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THE AREA OF ORIGIN AND A COLUMBIA RIVER DIVERSION†

Ralph W. Johnson*

In 1968 Congress declared a ten-year moratorium on any study of diversion of Columbia River water to the Southwest.1 One of the reasons for the moratorium was to give residents of the Pacific Northwest time to analyze their region’s water needs to determine if “surplus” waters are available for export, and to establish, in a broader sense, a regional policy towards diversion proposals. This article assumes a neutral stance2 towards the ultimate issue of diversion and attempts only to analyze the problem of protecting the area of origin in the event of a Columbia River to Southwest interbasin water transfer.3

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2. A few words need to be said about perspective. One of the difficulties standing in the way of rational analysis of the diversion question is the regional protectionist attitude that conditions much thinking about it. A transfer of part of the Columbia River to the Southwest may, or may not be the most efficient answer to the very pressing water problems besetting that region. Such a transfer may have a positive, a negative, or a zero impact on the Pacific Northwest.

3. It is conceivable that a diversion scheme can be designed that would provide the Northwest with greater benefits than costs. One expert argues that the Columbia River diversion plan should have built into it benefits that exceed losses, present and future, to the Northwest. He suggests as a possibility the development of storage sites, not involving the mainstream of the Columbia, to allow the capture of flood waters during peak flows, and permit the use of these stored waters for transportation to the Southwest. Address by Charles Hodde, Water Resources Committee of the Los Angeles Chamber of Commerce, 1969.

The issues raised by Mr. Hodde are difficult and complex. They require intensive study. The best approach to them, as well as to the other questions incident to diversion, is an openness that does not presuppose answers, and allows the Pacific Northwest to take a broader, and possibly more realistic, look at its own and the nation’s best interests.

3. This study does not purport to answer a number of questions such as: should the Columbia River be diverted to the Southwest? Is the need of the Southwest great enough to justify such a diversion? Is there “surplus” water in the Columbia? What would be the relative costs and benefits of such a transfer? Are there other sources of water that should be considered instead of the Columbia? Are there other,
Out-of-basin exports of water are not novel in this country. Many such transfers are being made on different rivers throughout the western United States. However, no project transfers water into a state lying entirely outside the basin of origin. This suggests both the novel nature of the Columbia River diversion proposal, and the special impact that state borders have had on national water planning. The concern of the Pacific Northwest for the potential future damage to the region is not unique; many areas of origin have expressed such concern, and many have undertaken to assure "protection" for their future development in the event the waters exported do not remain "surplus" to the region.

This study will attempt to answer six questions: (1) what is an area of origin? (2) what intrastate solutions have been designed to protect areas of origin? (3) what interstate precedents exist for protecting areas of origin? (4) who will make the decision on the question of diversion and formulate the policy affecting areas of origin? (5) what methods has Congress considered for protecting areas of origin? (6) how effective are the present proposals for protecting areas of origin?

I. WHAT IS AN AREA OF ORIGIN?

No definition of the term area of origin has found universal acceptance. Its meaning has usually been defined within the context of a specific project, but generally the area of origin refers to either a geographic area or an area defined by political boundaries.

The geographical areas of origin commonly described in existing legislation are the watershed and the basin. These terms are not non-water alternatives that should be considered? Several authors have tackled these questions, although definitive studies are yet to be made. See, e.g., Crutchfield, Water, Washington and Welfare, 57 WASH. ALUMNUM 26 (Spring. 1967); Corker, Save the Columbia for Posterity or What Has Posterity Done for You Lately, 41 WASH. L. REV. 838 (1966); Crutchfield, Water and the National Welfare, 42 WASH. L. REV. 177 (1966); Johnson, Some Myths About Water Shortages, 24 UNIV. OF WASH. BUS. REV. 5-10 (1964); NATIONAL ACADEMY OF SCIENCES, WATER AND CHOICE IN THE COLORADO BASIN (Pub. No. 1689, 1968). See also O. Eckstein, Water Resource Development (1961); Fox and Herfindahl, Efficiency in the Use of Natural Resources, AMER. ECON. REV., May 1964, at 190.


5. See, e.g., COLO. REV. STAT. ANN. § 150-5-13(2)(d) (1963) and note 34 and
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always used in the same way. A California statute purports to protect any "watershed . . . wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom." A Colorado statute protects "the natural basin of the Colorado River and its tributaries." Defining the area of origin in terms of watersheds and basins has been criticized as vague and impractical, making the protected area impossible to determine.

An alternative geographical description might extend protection to the portion of a watershed or basin that would be adversely affected by the diversion. The most obvious area of potential adverse impact would seem to lie downstream from the point of diversion where a water shortage might occur for irrigation, fish propagation, or power generation. Further analysis reveals, however, that upstream areas might also be subjected to adverse impacts in the form of increased power rates, reduced water available for dilution of pollution, and reduced salmon runs. Also, the impact would be felt in areas nearby but outside the basin.

