
INTERSTATE WATER ALLOCATION: THE LAW AND ITS IMPLICATIONS FOR THE PACIFIC NORTHWEST

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1. INTERSTATE WATER ALLOCATION: THE LAW AND ITS IMPLICATIONS FOR THE PACIFIC NORTHWEST

A. The law of interstate allocation

(1) Overview

State and federal water law is designed, by and large, to allocate and manage water 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 rule of priority 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 received 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 is the brute force approach to interstate allocation, which serves as the underlying threat motivating most of the other approaches discussed below. These cases are tried by a special master and 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." This is a legally enforceable agreement. Compacts must be approved by the U.S. Congress. Typically, these 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. The goal of this approach is 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 (as in the traditional methods), 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 one state to serve uses in another state. 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. More limited unilateral restrictions on exports that further legitimate 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. Private 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 not be allowed to enforce priorities across state lines because doing so would upset the established allocation.

Each of these approaches is discussed below.

(2) 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

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.

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.”²

The law of interstate allocation did not arise until the 20th century. In the 1800s, water resources were not sufficiently developed in Western states sharing common rivers to generate any cross-border conflicts. Beginning in the early 1900s, however, depletions in some interstate streams became so severe that states took each other to court to fight over what was left. 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.³ Indeed, disputes over water in the Eastern United States are becoming increasingly common today.⁴

The U.S. Supreme Court has the power to entertain and decide disputes between two or more states pursuant to the Constitution’s grant of original jurisdiction.⁵ 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 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. The special master hears evidence, rules on motions, and proposes a recommended decree. The Court pays significant deference to the special master’s recommendation, but reserves the right to render the final judgment.⁶

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. 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.⁷ More recently, the Court has said that the party initiating the suit must demonstrate “real or substantial injury or damage.”⁸

The Court’s jurisdiction is equitable in nature. 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.⁹

² *Nebraska v. Wyoming*, 325 U.S. 589, 599, 618 (1945).

³ *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).

⁴ *E.g.*, *Virginia v. Maryland*, 124 S. Ct. 598 (2003) (ruling that Maryland may not prohibit a Virginia county from diverting water from the Potomac River, despite the fact that the river is entirely on Maryland’s side of the border).

⁵ U.S. Const. art. III, § 2, cl. 2.

⁶ William D. Olcott, Comment, *Equitable Apportionment: A Judicial Bridge Over Troubled Waters*, 66 Neb. L. Rev. 734, 736 (1987).

⁷ *Missouri v. Illinois*, 200 U.S. 496, 519-21 (1906).

⁸ *Colorado v. New Mexico*, 459 U.S. 176, 188 n.13 (1982), *appeal after remand*, 467 U.S. 310 (1984).

⁹ 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.A(4) at page 8). “Where Congress has so

The Court has made clear that whether the headwaters of a river arise in one state or another is “essentially irrelevant.”¹⁰ As a practical matter, equitable apportionment litigation is typically initiated by a downstream state seeking to curtail water diversions by an 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.¹¹ Although this was a compact case, not an equitable apportionment case, it built on a long history of equitable apportionment of that river.¹²

The first interstate equitable apportionment case was *Kansas v. Colorado*,¹³ decided in 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 with a clean slate 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 (*Nebraska v. Wyoming* in 1945 and *Colorado v. New Mexico* in 1982¹⁴) the Court has declared that the rule of priority is only one factor to be considered.

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).

¹⁰ *Colorado v. New Mexico*, 467 U.S. 310, 467 (1984).

¹¹ *Kansas v. Colorado*, 533 U.S. 1 (2001).

¹² *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).

¹³ *Kansas v. Colorado*, 206 U.S. 46 (1907).

¹⁴ *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).

Over the years, the Supreme Court has heard eleven cases in which decrees were sought allocating water on interstate streams.¹⁵ 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:¹⁶

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.

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.¹⁷ 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 shifted by the Supreme Court from one state to another on the basis of states’ relative commitment to promoting water

¹⁵ 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).

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).

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).

¹⁶ *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

¹⁷ *Colorado v. New Mexico*, 459 U.S. 176 (1982), *appeal after remand*, 467 U.S. 310 (1984).

conservation and efficiency of use. The case should serve as a warning to all Western states to countenance wasteful water use practices at their peril.

