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The Galloway Proposal and Colorado Water Law: The Limits of the Doctrine of Prior Appropriation

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The Galloway Project and the Colorado River Compacts: Will the Compacts Bar Transbasin Water Diversions?

The Galloway Project (Galloway) and others like it are *the* water issue of the 1990s. In a nutshell, Galloway plans to sell surface water, which was apportioned to Colorado under interstate compacts and acquired pursuant to state law, to users in a different state and a different river basin.¹ Galloway poses a new question for the Colorado River Compacts: do the Compacts limit water use to specific geographical territory? This paper finds express or implied territorial use limitations in the Compacts. The Compact language would preclude the out-of-Basin use of Colorado River water which Galloway proposes. Because the Compacts are federal law, they are immune from Commerce Clause attack and preempt inconsistent state law. This paper explores these propositions in depth. As a context for this discussion, the paper first introduces the Galloway Project and the Law of the River that controls the Project.

The setting for the Galloway conflict is the Colorado River System. In *Arizona v. California*, the Court eloquently described the river system's physical characteristics as follows:

The Colorado River itself rises in the mountains of Colorado and flows generally in a southwesterly direction for about 1,300 miles through Colorado, Utah, and Arizona and along the Arizona-Nevada and Arizona-California boundaries, after which it passes into Mexico and empties into the Mexican waters of the Gulf of California. On its way to the sea it receives tributary waters from Wyoming, Colorado, Utah, Nevada, New Mexico, and Arizona. The river and its tributaries flow in a natural basin almost surrounded by large mountain ranges and drain 242,000 square miles, an area about 900 miles long from north to south and 300 to 500 miles wide from east to

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1. To date no compact explicitly allows trans-basin diversions in different states, and no one has successfully implemented such a diversion. Johnson, *Law of Interbasin Transfers*, 3-5 (National Water Commission, 1971). Compacts do allow trans-basin diversion in the same state and trans-subbasin diversions in different states; see Colorado River Compact of 1922, art. II(f)(g), *ratified* by Boulder Canyon Project Act, ch. 42, 45 Stat. 1057 (1928) [hereinafter cited as Colorado River Compact]; Upper Colorado River Compact of 1949, art. IX a, ch. 48, 63 stat. 31 (1949) [hereinafter cited as Upper Colorado River Compact].

west—practically one-twelfth the area of the continental United States excluding Alaska. Much of this large basin is so arid that it is, as it always has been, largely dependent upon managed use of the waters of the Colorado River System to make it productive and inhabitable.²

This ribbon of water through the desert averages a flow of approximately 13 million acre-feet (m.a.f.) per year at Lee Ferry,³ the key measuring point which is below the Glen Canyon Dam in Arizona.

The Galloway Group, Ltd., a Colorado corporation,⁴ claims to have water rights to 1.3 m.a.f.⁵ of surface water on the Yampa and White Rivers, which are tributaries of the Colorado River in northwestern Colorado. The exact basis in Colorado law for the corporation's water rights is unclear.⁶ Galloway intends to raise over \$230,000,000 in private capital⁷ to construct reservoirs to store the water and generate hydroelectric power. The corporation's proposed reservoir sites on the Yampa River east of the Little Snake River and on the White River west of the town of Meeker could impound more than 1 m.a.f.⁸ But Galloway's real interest is not impoundment and hydroelectric power generation. Rather Galloway intends to lease over 1 m.a.f. per year of water to water districts in Arizona and Southern California.⁹ Galloway plans to use the Colorado River channel and existing dams and aqueducts to transport and deliver its water.

The Galloway Group could mark the beginning of private entrepreneurship in massive public works projects that previously were government-financed. By May, 1986, the Galloway group plans to start construction of the Little Beaver reservoir on the White River.¹⁰ This 20,000 a.f. capacity reservoir will cost approximately \$28,000,000 and will be totally privately financed.¹¹ The corporation intends no public stock offerings;

2. *Ariz. v. Cal.*, 373 U.S. 546, 552 (1962).

3. Meyers, *The Colorado River*, 19 STAN. L. REV. 1,2 (1966). An acre-foot is enough to cover an acre of land with one foot of water. The Colorado River's flow is erratic: 17.9 m.a.f. in 1952 as compared to 6 m.a.f. in 1954. *Id.* at 2-3.

4. "Doyle G. Berry, the developer of the [Galloway] plan. . . , a Louisiana oilfield contractor, has amassed extensive land holding in the Meeker area. He had hoped to cash in on a building boom in Meeker related to the oil shale industry, which has fallen on hard times." Simison, *Debate is Growing Over a Proposal to Sell Water from Colorado River*, Wall St. J., Nov. 19, 1984, at 33.

5. Telephone interview with Phil Ray, Consultant, Galloway Group Ltd. (Sept. 13, 1985).

6. Galloway claims to have purchased adjudicated water rights and to have rights appurtenant to land they have purchased. Telephone interview with Phil Ray, Executive V.P., Galloway Group Ltd. (April 15, 1985). In addition and alternatively, under Colorado law the mere intent to appropriate and the physical act of building a dam technically constitute an appropriation. Telephone interview with Bill McDonald, Director, Colorado State Water Conservation Board (April 17, 1985). Colorado state water rights questions are beyond the scope of this paper. This paper assumes that Galloway owns surface water rights pursuant to Colorado state law.

7. Ray, *supra* note 5.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

it will finance its reservoir construction program with tax exempt bonds, bank loans, corporate bonds, and other private sector financing tools.¹² Galloway anticipates completing construction of its more than \$200 million building program by 1990 and collecting a 17% to 18% return for 30 years.¹³ In an open market the price for water could jump from \$3-20/a.f., the current rate in federally subsidized projects, to \$100-200/a.f., and eventually to \$500/a.f.¹⁴ These financial possibilities leave little doubt why private entrepreneurs are interested in the water market.

In August 1984, the San Diego County Water Authority (SDCWA) paid Galloway \$10,000 for an option to lease 300,000-500,000 a.f. per year for forty years.¹⁵ By 1987, Galloway and SDWCA will decide whether to convert the option into a binding agreement.¹⁶ San Diego will suffer severe water problems unless the county succeeds in arranging water imports soon. The Colorado River supplies 90% of San Diego's water.¹⁷ In recent years, San Diego has received more than its actual Colorado River entitlement because the flow of the Colorado River was greater than in previous years of recorded flow, other Colorado River users in California did not exercise all their water rights, and other states entitled to use the Colorado River have not used their full share.¹⁸ A series of compacts and agreements dictate San Diego's Colorado River allocation. In brief, the Colorado River Compact guarantees 7.5 m.a.f. per year from the Colorado River to the states of Arizona, California and Nevada,¹⁹ the California Limitation Act²⁰ limits California's share of the Colorado River to 4.4 m.a.f. per year, and the Seven Party Agreement²¹ apportions California's share among seven users. The Seven Party Agreement assigns San Diego fifth priority out of seven, and entitles San Diego to 112,000 a.f. per year.²² In 1980, San Diego used approximately 269,000 a.f. of Colorado River water.²³ San Diego's water supply situation is about to

12. *Id.*

13. Simison, *supra* note 4.

14. *Id.*

15. Getches, *Legal Issues Surrounding the Galloway Group Proposal to Market Colorado Water to San Diego*, (January 8, 1985) (outline presented to workshop on Water Rights Law).

16. Ray, *supra* note 5.

17. Getches, *supra* note 15, at 2.

18. COOPER, *AQUEDUCT EMPIRE* 316 (1968).

19. Colorado River Compact, art. III(a). Art. III(b) of the Compact gives the Lower Basin an additional million acre feet per year. For simplicity, this paper only refers to the Lower Basin's 7.5 m.a.f. per year allocation because that is the same as the Upper Basin's.

20. Act of March 4, 1929, Ch. 16, 48th Sess. Stats. & Amends & Codes (1929).

21. Agreement Requesting Apportionment of California's Share of the Waters of the Colorado River Among the Applicants in the State, Aug. 18, 1931. Found in DEPT. OF INTERIOR, BUREAU OF RECLAMATION, *UPDATING THE HOOVER DAM DOCUMENTS* (1978) [hereinafter cited as *UPDATING DOCS.*]

22. *Id.* at § 5.