Even when a geographical description is sufficiently precise to be useful in defining the area of origin of an intrastate transfer where one state exercises exclusive jurisdiction, it can be quite unsatisfactory when the transfer is from a geographical area encompassing several states. The Columbia River Basin includes major portions of Washington, Oregon, and Idaho, and lesser portions of Montana and Wyoming. In addition about one third of the Basin lies in British Columbia. If the Columbia River Basin is to be the area protected, some political unit must speak for it. No such unit now exists, nor is any likely to be created, given the international and interstate complexities involved.

In the past, Congress has coped with the problem of transfers from interstate river basins by defining the area of origin in political terms as being the states that share the basin of origin. The Colorado River Basin Project Act defines areas of origin in two different ways for

accompanying text, infra; ch. 297, § 3(b), [1965] Tex. Laws 588 and note 42 and
accompanying text, infra.

8. See discussion at note 26 and accompanying text, infra.
different purposes. The provision granting a right of recapture provides that the right is to be held by "any state lying wholly or in part within the drainage area" of the river of origin.\textsuperscript{10} This language would seem to imply that the protection extends to the entire area of any state touched by the river, and not just that portion of the state within the river's basin. Similarly, the provision creating a financial guarantee applies to "states and areas of origin."\textsuperscript{11} Thus it would seem that the guaranteed price protection extends to those portions of the states of origin that are outside the watershed of origin as well as to those within the watershed. In proposed legislation authorizing studies of water diversion from the Columbia River,\textsuperscript{12} states "affected by such exportation" are given a so-called "veto" power over any proposed diversion plan. Implicit in the category of "affected" states is the idea that affected areas outside of the basin of origin are protected because they are politically within the state of origin.

In defining the area of origin for a Columbia River diversion the more usable definition is probably "the states that share the Columbia River Basin." A political rather than a geographical definition is chosen because the states are best able to speak for the different interests affected. This definition recognizes the subtle and diverse ways that the benefits of a river can affect the economic and social well-being of an entire region. It also recognizes that representatives from the states, either in Congress or in compact negotiations, must negotiate for the benefits and protections. Although the area of origin is defined in terms of the states of origin, it does not necessarily follow that a given benefit or protection must accrue equally to all the citizens or all the areas of a given state. If a particular burden falls on one group or one area, the state would presumably see that such group or area was the recipient of the protections and benefits provided. Such allocative decisions fall within the traditional roles of the states.

\textsuperscript{10} 43 U.S.C. § 1513(b) (Supp. V, 1970). For a discussion of this provision see note 120 and accompanying text, infra.

\textsuperscript{11} Id. § 1513(a). For a discussion of this provision see note 126 and accompanying text, infra.

\textsuperscript{12} H.R. 3300, 90th Cong., 2d Sess. § 201(a)(2) (1968). For a discussion of this provision see note 124 and accompanying text, infra.
II. WHAT INTRASTATE SOLUTIONS HAVE BEEN DESIGNED TO PROTECT AREAS OF ORIGIN?

The concept of protecting the area of origin can be traced to the riparian rights system of the eastern states. In the East, water was generally plentiful and was seldom withdrawn from streams or lakes for irrigation or other purposes. Streams were for the most part used for running mill wheels and for recreation. The water was more valuable in the stream or lake than out of it, and the common law reflected this fact by providing that the water could only be used on lands adjacent, i.e., “riparian,” to the water. It was said that the right to have the water flow past these lands was inseparably annexed to the land, and that riparian rights were not lost by disuse, nor gained by use; they existed by virtue of the physical relationship of the land to the water. Since the water of a stream can only be used by persons owning land that abuts the stream, the riparian system automatically protects the watershed of origin.

In contrast to the riparian system, the western appropriation system does not explicitly protect areas of origin. This system is based on the idea “first in time is first in right,” i.e., the first person who puts the water to beneficial use from a lake or stream acquired a legal right indefinitely to continue such use. The system arose during the Nineteenth Century in response to the needs of western farmers and miners who required water to irrigate crops and mine gold; these uses often required transfer of the water to distant places and other watersheds. With the adoption of the appropriation system, the riparian system was rejected or substantially modified throughout most of the arid West.

13. This system is also in effect alongside the appropriation system in the states bordering either side of the West's most arid region; thus both the riparian and appropriation systems can be found in Washington, Oregon, California, and the tier of states running south from North Dakota.

14. The appropriation system says that water can be taken from a stream and used anywhere. Where the riparian system exists alongside the appropriation system (see note 13, supra), an inevitable conflict exists. The clash between these two systems in the State of Washington, and how the courts have resolved it, is discussed in Johnson, Riparian and Public Rights to Lakes and Streams, 35 WASH. L. REV. 580 (1960). For an analysis of the way this conflict has been handled elsewhere, see Larson, A Regional View: Riparian-Appropriation Conflicts in the Upper Midwest, 38 N.D.L. REV. 278 (1962); Trelease, Coordination of Riparian and Appropriate Rights to the Use of Water, 53 TEXAS L. REV. 24 (1954); Shaw, The Development of the Law of Waters in the West, 10 CALIF. L. REV. 443 (1922).
The appropriation system does not provide protection for possible future water uses in the area of origin. The system is based on the notion that a water right can only be gained by actual beneficial use; it cannot be reserved for some indefinite and prospective future use, certainly not as against someone who can make a present beneficial use of the water.

