the success resulting from South Dakota's decision to market its water may cause a reevaluation of state water policies. Such reevaluation may be prudent in light of South Dakota's and Wyoming's willingness to supply water for a price, which has shattered the former solidarity of western states on the issue of water for coal slurry operations. In adhering to their water embargo policies, many western states may eventually find themselves missing the potential for western water development realized by states such as South Da-

41. See ARIZ. REV. STAT. ANN. § 45-153B (1956); COLO. REV. STAT. § 37-81-101 (Supp. 1982); IDAHO CODE § 42-408 (1977); KAN. STAT. ANN. § 82a-726 (1977); MONT. CODE ANN. § 81-1-121 (1982); NEB. REV. STAT. § 46-233.01 (1978); NEV. REV. STAT. § 533.520 (1979); N.M. STAT. ANN. § 72-12-19 (1978); OKLA. STAT. tit. 82, § 1085.22 (1981); OR. REV. STAT. § 537.810 (1981); S.D. COMP. LAWS ANN. § 46-1-13 (Supp. 1982); UTAH CODE ANN. § 73-2-8 (1980); WASH. REV. CODE ANN. §§ 90.03.300, 90.16.110, 90.16.120 (1962); WYO. STAT. § 41-3-105 (1977).

42. See MONT. CODE ANN. § 85-2-104 (1981); WYO. STAT. § 41-3-115(b) (1977). The Wyoming statute specifies that "the water of the state" shall not be used "as a medium of transportation of mineral, chemical or other products to another state without the specific prior approval of the legislature on the advice of the state engineer." *Id.*; see also C. MEYERS & A. TARLOCK, *supra* note 3, at 388 (discussing states' fears of water use in coal slurry pipeline).

43. *E.g.*, MONT. CODE ANN. § 85-2-104(2) (1981) (declaring that water use for coal slurry is not a "beneficial use"); see Martz & Grazis, *supra* note 4, at 33-34.

44. C. MEYERS & A. TARLOCK, *supra* note 3, at 388-89.

kota, with a water policy of controlled development rather than a complete prohibition of development.

A reevaluation of western state water policy as it concerns energy industry projects may also be necessary as western states confront the prospect of federal preemption of their state water laws in favor of federal project law.⁴⁵ Such federal preemptions may occur if Congress takes specific action to promote the national interest and facilitate western energy development.⁴⁶ South Dakota, in marketing its water for energy industry use, has lessened the possibility that its water laws will be federally preempted in favor of a federally acquired water right.⁴⁷ By offering to sell its water, South Dakota has caused any dispute concerning its right to market water to become a conflict among sovereign western states⁴⁸ rather than a confrontation between South Dakota and the federal government. This would not have been the case had the federal government come to the aid of ETSI and attempted to override any South Dakota prohibition over the appropriation of Oahe Reservoir water for coal slurry operations. South Dakota would then have faced a legal adversary possessing superior constitutional authority,⁴⁹ and thus would almost certainly have lost.⁵⁰ It is this fact—South Dakota has voluntarily marketed its water resources—that makes this recent development noteworthy.⁵¹

45. See *supra* notes 28-30 and accompanying text.

46. Trelease, *Federal-State Problems in Packaging Water Rights*, 1978 INST. ON WATER ACQUISITION FOR MIN. DEV. 13-14.

Should Congress find that a major federal policy was being thwarted and should be stirred into action, however, there is little doubt that supremacy could be invoked and federal powers found to regulate and control the quantitative aspects of waters back to the smallest springs and tributaries and the deepest aquifers. A federal water law like this is what they may invite by using water law to control by indirection the use and movement of energy resources that they cannot control directly.

Id.; see also Martz & Grazis, *supra* note 4, at 34-35.