23. See Getches, *supra* note 15, at 2. Getches estimated that San Diego uses 30 percent of the Metropolitan Water District's (MWD) total supply. A computation sheet from Bill Miller, State Engineer's Office, New Mexico, showed that MWD used 813,000 a.f. in 1980.

change. As Arizona and other states actually use more of their allocation of Colorado River water, San Diego will receive less. At issue in this paper is whether Galloway will be allowed to relieve San Diego's water crisis. As prelude to an analysis of Compact bars to the Galloway Project, the next sections describe pertinent Compact provisions and apply them to Galloway.

LEGAL OBSTACLES—LAW OF THE RIVER

The U.S. Constitution authorizes states to enter into interstate compacts:

"No State shall, without the Consent of Congress. . . enter into any. . . Compact with another State. . ."²⁴

Compacts are consensual agreements, which become federal law by virtue of congressional consent.²⁵ Compacts originated during the colonial era as a means of solving interstate boundary disputes.²⁶ Justice Felix Frankfurter and James Landis' seminal article on compacts, published in 1925, "foresaw an increasing use of compacts for the resolution of interstate natural resource problems as mechanisms between federal preemption and independent state action which could solve the federalism problem presented."²⁷ Compacts are particularly adapted to solving problems that transcend state boundaries and require regional solutions. The Compact Clause of the Constitution required federal consent, so that Congress would determine whether the arrangement truly was a compact and Congress could exercise "national supervision" and "protect the national interests" from undue erosion of federal sovereignty.²⁸ Congress' consenting to the Colorado River Compact in 1928 could be said to have implemented Justice Frankfurter's vision because the Colorado River Compact addressed a major natural resource problem affecting seven states.

The Colorado River Compact of 1922

When the seven Colorado River Basin states signed the Colorado River Compact in 1922, their motivations were various. The four states of the Upper Basin, Wyoming, Colorado, Utah and New Mexico, feared that

24. Art. I, § 10, cl. 3.

25. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983), *Petty v. Tennessee-Missouri Comm'n.*, 359 U.S. 275, 279 (1958).

26. Frankfurter & Landis, *The Compact Clause of the Constitution — A Study in Interstate Adjustments*, 34 *YALE L.J.* 685 (1925).

27. Carver, *Interstate Water Compacts*, for a Short Course on New Sources of Water for Energy Development and Growth: Interbasin Transfers, at N-4 (University of Colorado Law School, June 7-10, 1982).

28. *Petty*, 359 U.S. at 282 n. 7 and 288.

the recent U.S. Supreme Court decision in *Wyoming v. Colorado*,²⁹ affirming prior appropriation as the law of the river when an equitable apportionment action involved two states with prior appropriation water law, would either result in Southern California appropriating all of the Colorado River first or force the Upper Basin to develop prematurely.³⁰ They also feared that if the states could not agree, the "big power interests of the country [would] exert tremendous influence on matters connected with the Colorado River. . . [N]ot the slightest doubt that if left to them. . . they [would] absolutely control. . . the river in the end."³¹ In the Lower Basin, the Colorado River unpredictably flooded or dried up Southern California.³² California "more ardently than anyone else lusted for [Hoover] dam" to control the river once and for all and to generate electric power.³³ California recognized that only the compact would appease the Upper Basin states' implacable opposition to the dam. Aside from territorial-based motivations for the Compact, "to the generation of the thirties, Boulder Dam [now known as Hoover Dam], Grand Coulee and TVA, were the psychological equivalents of America's first astronaut landings a quarter century later": Boulder Dam would make the Colorado River stand still for the first time.³⁴

The Colorado River Compact resolved the most urgent conflict among the states, the struggle between Upper Basin and Lower Basin states, by dividing the river into two basins.³⁵ Early in the final negotiating process Chairman Hoover told the commissioners to "mentally abandon the notion of apportioning [the river] among states."³⁶ Instead, Art. III(d) of the Compact obligated the Upper Basin³⁷ to deliver 75 m.a.f. per 10 years to the Lower Basin³⁸ at Lee Ferry, a "natural physical division" between the two basins.³⁹ This compromise left each basin "free to pursue its own course."⁴⁰

29. 259 U.S. 419 (1922).

30. Address by L. W. Bannister, U.S. Chamber of Commerce, Western Division (December 7, 1926) (available in N.M. State Archives).

31. Letter from George Neel, N.M. State Engineer, to John Morrow, N.M. Congressman (October 1, 1925) (available in N.M. State Archives).

32. COOPER, *supra* note 18, at 304.

33. *Id.* at 304-05. The Boulder Dam, which is now known as the Hoover Dam, is located on the Colorado River.

34. *Id.* at 308.

35. Colorado River Compact, art. I.

36. Minutes and Record of the First Eighteen Sessions of the Colorado River Commission Negotiating the Colorado River Compact of 1922, at 51 (1922) [hereinafter cited as Minutes, Bk. 1].

37. The "Upper Basin" is defined as those parts of Utah, Colorado, New Mexico, and Wyoming within the Colorado River System above Lee Ferry. Colorado River Compact, art. II(f).

38. The "Lower Basin" refers to California, Nevada and Arizona, *Ariz. v. Cal.*, 373 U.S. at 559.

39. Minutes, Bk. 1, *supra* note 36, at 47. (Comm'r Carpenter of Colorado).

40. *Id.* at 25 (Sess. No. 15) (Comm'r Carpenter of Colorado).

The Compact language suggested territorial use limitations. When Arts. III(a) and II(f)(g) are read together, the "exclusive consumptive use" allowed each Basin in the Compact is limited to the physical territory of the particular basin. Art. III(a) apportioned to each basin the "exclusive beneficial consumptive use" of 7.5 m.a.f./year. Art. II(f)(g) defined the Upper Basin as those named states "within which and from which waters naturally drain into the Colorado River System" above Lee Ferry, and the Lower Basin as those named states below Lee Ferry. Art. VIII further specified territorial use limitations, affirming that "[a]ll rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate." The drafters added this language to the article which dealt with water storage to meet the Lee Ferry delivery obligation, in order to affirm that water stored in the Upper Basin for the benefit of the Lower Basin would be part of the Lower Basin's apportionment.⁴¹

Although the Colorado River Compact did not specifically define "exclusive beneficial consumptive use," it set forth some policies regarding use. First, Art. III(e) precluded waste by requiring the Upper Basin not to withhold water which the Upper Basin could not apply to domestic and agricultural uses from the Lower Basin. This requirement addressed Arizona's fears that the Upper Basin would deliberately withhold water, precluding even a minimum stream flow to the Lower Basin.⁴² Second, Art. IV(b) preferred agricultural and domestic uses to electrical power generation; this preference did not apply across basins⁴³ and was subordinate to state law use preferences within the boundaries of the state.⁴⁴

Upper Basin Controls

More than twenty years elapsed between the seven Colorado River States' negotiating the Colorado River Compact and the four Upper Basin Colorado River States negotiating the Upper Colorado River Compact. In 1949 the Upper Basin States ratified the Upper Basin Compact because the Bureau of Reclamation (BOR) required them to allocate their share of the Basin among themselves before the BOR would submit its Upper Basin reservoir construction program to Congress.⁴⁵ Only reservoir storage would assure the Upper Basin its full Colorado River Compact allocation of 7.5 m.a.f. per year.⁴⁶ After the Colorado River Compact had

41. Minutes and Record of Sessions Nineteen thru Twenty-Seven of the Colorado River Commission Negotiating the Colorado River Compact of 1922, at 286 (1922) (Sess. No. 26) [hereinafter cited as *Minutes*, Bk. 2].

42. *Id.* at 188.