(3) 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”¹⁸

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.¹⁹ 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.”²⁰

Compacts are enforceable agreements. In 2001 the Supreme Court awarded monetary damages and pre-judgment interest to Kansas, based on Colorado’s violation of its compact with the state.²¹ 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.’”²²

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.²³

¹⁸ U.S. Const. art. I, § 10, cl. 3.

¹⁹ *Texas v. New Mexico*, 462 U.S. 554 (1983).

²⁰ 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).

²¹ *Kansas v. Colorado*, 533 U.S. 1 (2001).

²² *Kansas v. Colorado*, 533 U.S. 1, 10 (2001).

²³ 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).

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.²⁴

(4) 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,²⁵ 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.”²⁶

The most notable congressional apportionment (also known as congressional allocation) came in the form of the Boulder Canyon Project Act enacted by Congress in 1928.²⁷ The Act established a 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.²⁸

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.

(5) Informal agreements

As an alternative to formal interstate compacts, states may elect to enter into less formal agreements. 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 no allocation at all. Instead, the agreement might include 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.

²⁴ Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. Colo. L. Rev. 105 (2003).

²⁵ 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).

²⁶ Joseph L. Sax, et al., *Legal Control of Water Resources* 731, 737 (2nd ed. 1991).

²⁷ 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.

²⁸ *Arizona v. California*, 373 U.S. 546 (1963).

The key difference between this approach and an interstate compact is that it is easier and more flexible. 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 may walk away (and, perhaps seek an equitable apportionment) 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.
- 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 compact was crafted in terms of promoting water conservation, it would probably survive the test established in *Sporhase v. Nebraska*. (See discussion in section 1.A(6) at page 9).

(6) Unilateral restrictions on the export of water

From time to time, states have sought to solve their water problems by barring out-of-state interests from physically taking water out of the state. Federal constitutional constraints severely constrain this approach.

The so-called dormant commerce clause of the U.S. Constitution has been interpreted to restrict the ability of states to regulate commerce. In *Sporhase v. Nebraska*,²⁹ 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.³⁰

See discussion of Idaho's export restrictions in section 1.B(2) at page 12.

(7) 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

²⁹ *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). 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).

³⁰ 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).

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, 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.

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 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.³¹

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.B(2)(a) at page 12) and, if applicable, Idaho's out-of-basin rules (see discussion in section 1.B(2)(b) at page 13). 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 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.³² 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.

³¹ 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).

³² Telephone conference between Phillip J. Rassier, Chief Counsel, IDWR and Christopher H. Meyer (Aug. 25, 2009).

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 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.

(8) 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*³³ in 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*³⁴ in 1945 and every equitable apportionment case since, all of which have recognized that priority of use is but one factor to consider.

³³ *Wyoming v. Colorado*, 259 U.S. 419 (1922).

³⁴ *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).

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.

B. 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, 1980.³⁵ 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.³⁶

In 1963, Idaho ratified the Columbia River Interstate Compact among the states of Idaho, Montana, Oregon and Washington.³⁷ Not all of the states ratified the compact. Idaho repealed its ratification of the compact in 1975.³⁸ 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

In 1990, the Idaho Legislature enacted detailed legislation specifically dealing with any new out-of-state uses of water (by either appropriation or transfer of existing rights).³⁹ The 1990 Act was intended to bring the state into compliance with *Sporhase v. Nebraska ex rel. Douglas*,⁴⁰ which set constitutional standards under the federal commerce clause for the circumstances under which states may restrict water exports to other states.⁴¹ The 1990 Act included two primary elements.

³⁵ Pub. L. 96-189, 94 Stat. 4; Idaho Code § 42-3402.

³⁶ Act of March 21, 1950, 64 Stat. 29; Idaho Code § 42-3401.

³⁷ 1963 Sess. Laws 818.

³⁸ 1975 Sess. Laws 29.

³⁹ 1990 Idaho Sess. Laws, ch. 141 (codified at Idaho Code §§ 42-222, 42-401(3) and elsewhere).

⁴⁰ *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

⁴¹ In *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), the Supreme Court 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. 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

First, it added a requirement applicable to *all* water right applications (not just those out-of-state): Every new water right appropriation or transfer must be shown to be consistent with the “conservation of water resources within the state of Idaho.”⁴²

Second, the 1990 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.⁴³ The six tests are described as “factors” that the IDWR Director is instructed to consider:⁴⁴

- (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.