47. See *supra* notes 28, 30, 46 and accompanying text.

48. See *Wyoming v. Colorado*, 259 U.S. 419, 433-38 (1957); see also *Sporhase v. Nebraska*, 102 S. Ct. 3456, 3463 (1982) (state does not have sovereign right to prohibit transfers of groundwater for use in another state); *New Jersey v. New York*, 283 U.S. 336, 342-43 (1930) (noting state sovereignty and its relation to the doctrine of equal apportionment).

49. See F. TRELEASE, *supra* note 11, at 56-57.

50. *Id.*; see also *Winters v. United States*, 207 U.S. 564, 577 (1908) (noting federal government's superior rights to appropriate water). In the case of South Dakota's sale of water, federal preemption was a possibility, since the Oahe Reservoir, the source for the water sold to ETSI, was a federal reclamation project built pursuant to express congressional authority. See *supra* note 23.

51. Although the recent Supreme Court decision in *Sporhase v. Nebraska*, 102 S. Ct. 3456 (1982), was announced after South Dakota contracted to sell its water, the relation of the *Sporhase* case to the South Dakota contract may be noteworthy. At issue in *Sporhase* was the constitutionality of a Nebraska water conservation statute. Nebraska officials had used the statute to enjoin a Nebraska farmer from using groundwater appropriated in Nebraska to irrigate the Colorado portions of his fields, which straddled the Nebraska-Colorado border. The Court found groundwater

Though avoiding federal-state conflict, South Dakota's decision to market water from the Missouri River could yet foster an interstate dispute. Western states downstream from South Dakota may seek to challenge the right of South Dakota to market large quantities of water from a major interstate river. Such interstate disputes are not rare⁵² and are adjudicated by the United States Supreme Court, which has original jurisdiction in all cases "in which a state shall be a party."⁵³ However, the Supreme Court has stated that it is reluctant⁵⁴ to adjudicate interstate stream disputes, and has urged states to resolve their differences through the use of interstate compacts.⁵⁵

Should adjudication become necessary, the doctrine of prior appropriation has usually been held to apply across state boundaries.⁵⁶ This has resulted in the Court's upholding a vested appropriated right upstream.⁵⁷ Yet the Court has also recognized the doctrine of equitable apportionment in many cases where an abusive exercise in upstream appropriations by one state has greatly impaired the interest of states downstream.⁵⁸ Hence, the appropriation in South Dakota of water for coal slurry operations would probably stand as a prior right in relation to future appropriations downstream. Should a contesting state downstream prove that South Dakota's appropriation unfairly impairs that state's interests, the doctrine of equitable apportionment could be in-

to be an article of interstate commerce and struck down the Nebraska statute as an impermissible burden on interstate commerce. South Dakota's voluntary marketing of its water resources was not of a prohibitory nature, as in *Sporhase*, but was an affirmative act allowing the interstate use of its water.

52. See C. MEYERS & A. TARLOCK, *supra* note 3, at 382.

53. U.S. CONST. art. III, § 2, cl. 2.

54. This reluctance was noted in *Colorado v. Kansas*, 320 U.S. 383 (1947). "We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power." *Id.* at 392 (footnote omitted).

55. *Id.* Interstate compacts are commonly used by states in addressing such problems as pollution, flood control, and allocation of interstate waterways. See NAT'L WATER COMM'N, *supra* note 4, at 418.

56. See *Wyoming v. Colorado*, 259 U.S. 419, 423-25 (1922); *Bean v. Morris*, 221 U.S. 485, 487-88 (1911).

57. *Bean v. Morris*, 221 U.S. 485 (1911).

58. *Wyoming v. Colorado*, 259 U.S. at 423. There, the Court noted,

The question here is not what one State should do for the other, but how each should exercise her relative rights in the waters of this interstate stream. Both are interested in the stream and both have great need for the water. . . . Both States recognize that conservation within practicable limits is essential in order that needless waste may be prevented and the largest feasible use may be secured. . . . We think that doctrine lays on each of these States a duty to exercise her right reasonably and in a manner calculated to conserve the common supply.