43. See *infra*. text at notes 89-91.

44. Colorado River Compact, art. IV(c).

45. O. Stratton and P. Sirotkin, *The Echo Park Controversy* 5 (The Inter-University Case Program 1959).

46. *Id.* at 6.

been approved, the states discovered that the Colorado River's average annual flow was 14 m.a.f. per year, not 20 m.a.f. as they had thought, and that during the drought decade of 1931-1940 the flow averaged only 10 m.a.f. per year.⁴⁷ The Bureau of Reclamation estimated that if, during years of high flow, the Upper Basin stored 23 m.a.f. of surplus flow for release during dry years, the Upper Basin could consume 7.5 m.a.f. per year *and* meet its Lee Ferry delivery obligation.⁴⁸ The Upper Basin States adopted the Upper Colorado River Compact to protect their future water development needs.

The Upper Colorado River Basin Compact measures consumptive use of water "by the inflow-outflow method in terms of man-made depletions of the virgin flow at Lee Ferry."⁴⁹ Essentially this method compares the difference between total inflow and total outflow from a state.⁵⁰ The consumptive use definition would permit the Upper Basin to consume more than the 7.5 m.a.f. per year apportioned to it because much of the water returns to the Colorado River and, thus, contributes towards the Upper Basin's delivery obligation at Lee Ferry.⁵¹ The definition matches Upper Basin use patterns, which consist of many small diversions involving return flows, including some underground return flows.⁵²

Lower Basin Controls

The Upper Basin's delivery obligation of 75 m.a.f. per ten years at Lee Ferry guarantees Colorado River water to the Lower Basin. The disputatious Lower Basin states could not agree about how to apportion this water among themselves. So in the Boulder Canyon Project Act, Congress required California to unconditionally and irrevocably limit its consumptive use of the Colorado River to 4.4 m.a.f. per year.⁵³ Subsequently, California users apportioned California's share among themselves, giving San Diego almost the lowest priority.⁵⁴ The Boulder Canyon Project Act also provided that, in absence of state agreement, the Secretary of Interior's (SOI) contracts with the Lower Basin states would effect an apportionment.⁵⁵ Almost forty years later, the Supreme Court upheld this

47. *Id.* at 5-6.

48. *Id.* at 6.

49. Upper Colorado River Basin Compact, art. VI.

50. Meyers, *supra* note 3, at 30.

51. Stratton, *supra* note 45, at 91.

52. Meyers, *supra* note 3, at 30-31; Stratton, *supra* note 45, at 91. The trans-basin shipments from the Colorado River to Denver, which the Colorado River Compact allows, count towards Colorado's consumptive use, since such shipments are measurable as man-made depletions at Lee Ferry.

53. Boulder Canyon Project Act, § 4(a), 45 Stat. 1057, 1064; California Limitation Act, Act of March 4, 1929, Ch. 16, 48th Sess., Stats and Amends and Codes 38-9 (1929).

54. UPDATING DOCS., *supra* note 21, at § 5.

55. *Ariz. v. Cal.*, 373 U.S. at 562.

congressional apportionment,⁵⁶ clearing the way for the Central Arizona Project (CAP). In authorizing the CAP, Congress gave California priority for its 4.4 m.a.f. over any water diverted for CAP, thus putting the burden on Arizona of Upper Basin deliveries at Lee Ferry below 7.5 m.a.f. per year.⁵⁷

Colorado Export Statute

Colorado state water law provides for the Compacts to control out-of-state water use. To approve a water export application, the Colorado state engineer, groundwater commission, or water judge must find:

The proposed use of water outside this state is expressly authorized by interstate compact or credited as a delivery to another state pursuant to [a compact] . . . or that the proposed use of water does not impair the ability of this state to comply with its obligations under any judicial decree or interstate compact which apportions water between this state and any other state or states.⁵⁸

The Colorado water export statute quoted above conditions approval of exports on compliance with interstate water compacts. The statute sets out three compact-related criteria by which state water authorities must evaluate water export applications: whether an interstate compact expressly authorizes the proposed out-of-Colorado use of the water, whether an interstate compact or other judicial decree credits the water to the apportionment of another state in which the water is actually used, or whether the proposed use of water impairs Colorado's interstate compact obligations. Possible illustrations of these criteria are found in the Upper Colorado River Compact. The Upper Colorado River Compact expressly apportions the Yampa River, which only flows in Colorado, to Colorado and Utah,⁵⁹ and the same compact permits diversion and storage in one state for use in another as part of the latter's apportionment.⁶⁰

THE LAW OF THE RIVER APPLIED TO THE GALLOWAY PROJECT

The Colorado River Compact applies to the Galloway Project because the Compact covers tributaries as well as the mainstem of the River.⁶¹

56. *Id.* at 565.

57. Colorado River Basin Project Act of 1968, 43 U.S.C. 1521 (1982).

58. Colo. Rev. Stat. § 37-81-101(3)(a) (1984 cum. supp.).

59. Upper Colorado River Basin Compact, art. XIII.

60. *Id.* at art. IX(a).

61. Colorado River Compact, art. II(a). *Contra* Ariz. v. Cal., 373 U.S. at 567-68. The Supreme Court held that "[t]ributaries are not included in the waters to be divided but remain for the exclusive use of each State," but limited its decision to Lower Basin apportionment and the Boulder Canyon Project Act, not the Colorado River Compact. This holding allowed the Court to exclude the Gila River from Arizona's Colorado River apportionment.

Galloway plans to appropriate water from the White and Yampa Rivers, which are tributaries to the Colorado River. The Colorado River Compact also applies to the Galloway Project because compacts bind individuals who acquire water rights pursuant to state law, and they preclude states from granting rights in excess of those apportioned to the state under the compact.⁶²

The Colorado River Compact appears to forbid the Galloway Project. Essentially, the Compact apportions exclusive use of a quantity of water to the Lower and Upper Basins. Galloway envisions using water apportioned to one Basin in the other. Art. VIII of the Compact expressly precludes Galloway's arrangement. This Article requires that all rights to beneficial use under the Compact "be satisfied *solely* from the water apportioned to that Basin in which they are situate."⁶³ As will be discussed in the remaining sections of this paper, Articles II, III, and IV also preclude Galloway's arrangement because they limit the use of the water to the territory of the Basin to which the water was apportioned.

The Galloway Project is inconsistent with the basic understanding embodied in the Compact of what would happen to water apportioned to the Upper Basin for which the Upper Basin had no need. Under Art. III(e) the Upper Basin could not withhold water which it could not use and which the Lower Basin could reasonably apply to domestic and agricultural uses. The Upper Basin had to let the water flow south into the Lower Basin free of charge. Galloway would violate this Compact provision because Galloway would store water apportioned to Colorado for which the state has no present beneficial use and would sell this water to certain Lower Basin users without regard to Compact-mandated allocations among Lower Basin users.

The Upper Colorado River Compact and Lower Basin Colorado River agreements add further impediments to the Galloway Project. Galloway plans to impound the Yampa River and store the equivalent of the River's average annual flow for lease to Lower Basin users.⁶⁴ The Upper Colorado River Compact, however, expressly apportioned approximately one-half the Yampa's average annual flow to Colorado, and one-half, to Utah.⁶⁵ Utah conditioned its approval of the Upper Colorado River Compact on apportionment of the Yampa because Utah feared the salt from newly-irrigated Wyoming land would so pollute Green River water that Utah had to find alternative water for its principal scheme, the Central Utah

62. *Hinderlider v. La Plata Co.*, 304 U.S. 92, 106 (1937).

63. Colorado River Compact, art. VIII (emphasis added). The Compact excepts the 5 m.a.f. stored for the Lower Basin at Hoover Dam from this requirement.

64. The Yampa averages 1.065 m.a.f. per year. U.S. DEPARTMENT OF INTERIOR, BUREAU OF RECLAMATION, THE COLORADO RIVER 109 (1946). Galloway plans reservoir capacity of over 1 m.a.f. on the Yampa and annual diversions of about 900,000 a.f. Ray, *supra* note 6.