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 1992.⁴⁵

(b) Out-of-basin uses

The following requirements are aimed at out-of-basin uses, but would likely apply to out-of-state uses as well.

In 1980, the Legislature established special rules for “out-of-basin” uses for ground water rights involving over 5,000 acres or 10,000 acre-feet per year. Such uses must meet special tests related to “the local economic and ecological impact” and must be specifically approved by the Legislature.⁴⁶

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.

⁴² Idaho Code §§ 42-203A(5)(f), 42-222(1).

⁴³ Idaho Code § 42-401(3).

⁴⁴ Idaho Code § 42-401(3).

⁴⁵ 1992 Idaho Sess. Laws, ch. 101, § 1 (codified at Idaho Code § 42-1763).

⁴⁶ 1980 Idaho Sess. Laws, ch. 186, § 1 (codified at Idaho Code § 42-226).

As part of the 2003 amendment to the local public interest legislation, the Legislature grafted onto the water code new protections against out-of-basin water uses. When water is moved from one basin to another (in either an appropriation or a transfer), 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).⁴⁷

(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

⁴⁷ Idaho Code §§ 42-203A(5)(g) (appropriations), 42-222(1) (transfers), 42-240(5) (exchanges), 42-1763 (water bank). Note that the Department’s water appropriation rule does not address this recently-adopted requirement.

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.⁴⁸ In 2002 IDWR denied the applications as being inconsistent with the “conservation of water” test.⁴⁹ 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.

⁴⁸ Application for Water Right No. 95-09086 by Kootenai Generation LLC; Application for Water Right No. 95-09069 by Cogentrix Energy, Inc.

⁴⁹ Idaho Code §§ 42 203A(5)(f), 42-222(1).

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 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

In 2006, the Idaho Legislature authorized IDWR to proceed with planning and designing the mechanisms for implementing an adjudication of water rights in the Coeur d'Alene and Spokane River drainages. Idaho Code § 42-1406B.⁵⁰

⁵⁰ The legislation authorizing the adjudication was amended in three ways in 2008. First, the Legislature provided for the deferral of the adjudication of small domestic and stock water claims. 2008 Idaho Sess. Laws, ch. 149 (codified at Idaho Code § 42-1406B(1)). Under this provision, holders of these rights are given the option of not filing adjudication claims at this time. Similar deferral is provided in the SRBA adjudication. Second, the Legislature carved out the Kootenai River Basin from the scope of the adjudication. 2008 Idaho Sess. Laws, ch. 148 (codified at Idaho Code § 42-1414). A major motivation for the Northern Idaho Adjudication is the desire to strengthen Idaho's position in documenting its water use and management vis-à-vis the State of Washington. The Kootenai River is tributary to the

This is envisioned as the first of three such north Idaho adjudications. The adjudication will later extend to the Palouse River Basin and the Clark Fork-Pend Oreille River Basins.

On September 29, 2006 the Idaho Supreme Court issued a provisional order assigning the current SRBA Judge (John M. Melanson) to serve as presiding judge over the North Idaho Adjudication.

IDWR petitioned the district court to initiate the litigation on July 8, 2008. The Commencement Order was issued by the Court on November 12, 2008.

Like the SRBA, the North Idaho Adjudication will be a McCarran Amendment proceeding. 43 U.S.C. § 666. This means that the federal government has waived its sovereign immunity, and that federal water rights may be adjudicated in this state court proceeding.⁵¹

This adjudication will be modeled largely on the SRBA process, which has been underway for years in southern Idaho and is now nearing its completion. A big difference, however, will be how the Department handles beneficial use claims. In the SRBA, a claimant simply filed a form asserting the existence of such a right. The Department initiated an often time-consuming process of soliciting and evaluating evidence in support of the claim. The Department has learned, the hard way, to demand such evidence up front. The end result is expected to be a more streamlined process (from the Department's perspective) and a more rigorous process (from the applicant's perspective).

The process is also expected to move much faster because the parties can build on the substantial body of law developed in the course of the SRBA. That process was stalled for years as the Idaho Supreme Court heard a series of "basin-wide" issues on interlocutory appeal. That cumbersome process, one would hope, need not be repeated.