Id. at 484.

voked by the Supreme Court as a means to protect the correlative rights of downstream states. In this case, however, an annual appropriation of up to 50,000 acre-feet of water from the Oahe Reservoir is unlikely to substantially impair the interests of downstream states.⁵⁹

Regardless of the interests of downstream states, one may question whether any appropriation from the upper Missouri River could withstand economic analysis. The National Water Commission in its 1973 final report recommended that interbasin transfers of water be utilized only when the value of the water in its new use exceeds the aggregate of the value of its old use.⁶⁰ Applying this recommendation to the Missouri River, it may be asked whether a certain measure of water appropriated from the river for use in energy industry operations has greater economic value than that same quantity of water left unappropriated and free to travel downstream through hydroelectric generating facilities. In the context of South Dakota's sale of water, the use of that quantity of water for coal slurry operations may have a lessened aggregate economic value than if that same quantity were left unappropriated and free for other uses by downstream states. In the future, similar economic analyses should be made to ensure the most economic utilization of western water supplies.

South Dakota's decision to market its water also raises basic questions regarding the continued use of the prior appropriation doctrine as a means of distributing western water rights. Under the doctrine, it is possible for a series of continued appropriations or even one large appropriation to exhaust a river or stream. This potential for exhaustion supports the view that the prior appropriation doctrine favors a "rugged individualist" over a "share-the-wealth"⁶¹ theory of water utilization and fosters utilization, rather than conservation, of western water.⁶² Many western states may someday find themselves in a position of having codified a water law doctrine which inherently conflicts with an overall policy of conservation of water as a valuable state resource.⁶³

59. It has been noted that the Oahe Reservoir has in excess of 13,700,000 acre-feet of water of holdover capacity with an average annual flow of 18,525,000 acre-feet. Thus, an appropriation of 50,000 acre-feet is a very small amount of total available water reserves. See NORTHERN GREAT PLAINS RESOURCES PROGRAM, EFFECTS OF COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS 81 (1975). This study estimates that over three million acre-feet of water could be utilized for coal development without competing with existing or anticipated uses. *Id.* at 80.

60. NAT'L WATER COMM'N, *supra* note 4, at 331 (recommendation 8-1(b)).

61. McCormick, *supra* note 14, at 34.

62. See Note, *supra* note 1, at 1276-77.

63. *Id.*

With the increased use of interstate transfers of western water as a means to promote western energy development, large amounts of water will be appropriated for energy industry use. As water supplies run low, there may come a day when continued adherence to the prior appropriation doctrine is no longer possible. South Dakota's decision to market its water may be the first major step towards that result.

IV. CONCLUSION

South Dakota's recent decision to market its water for coal slurry operations marks the first time a western state has allowed the appropriation of its waters for transfer out of the state for an energy industry use. This action also marks a break in western solidarity, if not a change of course, in western state water policy that heretofore has generally prohibited the appropriation of large amounts of water for coal slurry operations or interstate transfers.

It is possible, due to South Dakota's willingness to supply water for energy industry use, that other western states may change their water laws to take advantage of the benefits of a more flexible approach. Such changes would modify the attitude of absolute prohibition towards an attitude favoring controlled development of state water for energy industry use.

The South Dakota sale may thus signal the beginning of a new era—one of increased water usage in the western United States for energy development and production. Yet, as water supplies dwindle, many western states may have to recognize that their water law follows a doctrine which favors the utilization rather than conservation of western water.

While South Dakota's contract with ETSI is beneficial for both parties, states contemplating similar action in the future must employ foresight in weighing the factors surrounding the sale of state waters for use in an interstate transfer for energy industry use. The prudent, beneficial use of this scarce natural resource should always outweigh monetary considerations. Ultimately, western states may have to acknowledge the fact that the doctrine of prior appropriation is not in their best interests, and legislative changes reflecting that acknowledgment may have to be made.

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