65. Upper Colorado River Compact, art. XIII.

Project.⁶⁶ Galloway's planned annual diversion of most of the Yampa's flow clearly violates this Compact provision.⁶⁷

Furthermore, Galloway defies the Upper Colorado River Compact's measurement of beneficial consumptive use by the "inflow-outflow method in terms of man-made depletions of the virgin flow at Lee Ferry."⁶⁸ Technically, Galloway is not a consumptive use because the project does not result in man-made depletions at Lee Ferry. Galloway could be considered a complete diversion with no return flow because the water would actually be used out of the Upper Basin. On the other hand, the project could be considered a 100 percent return flow because no water would be used in the Upper Basin and the Galloway reservoir might even salvage water otherwise lost to nature. Whichever way Galloway's water use was measured, Galloway could change the amount of water that states were entitled to receive and create uncertainty among present Colorado River users about how much they would be entitled to.

Finally, Galloway does not satisfy any of the Colorado Water Export Statute's three criteria for the Colorado water authorities to approve export under that statute.⁶⁹ Galloway's export to California is not authorized by interstate compact and could not be credited to California because such a credit would cause California to exceed the Limitation Agreement.⁷⁰ Thus, Colorado would have to find that Galloway satisfied the statute's third criterion: that the project did not impair Colorado's ability to comply with the Colorado River Compacts. Galloway's proposal affects several explicit Compact obligations. First, Colorado could not fulfill the Upper Colorado River Basin Compact's requirement to deliver annually .5 m.a.f. of the 1 m.a.f. Yampa River to Utah⁷¹ because Galloway would divert approximately .9 m.a.f. of the river to San Diego and other out-of-basin users. Second, according to Bureau of Reclamation data, only 767,000 a.f. of Colorado's Colorado River apportionment was unappropriated in 1980, and only 483,000 would be in 1990.⁷² Galloway's using 1.3 m.a.f. of Colorado's apportionment would cause Colorado to exceed its Compact apportionments. Galloway's use of so much water could affect other water users in Colorado because in times of shortage the Upper Colorado River Basin Compact requires Colorado to immediately make up any difference

66. Stratton, *supra* note 45, at 5.

67. Galloway also plans to impound and divert the White River in Colorado for similar uses. The Upper Colorado River Compact's silence regarding the White River led to subsequent controversy concerning whether the Colorado River Compact or the Upper Colorado River Basin Compact apportioned that river. Carver, *supra* note 27, at N-25.

68. Upper Colorado River Compact, art. VI.

69. See *supra* text at notes 58-60.

70. See *supra* text at note 53.

71. Upper Colorado River Compact, art. XIII. See *supra* note 64.

72. Bureau of Reclamation, Upper Colorado Region, Projected Water Supply and Depletions, Upper Colorado River Basin (June, 1982) (available from N.M. State Engineer).

between the state's actual use and what the Compact apportioned to the state.⁷³ Finally, the Colorado River Compact mandates that the Upper Basin apportionment be used within the territory of the Upper Basin states. The next section of this paper discusses this mandate.

THE COLORADO RIVER COMPACT'S TERRITORIAL USE LIMITATIONS

A finding that the Colorado River Compact limits the use of water to certain territory is the key not only to whether the Compact bars Galloway, but also to whether the use limitation will survive Commerce Clause attack and preempt inconsistent state law. The Compact apportions the exclusive beneficial consumptive use of 7.5 m.a.f. per year to the Upper and Lower Basins (defined so as to include only named states) and requires that, except for certain storage for the benefit of the Lower Basin, all rights to beneficial consumptive use be satisfied by the apportionment to the basin where the water would be used.⁷⁴ Since no Court has interpreted the Compact's territorial limitations on the use of the water, this paper will suggest interpretative approaches.

One could argue that the Compact language summarized above is clear on its face and expressly requires each Basin to use its apportionment within the Basin's own territory. The Compact's unusual phrasing "*exclusive* beneficial consumptive use" suggests such territorial use limitations because "exclusive" rarely modifies "beneficial consumptive use" in other water agreements.⁷⁵ "Exclusive" means "appertaining to the subject alone. . . . Sole. Shutting out; debarring from interference or participation; vested in one person alone."⁷⁶ Beneficial use is "a restrictive concept of valid water uses in the water law of the arid western states requiring that water only be used for purposes that are beneficial to the user and to society in general, such as irrigation and municipal uses."⁷⁷ "Consumptive" specifies that such use tends to destroy, expend, and to

73. Upper Colorado River Compact, art. IV.

74. Colorado River Compact, arts. II(f)(g), III(a), VIII.

75. The South Platte River Compact, art. III, 44 Stat. 195 (1926), gave Nebraska "the full and unmolested use and benefit of all waters flowing in Lodgepole Creek [above a certain point, and Colorado] the exclusive use and benefit of all waters flowing" below that point; in contrast, the Republican River Compact, art. IV, 57 Stat. 86 (1943), provided for allocations to each state "for beneficial consumptive use in" each state. Exclusive use of water imported into the basin is envisioned in the Pecos River Compact, art. VII, 63 Stat. 159 (1949), which provided that any state importing water into the Pecos River Basin shall have "the exclusive use of such imported water," and the Kansas-Nebraska Blue River Basin Compact, art. V, 86 Stat. (1971), which provided that a state importing water "shall have exclusive use of such imported water."

76. BLACK'S LAW DICTIONARY 506 (5th Ed. 1979).

77. Professor Albert E. Utton, *Glossary of Terms Commonly Used in Water Law* (1985)(University of New Mexico School of Law).

use up the resource.⁷⁸ Thus, the words "exclusive beneficial consumptive use" expressly confer on each Basin the sole right to use up its Colorado River apportionment.

Also key to any finding that the Compact limits water use to certain geographical areas is the Compact's definition of the Lower and Upper Basins. The Compact defines each Basin as

those parts of [certain named states] within which and from which waters naturally drain into the Colorado River System. . . and also parts of said States located without the drainage area of the Colorado River System which are. . .beneficially served by waters diverted from the System [within said Basin].⁷⁹

This definition is precise as to territorial area. The definition expressly provides for trans-basin diversions within a Basin, but not between Basins. The Compact's apportioning the exclusive beneficial consumptive use of 7.5 m.a.f. per year to the Lower and Upper Basin amounts to an express territorial use limitation because the consumptive use pertains to the territory enumerated in the definition of each Basin. In addition, Article VIII requires that each Basin's water rights be satisfied solely from the water apportioned to the Basin.

However, one could also argue that the Compact's apportioning exclusive beneficial use to each Basin is not an express territorial limitation on the water's use because the Compact speaks only of the Basin's use *of* the water. The Compact does not expressly refer to the use of the water *in* the Basin. Thus, one could conclude that the Colorado River Compact is ambiguous about limiting water apportioned to a Basin to use in that Basin.

When a law is ambiguous, then the courts must interpret it to determine what the parties meant and construe it to ascertain the legal consequences. This applies to compacts as well. Typical tools for statutory interpretation and construction are: the act's purpose, the circumstances surrounding approval (what problems did the statute address?), the act's legislative history (what did the framers intend?), common law or statute, administrative construction of the act, the act's legislative declaration of purpose, and for interstate water compacts: the equities.⁸⁰ In *Petty v. Tennessee-Missouri Comm'n*, Justice Douglas, writing for the Court, required that the Court "turn to federal law not state law" to interpret the compact language because congressional consent made the compact federal law.⁸¹ He proceeded to look at what Congress enacted and what it might have

78. BLACK'S, *supra* note 76, at 287; WEBSTER'S NEW WORLD DICTIONARY 305 (2d ed. 1972).

79. Colorado River Compact, art. II(f)(g).

80. Matter of Rules and Reg. Governing Use, Control & Protection (Alamosa-La Jara Water Users Ass'n), ___Colo.___, 674 P.2d 914, 921 (1983).

81. 359 U.S. at 280.

done, relevant federal court decisions during the period before Congress approved the compact, and legislative history.⁸² This paper will apply these tools of statutory construction to the Colorado River Compact's territorial use limitations.