Finally, the state of computer technology and data interconnection is far superior to what it was when the SRBA was initiated. IDWR will now be able to take advantage of extensive data bases at the local government level (which often bear indirectly on water use).

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.

Columbia River, which in turn flows through Washington. However, the Kootenai joins the Columbia in Canada, not Washington. Moreover, there are no significant water right conflicts on the Kootenai River. (There are significant environmental and flood management issues concerning water flows and storage releases on the Kootenai, particularly with respect to the operation of Libby Dam. But these are not conflicts driven by water rights.) Consequently, it was felt unnecessary to adjudicate the Kootenai River at this time. Third, the Legislature reduced the fees charged for claims to match the fees set for the SRBA in 1987. 2008 Idaho Sess. Laws, ch. 148 (codified at Idaho Code § 42-1406B(1)).

⁵¹ At this writing (April 21, 2008), the State is negotiating a stipulation with the federal government confirming that it may defer domestic and stock water claims consistent with the McCarran Amendment, as contemplated under 2008 Idaho Sess. Laws, ch. 149 (codified at Idaho Code § 42-1406B(1)).

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 Court did not address water rights. However, the Tribe has made it clear in statements (e.g., at the May 8-9, 2007 meeting in Spokane Valley) that they intend to assert water right claims in the upcoming adjudication based on their ownership of the lake and, presumably, on 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 will probably 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.

(iv) Municipal water rights

In 2003 the State of Washington enacted H.B. 1338 validating what are known in Washington as "inchoate" water rights for municipalities. These rights allow municipalities to grow into larger uses over time. These rights are now being challenged in Washington courts. Thus, there is potential for significant new municipal demand in Washington, despite the de facto moratorium on new water rights.

Meanwhile, Idaho has long recognized the right of cities to hold water rights for reasonably anticipated future needs.

Appendix A: ABOUT THE AUTHOR

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- J.D. (cum laude), University of Michigan School of Law 1981.
- A.B in Economics (magna cum laude, high honors in economics, Phi Beta Kappa, Osterweil Prize in Economics, James B. Angell Scholar), University of Michigan 1977.
- Member of the bars of Idaho, Colorado, and the District of Columbia. Admitted to practice in federal courts in the District of Columbia, Eighth, Ninth, and Tenth Circuits.

Chris has been a leader in the fields of water, land use, environmental, constitutional and administrative law for three decades.

Chris is listed in the *Idaho Yearbook Directory* as “centrally located in the world of Idaho public affairs” and “a key figure in Idaho water law.” Chris has earned Martindale–Hubbell’s highest rating for practicing attorneys (“AV”), and is listed in *The Best Lawyers in American*, *Mountain States Super Lawyers*, *Chambers USA*, *Litigation Counsel of America*, *Who’s Who in America*, and *Who’s Who in American Law*. He also serves as President of the Idaho Environmental Forum, the largest environmental policy group in the state.

Before joining Givens Pursley in 1991, Chris held the position of adjunct professor at the University of Colorado Law School where he taught water law, negotiation and environmental law. Prior to that, he practiced natural resources law with the National Wildlife Federation in Washington, D.C.

Chris has written extensively on environmental and natural resource law subjects, and is a frequent speaker at law forums throughout the

United States. Among the dozens of publications he has authored and co-authored are:

- *Municipal Water Rights and the Growing Communities Doctrine*, The Water Report (2010).
- *Water Law Handbook: The Acquisition, Transfer, Use and Administration of Water Rights in Idaho* (2010).
- *Land Use Handbook: The Law of Planning, Zoning and Property Rights in Idaho* (2010).
- *Road Law Handbook: Road Creation and Abandonment Law in Idaho* (2010).
- *Ethics Handbook: Ethical Considerations for the Client and Lawyer in Idaho* (2010).
- *Municipal Water Rights and the Growing Communities Doctrine*, The Water Report (2010).
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- *Brownfields Law and Practice* (Idaho Chapter), Matthew Bender & Co., Inc. (2004) (named Best Law Book of the Year by the American Association of Publishers).
- *A Comprehensive Guide to Redeveloping Contaminated Property* (Idaho Chapter), American Bar Association (2002).
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- *Small Handles on Big Projects: The Federalization of Private Undertakings*, 41 *Rocky Mountain Mineral Law Institute* 5-1 (1995).