Congress gave high priority to the Colorado River Compact from 1921 when it passed an act consenting to the Colorado River Basin states negotiating and entering into a compact for the "equitable division and apportionment . . . of the water supply of the Colorado River,"⁸³ until 1928 when it approved the Boulder Canyon Project Act, consenting to the Compact and providing for the Boulder Canyon Dam.⁸⁴ Much of the discussion on the floor of the Senate concerned an apportionment among the Lower Basin states, but the record affirms that the Senators intended to divide the Colorado River waters for use in two basins:

I am told that the suggestion came from Mr. Hoover that whereas they had found it impossible to apportion and allocate to each individual State the quantity of water which it should be entitled to receive from the Colorado River for all time, that they take at least the first step and divide the waters of the Colorado River for use of two basins. That was done, and that was all that was done by the Colorado River Commission.⁸⁵

The extensive discussion of apportionment among Lower Basin states and the water needs of the Colorado River System States shows that the Senators assumed that the water would be used in the state to which it was apportioned.⁸⁶ Delph E. Carpenter, Colorado River Commissioner from Colorado, explicitly informed the Senate that the use of water apportioned to each Basin was confined to the territory of the Basin:

The apportionment of 7.5 m.a.f. exclusive annual beneficial consumptive use to the upper basin means that the territory of the upper basin may exhaust that much water from the flow in the stream each year. . . . [To Colorado, the Colorado River Compact grants] a preferred right to utilize the waters of the rivers within this state to the extent of our present and future necessities.⁸⁷

82. *Id.* at 280-82.

83. *Ariz. v. Cal.*, 373 U.S. at 556-57 (quoting 42 Stat. 171 (1921)).

84. *Id.* at 556-60, 45 Stat. 1057 (1928).

85. 70 CONG. REC. 163 (statement of Sen. Hayden, Arizona). See *Ariz. v. Cal.*, 373 U.S. at 554-62 for a summary of the legislative history.

86. The record is replete with references to how much individual states and the basins needed and wanted. As examples: "Each of the States in the Lower Basin was called upon to submit to the Denver Conference a statement of the quantity of water they desired to obtain out of the Colorado River." 70 CONG. REC. 161 (statement of Sen. Hayden of Arizona). The states of the Upper Basin "are most anxious to have reserved in perpetuity for their use whenever they have occasion to use it seven and one-half million acre-feet of water." 70 CONG. REC. 70 (statement of Sen. Hayden). See 70 CONG. REC. 67-80, 232-45, 264-69, 285-99, 330-40, 381-402, 458-74, 577-91, 830-38.

87. 70 CONG. REC. 578 (Statement of Delph E. Carpenter).

The record of the compact commissioners appointed by their states pursuant to the federal act of 1921 to negotiate the Compact⁸⁸ shows that they also contemplated territorial use provisions in the Compact. The words "exclusive beneficial consumptive use" evolved from the following "rough principles":

The appropriation of water shall be considered as its actual application to beneficial use and such beneficial use shall rank in priority first, to agricultural and domestic purposes; second, power, third navigation; and appropriations shall, as a class, have preference with each [basin] *and between the two [basins] in the right of use in the water in the order stated.*⁸⁹

During the term of this compact appropriations may be made in either. . . [basin] with equality of right as between them, up to a total of 7,500,000 acre feet per annum, for each. . . [basin].⁹⁰

While agreeing to many of the above principles, the commissioners disapproved allowing use preferences to cross Basin lines. The commissioners did not want Upper Basin agricultural uses, which might develop later in time, to invalidate Lower Basin power uses, which had developed at an earlier date. The commissioners also determined that states would establish use preferences within their boundaries and no Lower Basin claim could attach above Lee Ferry.⁹¹ The commissioners wanted each Basin to control its water independently of the other one. The commissioners eventually transformed these policy choices into Articles III and IV of the Compact, which apportion the water among the Basins, establish use preferences within each Basin, and allow states to control the use of water within their boundaries.⁹²

Chairman Hoover summarized the effect of the Article III apportionment: "[A] different allocation of water has been made to the upper states, and a different allocation, . . . to the Lower states. . . . [The pact is] hinged upon the seven and a half million consumptive use confined to the upper states. . . ." ⁹³ In a later session the commissioners returned to Article III and changed a few words to further affirm that they were dividing the use of the water, not the water itself, because Chairman Hoover opined that:

You can divide the use of the water, but I don't believe you can divide the water itself. That is the assumption of an ownership in

88. 42 Stat. 171 (1921). The names of the commissioners, by state, are: Ariz.-W.S. Norviel, Cal.-W.F. McClure, Colo.-Delph E. Carpenter, Nev.-J.G. Scrugham, N.M.-Stephen B. Davis, Utah-R.E. Caldwell, and Wyo.-Frank C. Emerson.

89. Minutes, Bk. 1, *supra* note 36, at 123 [Sess. No. 18 (11/16/22)] (emphasis added).

90. *Id.* at 136.

91. *Id.* at 123-36.

92. Minutes, Bk. 2, *supra* note 41, at 70-9 (Sess. No. 20), 136, 149-150 (Sess. No. 22).

93. *Id.* at 164-65.

the body of the water, not the use of water and I think there are essentially different legal principles if I understand anything about it. I will ask Mr. Hamele what he thinks about that.

MR. HAMELE: That is true, Mr. Chairman. There is no property right in running water and there couldn't be any division in a compact of this kind of the actual water, because it is only the use that is in question. It passes on, goes down and the very water that is used in the upper [basin] is used again in the lower [basin].⁹⁴

The commissioners intended to clarify that the basins only had the right to use the water and that much of the water they used flowed downstream for reuse. They distinguished the right to use the water from ownership of the water. This distinction supports the Compact's limiting the territorial use of the water. If the Upper Basin "owned" 7.5 m.a.f. of water, then it could control where the water was used. However, the Compact only gave the basins the right to use the water. The right to use the water is valuable because the Compact guaranteed each basin a specified quantity of water for use within that basin.

In addition to the language apportioning exclusive beneficial use of the water to the Basins, the commissioners intended their definitions to address out-of-basin diversions:

MR. HOOVER: . . . , "The term 'lower Basin' means those parts of the States of Arizona, California, Nevada, New Mexico and Utah *within and from which waters naturally drain into the Colorado River System below Lee Ferry*, and also all parts of said states located without the drainage area of the Colorado River System which are now or may (shall) hereafter be beneficially served by waters diverted from the river below Lee Ferry."

MR. EMERSON: "Was the matter safeguarded where a diversion might be above Lee Ferry to serve the lower division? I thought that point had been considered and possibly it had been covered."

MR. HOOVER: "It is Mr. Carpenter's wording and I leave it to him to define it."

MR. CARPENTER: "Those parts of the territory within and from which waters naturally flow."⁹⁵

As these comments show, Mr. Delph Carpenter, the delegate from Colorado whose original draft proposal was the basis for much of the Compact,⁹⁶ felt that by defining each Basin in terms of the territory within

94. *Id.* at 253 (Sess. No. 25) (Mr. Hamele was counsel for the Bureau of Reclamation.) Chairman Hoover did not like the introduction to art. III: "The waters of the Colorado River System for beneficial consumptive use are hereby *divided* and apportioned," *Id.* at 250 (emphasis added). Art. III(a) was amended as follows: "There is hereby apportioned in perpetuity to each Basin [for its] the exclusive beneficial consumptive use[,] of 7,500,000 acre-feet of water." *Id.* at 254.

95. Minutes, Bk. 2, *supra* note 41, at 185-86. (emphasis added).

96. Minutes, Bk. 1, *supra* note 36, at 22-30.

the Basin, the Compact assured the Upper Basin that the Lower Basin could not divert water in the Upper Basin for use in the Lower Basin.

Furthermore, the commissioners rejected the following language proposed by Arizona's legal advisor which would have allowed diversion in one state for use in another:

Where water may be advantageously or economically diverted from the Colorado River in one state for use in another state, or where proper development within the basin requires that water be stored in one state for use in another state, such diversion or storage shall be permitted."⁹⁷

The main issue in this proposal may have been state consent, not diversion for use in other states. Mr. Sloan, Arizona's legal advisor, explained that the provision remedied the problem of a state's refusing to consent to a Colorado River Project storage dam being constructed in the state.⁹⁸ Wyoming and Utah's commissioners asserted that the provision would defeat the entire compact and said the furthest they could go would be for the state engineer to consider applications for diversion in his state for use in another.⁹⁹ However, some commissioners did link the proposal to out-of-state diversions. R.E. Caldwell, Utah's commissioner, joked that the provision supported Utah's "scheme. . .to take the White River out of Colorado."¹⁰⁰ The commissioners concluded that diversion in one state for use in another was a "localized problem" and left it up to the "two states to work out their differences in their own way," including through their own separate compact.¹⁰¹

The state of federal law at the time the Colorado River Compact was framed and approved further supports finding territorial use limitations in the Colorado River Compact. In 1922 two recent United States Supreme Court decisions had created great uncertainty as to how equitable appor-

97. Minutes, Bk. 1, *supra* note 36, at 149 (Sess. No. 18). Arizona proposed the paragraph during the commissioners' consideration of rough principles, including those set forth *supra* at notes 89, 90. Subsequently the commissioners adopted art. III and IV, text *supra* note 92, without further discussion of this proposal, except the allusion at *supra* note 95.

98. *Id.* at 151.

99. *Id.* at 154.

100. *Id.* at 158.

101. *Id.* at 155-57 (Comm'r Carpenter of Colorado). The Upper Colorado River Compact, which became effective twenty years later in 1949, did, however, expressly provide for diversion in one Upper Basin state for use in another Upper Basin state, as long as the water counted towards the apportionment of the state where the water was used:

No State shall deny the right of another signatory State. . .to construct. . .diversion works and storage reservoirs with appurtenant works, canals and conduits in one State for the purpose of diverting. . .water. . .in an upper signatory State for consumptive use in a lower signatory State, when such use is within the apportionment to such lower State made by this Compact.

Upper Colorado River Compact, art. IX(a).

tionment would work between the Colorado River States. In *Kansas v. Colorado*,¹⁰² the Court held that it had the power to equitably apportion an interstate stream between a riparian state and a prior appropriation state. But in *Wyoming v. Colorado*, where a dispute arose between two prior appropriation states, the Court held that to apply the doctrine of prior appropriation would be the equitable apportionment.¹⁰³ Of the Colorado River States, six were prior appropriation states, and the seventh, California, followed both riparian and prior appropriation.¹⁰⁴ This state of the law put pressure on the states to agree to a compact to end the uncertainty as to what water rights they had. As Senator Sam Bratton of New Mexico told his colleagues:

If the Compact is ratified, title to the water for purposes of irrigation and the development of power will become safe. Without it uncertainty will prevail, investments delayed, and growth retarded. There are only two ways known to me through which title to the water of an interstate stream. . . may be adjudicated. One is by compact or agreement. . . and the other is by a decree rendered in a suit instituted originally in the Supreme Court of the United States. . . Obviously the former course is infinitely better than the latter. Litigation of this character would be vexatious, interminable and without limit or expense.¹⁰⁵

The Compact equitably apportioned the Colorado River among the two Basins,¹⁰⁶ but left the states free to regulate use within their borders.¹⁰⁷ The states could regulate water because it was considered property of the state,¹⁰⁸ but the scope of their regulation only extended to the physical boundaries of the state.¹⁰⁹

In sum, the plain meaning and construction of the words apportioning to the Lower and Upper Basins the "exclusive beneficial consumptive use" of a quantity of water support a finding that the Compact limited the use of Colorado River water to the territory of the Basin to which the water was apportioned. The definitions of Lower and Upper Basin specify certain geographical territory which is to have the sole beneficial use of the water. The drafters' dividing the use of the River, not the ownership, is a key to finding that the Compact limits water use to certain territory. Under the Compact a geographical area got use of the water;

102. 206 U.S. 46 (1907).

103. 259 U.S. 419 (1922).

104. Bannister, *supra* note 30, at 4-6.

105. 70 CONG. REC. 330-31.

106. Colorado River Compact, art. I.

107. Colorado River Compact, art. IV(c).

108. Minutes, Bk. 2, *supra* note 41, at 79 (Mr. Emerson of Wyoming).

109. *Id.* at 78 (Herbert Hoover).

that was all it got. The area did not gain ownership or control over the water that would permit it to use the water wherever it desired. The Compact's authorization of state regulation of water use within state borders further ties use to the physical territory of the state because that was the extent of the state's sovereign authority. Also, Congress' explicit division of the water between the Basins, worry about allocations to each Lower Basin state, and requirement that California sign the California Limitation Agreement as a condition for congressional approval of the Boulder Canyon Project show that Congress thought there were express limits to the quantity of water available to the Basins and states. Finally, the Colorado River Compact drafters' rejection of a proposal to allow diversion in one state for use in another because this would have defeated the Compact demonstrates that the framers expressly rejected what Galloway seeks.

As alternatives to using a federal law approach to statutory construction, a court might consider either using state law to construe the Compact or construing the Compact in terms of contemporary equity to effect an equitable apportionment. The Court has never adopted a state law approach, and proponents on the Court limited this approach to compact provisions of "essentially local interest."¹¹⁰ Any trans-basin water diversion, such as Galloway, would not merely be of local interest, but would be of national interest because it would concern the rights of various states,¹¹¹ address express Compact terms, and threaten a complex compromise solution to a major regional resource problem.¹¹² Thus, if the Colorado River Compact use limitations could be interpreted one way under state law, and the opposite way under federal law, the federal law construction should prevail.

While a court would probably not construe the Colorado River Compact according to state law, it might apply equitable apportionment principles. The Court's "equitable power to apportion interstate streams" through judicial interpretation complements "the power of States and Congress

110. 359 U.S. at 284-85. In *Petty v. Tenn.-Missouri Comm'n*, Justice Frankfurter, in dissent, argued for state law construction of a compact. He wrote that even though a compact is federal law, any portion that is of essentially local interest should be interpreted in accordance with relevant state law, not federal law. *Id.* at 285. He likened compacts to contracts and sought "the meaning the parties attribute to the words [because that] governs the obligations assumed in the agreement." *Id.* *Petty* concerned whether the Tennessee-Missouri Compact waived state immunity from suit. To Justice Frankfurter, a state's immunity from suit was essentially a local interest, inappropriate for "blanket, nationwide doctrine." *Id.*

111. Frankfurter wrote that because the Court had art. III, sec. 2 jurisdiction over controversies among states, "the very nature of the controversy made it necessary for this Court to construe the terms of the Compact. . . ." *Id.* at 284. In contrast, *Petty* was a suit between an individual and the state, so the federal courts had jurisdiction only if the states authorized such suits.

112. The Colorado River Compact satisfied the Lower Basin's needs for flood control and earlier development, and the Upper Basin's, for water for future economic development.

acting in concert [through compacts] to accomplish the same result."¹¹³ The Court has Article III power to resolve controversies between states, which power extends to suits by states to declare rights under a Compact or enforce those rights.¹¹⁴ Exactly how the Court will exercise its equitable apportionment power is not completely clear:

It is my thesis that since the Supreme Court has the responsibility for equitable apportionment of streams, a kind of Gresham's law of compacts will cause the Supreme Court to avoid the detail of the meaning of compact language, and associated questions of liability for their breach. It will instead send the parties back to the bargaining table to come up with a settlement which the court can test against the standard of contemporaneous "equity," not a standard of equity as of the date of the original compact.¹¹⁵

Since the above words were written, the Court, in *Texas v. New Mexico*, was called upon to exercise its equitable apportionment power to construe a compact. The Court did not set aside the compact language in favor of modern equity. Instead, the Court refused to "order relief inconsistent with [the compact's] express terms."¹¹⁶ When the compact language required interpretation, the Court considered what fairly came within the language.¹¹⁷ To the Court, compact language was determinative for equitable apportionments involving compacts, while other factors would prevail for apportionments not involving compacts.¹¹⁸

WHETHER A COMMERCE CLAUSE ATTACK WOULD INVALIDATE THE COLORADO RIVER COMPACT'S BAR TO OUT-OF-BASIN WATER USE

Under the Commerce Clause, when Congress has the power to act because the matter involves interstate commerce, but has not acted,¹¹⁹

113. *Tex. v. N.M.*, 462 U.S. at 569. The source of the Court's equitable apportionment power is the U.S. Const. art. III, § 2, cl. 1, which provides "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States. . . — to Controversies between two or more States. . . ." The source of the states' and Congress' power to compact is the U.S. Const. art. I, § 10, cl. 3 which provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State. . . ."

114. 462 U.S. at 567.

115. Carver, *supra* note 27, at N-17-18.

116. 462 U.S. at 564.

117. *Id.* at 572.

118. The Court indicted in *Colo. v. N. M.*, ___U.S. ___, 104 S. Ct. 2433 (1984), which involved the equitable apportionment of an interstate stream that was not subject to a compact, that "the equitable apportionment of appropriated rights should turn on the benefits, harms, and efficiencies of competing uses, and that the source of the . . . waters should be essentially irrelevant to the adjudication of these sovereigns' competing claims." *Id.* at 2442.

119. U.S. Const., art. I, § 8, cl. 3. "[The Congress shall have Power] To regulate Commerce. . . among the several States. . . ." Congressional inaction is known as the dormant commerce clause.

then states may not place unreasonable burdens on interstate commerce.¹²⁰ By means of the Commerce Clause, the framers hoped to avoid economic Balkanization.¹²¹ They wanted to preclude states from hoarding scarce natural resources.¹²² *Sporhase v. Nebraska*,¹²³ the case that established that water was an article of commerce and that state water embargo statutes were vulnerable to Commerce Clause attack, left open the validity of territorial use limitations in compacts. The Court observed that "our law [regarding interstate compacts]. . . has recognized the relevance of state boundaries in the allocation of scarce water resources,"¹²⁴ but found no relevant compact provisions that would save the state water embargo statute from Commerce Clause attack.¹²⁵ This paper will consider possible Commerce Clause attacks on the Colorado River Compacts and on Colorado law regarding out-of-Basin water use.

Colorado River Compacts

The key to the Commerce Clause's invalidation of the Colorado River Compacts' territorial use limitations is determining whether the Compact is federal or state law. No federal law violates the Commerce Clause because the Commerce Clause empowers Congress to regulate commerce among the states. "Federal legislation is not subject to the restrictions that the Commerce Clause imposes on state laws affecting commerce. Under the Commerce Clause, Congress may, unlike the states, enact legislation that affects states unequally. . . ."¹²⁶ Also, Congress may expressly authorize state regulation of commerce; any state regulation within such a Congressional authorization is also immune from Commerce Clause attack.¹²⁷ Thus, only state regulation which Congress has not expressly authorized is vulnerable to Commerce Clause attack.

As recently as 1983, the Court reaffirmed that interstate water compacts to which Congress has consented are federal law because "Congressional consent transforms an interstate compact within. . . [the Compact Clause] into a law of the United States."¹²⁸ Determining whether interstate water

120. *Sporhase v. Neb.*, 458 U.S. 941, 953 (1982), *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970).

121. *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533 (1949).

122. *Sporhase*, 458 U.S. 951, 953, 958; *Hughes v. Okla.*, 441 U.S. 322, 334 (1979).

123. 458 U.S. 941.

124. *Id.* at 956.

125. *Id.* at 959-60.

126. *Intake Water Co. v. Yellowstone River Compact Comm'n*, 590 F. Supp. 293, 296-97 (D.Mont. 1983) (citations omitted) *aff'd* slip op. (9th Cir. Aug. 20, 1985).

127. *Northeast Bancorp v. Board of Governors, FRS*, ___ U.S. ___, slip op. at 13-14 (June 10, 1985); *Sporhase*, 458 U.S. at 960; *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653-54 (1981).

128. *Tex. v. N. M.*, 462 U.S. at 564 (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981) and citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 566 (1852)).

compacts are federal law is less difficult than determining whether other interstate agreements, which may or may not have congressional consent, are. Examples of other interstate agreements include an interstate banking agreement¹²⁹ and the interstate detainer agreement regarding prisoner transfers.¹³⁰ Interstate water compacts satisfy the key criteria for being federal law: they touch the national interest. Congressional consent to a compact symbolizes that the agreement is of national interest. As Justice Douglas explained to *Petty*:

. . . Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The framers thus astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments but duly safeguarded the national interest.¹³¹

In the extensive litigation involving the Colorado River Compact, the Court has found that this Compact served national purposes. The Compact addressed problems that individual states were incapable of resolving. Moreover, Congress contributed towards solving the problems by federal participation in the Boulder Canyon Project (Hoover Dam). The Compact grew out of a recognized desire to "transform the erratic and often destructive flow of the Colorado River into a controlled and dependable water supply desperately needed in so many States."¹³² The problem was "far more than a purely local problem which could be solved on a farmer-by-farmer, group-by-group, or even state-by-state basis, desirable as this kind of solution might have been."¹³³ Congress both apportioned a specified quantity of water to each state¹³⁴ and "create[d] a great system of dams and public works nationally built, controlled, and operated for the purpose of conserving and distributing the water."¹³⁵ Without the federally created dams, California would never have agreed to the apportionment.¹³⁶

In addition to finding that the Colorado River Compact was federal law, a court would have to find that the Compact language barred out-of-basin water use for the transbasin use prohibition to survive Commerce Clause attack. A court could find such a bar either in the Compact's territorial use limitations, discussed extensively in the preceding section, or in the Upper Colorado River Compact's express apportionment of the

129. *Northeast Bancorp*, slip op. (June 10, 1985).

130. *Cuyler*, 449 U.S. 433.

131. *Petty*, 359 U.S. at 282 n. 7 (citing *Frankfurter*, *supra* note 26, at 694-95).

132. *Ariz. v. Cal.*, 373 U.S. at 554.

133. *Id.*

134. *Id.* at 556.

135. *Id.* at 552.

136. *COOPER*, *supra* note 18, at 305.

Yampa to Colorado and Utah and definition of "consumptive use" in a way that precluded transbasin use. A court's findings on the Compact as federal law and on the Compact expressly prohibiting out-of-basin use would also seal the fate of state export statutes.

State Law

Different court interpretations of the Colorado River Compact's territorial use limitations would determine whether the Colorado Water Export Statute would be subject to Commerce Clause attack. If a court were to determine that the Colorado River Compact, the Boulder Canyon Project Act, and other acts and compacts did not bar out-of-Basin water use, then a court could subject Colorado's water export statute to Commerce Clause scrutiny. In this event, no federal law would limit Colorado River water use to particular territory and Congress would not have expressly authorized states to limit the use of Colorado River water to their territory. State laws limiting water use to state territory would violate the Commerce Clause because they would discriminate against out-of-state appropriators.¹³⁷ *Sporhase* exemplifies this situation. In *Sporhase* the Court found that interstate compacts did not expressly authorize state water reciprocity statutes.¹³⁸ Thus, there was no express federal law provision to protect Nebraska's water reciprocity statute from Commerce Clause attack.

The present Colorado Export Statute would, however, probably survive Commerce Clause attack. The statute is tied to the state's compact obligations. If the Colorado River Compacts had no territorial use limitations, then the Export Statute would not either. Commerce Clause attack would be unnecessary because the Compacts and the Statute would not bar out-of-Basin use. But if the Colorado River Compacts had territorial use limitations, then the Export Statute would also. The Export Statute could result in economic discrimination. But the Statute would probably survive Commerce Clause attack. The state's actions would conform to express Compact provisions. These express provisions are federal law and immune from Commerce Clause attack as discussed above.

WHETHER A STATE LAW ALLOWING OUT-OF-BASIN TRANSFERS WOULD SUPERCEDE THE COLORADO RIVER COMPACT'S TERRITORIAL USE LIMITATIONS

This paper now shifts from the territorial use limitations in the Compacts themselves to the relationship between Compact use requirements and state-enacted use requirements. Galloway raises the issue of whether

137. *Sporhase*, 458 U.S. 941.

138. *Id.* at 960.

a state statute allowing out-of-Basin¹³⁹ use of Colorado River water would supercede the Compact prohibitions on such use. The Colorado River Compacts expressly allow states to regulate the use of Colorado River water within their boundaries. Would a statute permitting out-of-Basin export fit within this provision? If it did, would the Colorado River Compacts' prohibitions on out-of-Basin use preempt the state statute? In its analysis of these questions, this paper will not be limited to the Colorado Water Export Statute because that statute so incorporates the compacts that it should preclude any export not authorized by the compacts.

The Boulder Canyon Project Act, Colorado River Compact, and Upper Colorado River Compact recognized state authority over the appropriation, control, and use of waters within the state's borders as follows:

Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders. . . .¹⁴⁰

Whether this provision would permit a state statute authorizing out-of-Basin use depends on how one interprets the restriction "waters within their borders." On its face, state regulation outside state borders would exceed the scope of state authority under the Compact. A state statute permitting out-of-Basin uses would regulate water beyond the state's territory because that is where the water would actually be used. However, under the following analysis a state statute allowing out-of-Basin use could be interpreted as regulating use within state boundaries. State law specifies beneficial uses to which water may be put. Export is analogous to use, since export simply amounts to another right in the "bundle of rights" one acquires when one acquires a water right. Thus, a state would have authority to enact a statute permitting out-of-Basin use because the law would be considered to pertain to matters within the state boundaries.

Assuming the state has authority to enact a statute permitting out-of-Basin water use, then Compact provisions prohibiting out-of-Basin use would supercede the state law if the Compact preempted the state provisions. Under the Supremacy Clause of the Constitution,¹⁴¹ federal laws preempt, or take precedence over, state laws under certain circumstances. Federal laws preempt state laws when, first, the federal government occupies the field, thus precluding state law initiatives, or, second, the state

139. For purposes of this section "out-of-Basin" means use out of the Basin *and* out of the state to which the water was apportioned.

140. Boulder Canyon Project Act, § 18. See Colorado River Compact, art. IV(c) and Upper Colorado River Compact, art. XV(b) for similar provisions.

141. U.S. Const., art. VI, cl. 2.

law directly conflicts with federal law or inhibits federal policies. This preemption analysis applies to compacts because "of necessity, the law governing an interstate apportionment . . . is federal law. . . [T]he power to impose a solution is federal power and the rule applied is a federal rule."¹⁴²

*Arizona v. California*¹⁴³ speaks to both types of federal preemption. First, the federal government occupies the field in managing interstate waterways because of the nature of the subject matter and the pervasiveness of federal regulation. In *Arizona v. California*, the Court found that Congress passed the Boulder Canyon Project Act because the states, despite repeated efforts at settlement, were unable to agree on how much water each state would get.¹⁴⁴ The federal government occupied the field because it alone had the power and resources:

to make certain that the waters were effectively used. All this vast interlocking machinery—a dozen major works delivering water according to congressionally fixed priorities for home, agricultural and industrial uses to people spread over thousands of square miles—could function efficiently only under unitary management, able to formulate and supervise a coordinated plan that could take account of the diverse, often conflicting interests of the people and communities of the Lower Basin states.¹⁴⁵

Beyond this, Congress, through the various compacts, established a network of delivery requirements and allocations that would not permit simultaneous state regulation. Since state regulation of apportionments would unsettle the whole federal scheme, federal law precluded any state regulation.¹⁴⁶

In addition, under the second approach to preemption analysis, *Arizona v. California* resolved any direct conflict between federal law and state law governing the Colorado River in favor of federal law. In *Arizona* the Court found that "[w]here the Government, as here, has exercised [the power to regulate and develop the river and undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws."¹⁴⁷ The Boulder Canyon Project Act preserved the rights the states had in 1928, when the Act was passed,¹⁴⁸ including the right to regulate acquisition of water rights, vested interests therein,¹⁴⁹ and the use of

142. Meyers, *supra* note 3, at 58-59.

143. 373 U.S. 546.

144. *Id.* at 588-89.

145. *Id.* at 589.

146. *Id.* at 590.

147. *Id.* at 587.

148. *Id.*

149. *Id.* at 586.

tributary water in the Lower Basin.¹⁵⁰ The Court held that under the Act, congressional apportionment preempted state disposition by prior appropriation.¹⁵¹

Applying both forms of preemption analysis to Galloway, the Colorado River Compact territorial use prohibitions would preempt state law dealing with territorial use. The federal compact would preempt state law both because the federal government occupied the field of Colorado River system regulation and precluded state regulation and because the federal law was inconsistent with state law, thus invalidating the state law.

CONCLUSION

The Galloway plan may collapse because of complications, but interstate sale of water rights to out-of-basin users is an issue that will return. Obvious legal obstacles which the Colorado River Compacts pose to the Galloway proposal include the explicit apportionment of the Yampa River to Colorado and Utah, the lack of sufficient unappropriated water within Colorado's apportionment, and the measurement of consumptive use. The Colorado River Compact territorial use limitations also offer fertile grounds for protracted litigation. These limitations, discussed extensively in this paper, include the Compact's provisions for exclusive beneficial consumptive use within set geographical boundaries. This paper has concluded that the Compact language and legislative history support a finding of territorial use limitations within the Compact. The Compact territorial use limitations would survive Commerce Clause attack because, as a matter of national interest, the Compact is a federal law. The Compact territorial use limitations would preempt any state law that allowed out-of-Basin use because, under the Supremacy Clause, federal law preempts inconsistent state law.

In addition to the legal obstacles, the Galloway proposal lacks political support. Authoritative water agencies in six of the seven Colorado River Basin states formally oppose it.¹⁵² Finally, the Galloway Group and SDCWA have given themselves until 1987 to decide whether to formalize an agreement, suggesting that both parties recognize the proposal's legal, political and financial problems.

Beyond the Galloway project and the Colorado River Compacts lies the question of whether territorial use limitations in interstate water compacts will survive. If they don't, then the fear which motivated Upper Basin states to enter into the Colorado River Compact in 1922 will become

150. *Id.* at 588.

151. *Id.*

152. Speech by S.E. Reynolds, N.M. State Engineer, at Colorado River Water Users Ass'n (Dec. 14, 1984).

a reality: Lower Basin states will get all the unappropriated water for their earlier development, and the Upper Basin will lose future development opportunities.

Under reasonable interpretations, the compacts and the rest of the "law of the river" constitute federal law removing the waters of the Colorado River System from economic competition in interstate commerce. If by some judicial misadventure those interpretations were found wrong, the entire Upper Basin apportionment would become an article of commerce. . . . If the Upper Basin apportionment could be leased for use outside the defined boundaries of the Upper Basin, then it could be sold piecemeal for use in perpetuity outside of those boundaries by persons owning the right to use the water in any of the Upper [Basin] states.¹⁵³

Some consider interstate compacts an anachronism and predict that compacts "will survive, if [they do], as a gesture of goodwill by a dominating federal government."¹⁵⁴ Compacts, however, have *raison d'être*s which no one should take lightly. Justice Frankfurter sought to resurrect compacts as a mechanism for interstate adjustments because they were well-suited to regional problems that transcended the boundaries of individual states.¹⁵⁵ Compacts solve problems through negotiation rather than litigation. State and federal decisionmakers make policy determinations through compacts. If interstate water compacts do not survive, then market forces and the individual appropriators who are first to put the water to beneficial use will prevail and acrimony among states over who gets how much of scarce resources will increase.

153. *Id.* at 7.

154. Carver, *supra* note 27, at N-2, N-15.

155. Frankfurter, *supra* note 26, at 692.