Out-of-basin transfers were, from the first days of settlement of the West, recognized as a proper use of water under the western appropriation system. Thousands of such transfers have occurred throughout the West under this system. The appropriation system has, in fact, never made any distinction between uses within the watershed and uses outside it. In recent years as state and federal governments have planned and built larger projects, they have, for the most part, accepted this principle, and have not hesitated to plan for the transfer of water from one watershed to another. One recent study commenting on large interbasin transfers reported that such “transfers exist to some extent in all but two of these seventeen western states; the great bulk of the transfers, however, occur in only four states, California, Colorado, Texas, and Washington.”

Although the common law appropriation system does not provide protection for the area of origin, a variety of state statutes have been enacted in the western states for the protection of such areas.

A. California

Among the western states California has demonstrated more concern for area-of-origin protection than any other. In the 1920’s California designed a plan to provide water from the more abundant rivers of the northern Sacramento Valley to the semi-arid portions of the San Joaquin Valley. To carry out this plan the California legislature enacted the Feigenbaum Act in 1927, authorizing the state, through its Director of Finance, to file applications for the appropriation of all un appropriated water in the state needed for development. Such filings were thereafter made, principally in 1927, 1939, 1951, and 1957. The
residents of the northern area became deeply concerned that the proposed transfer would deprive them of water needed for future growth. Their concern produced a 1931 amendment to the Feigenbaum Act, restricting the State Water Resources Control Board from releasing any state filing or assigning any state appropriation which in the judgment of the Board would "deprive the county in which such appropriated water originates, of any such water necessary for the development of such county." This provision was subsequently referred to as the County of Origin Statute.

Another California area-of-origin protection plan was enacted in a 1933 statute authorizing construction and operation by the state of the Central Valley Project. The entire Sacramento Valley was to be the watershed of origin from which surplus water would be exported to the water deficient San Joaquin Valley. This statute provides that the area of origin cannot be deprived of a prior right to "all of the water reasonably required to adequately supply the beneficial needs of the watershed."

There are several differences between the provisions of the Central Valley Project Act and the County of Origin Statute. The latter creates a right of recapture against the users of export water, conditioning all

19. Id. It should be noted that this statute, by its terms, applies only to those waters on which the state has filed for appropriation. It does not apply to the operations of private developers unless they seek a release from the state of state-appropriated waters.
20. CAL. WATER CODE §§ 11460-61, 11463 (West Supp. 1967) read as follows:
11460 — In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.
11461 — In no other way than by purchase or otherwise as provided in this part shall water rights of a watershed, area, or the inhabitants be impaired or curtailed by the authority, but the provisions of this article shall be strictly limited to the acts and proceedings of the authority, as such, and shall not apply to any persons or State agencies.
11463 — In the construction and operation by the authority of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the authority unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange.
21. Id. at § 11460.
export water rights by giving the county of origin users a right to the exported water any time such water is necessary for the development of the county. 22 The former, however, applies only against the operator of the Central Valley Project, i.e., the State Department of Water Resources and (presumptively) the United States Bureau of Reclamation. 23 It has no direct relationship to the filings made by the state to unappropriated waters. It grants water users in the watershed of origin a priority of right to appropriate water for a beneficial use, as well as a priority of right, as against export users, to purchase water from the Central Valley Project. 24

In the late 1950's these statutes became the subject of substantial debate as California prepared to vote on a constitutional amendment to authorize issuance and sale of 1.75 billion dollars in general obligation bonds to assist in financing the State Water Project. This project is designed to transport water from the Sacramento-San Joaquin Delta several hundred miles to Southern California.

A special committee of water lawyers was appointed in 1957 to study the area of origin protection statutes and report its views to the Attorney General. This committee concluded 25 that one of the serious shortcomings of the present statutes was the lack of quantitative limits on the water reserved for the county, area, or watershed or origin. Such limits were demanded by the southern part of the state on the ground that costly projects for transporting the water to the south were not feasible unless the amount of "surplus" water permanently available for export was determined in advance. Residents of the north, on the other hand, objected that estimates of future needs in the north might be too low.

The water lawyers pointed out that this so-called conflict was irreconcilable only if the quantity reserved was considered final, permanent, and unchangeable. They believed that recapture offered no real solution, and that it would be futile to permit construction of costly projects, such as the Feather River Project, with the possibility that the

project might be made worthless by later recapture of the water by the area of origin. At the same time the Committee was worried that guaranteeing a given quantity of water to the politically powerful southern part of the state would not necessarily guarantee southern support for new projects in the north if the water reserved for the north later proved inadequate. The lawyers concluded that the answer lay not in recapture, but in long-range state plans for water development throughout the state. If the citizens of the north could rely on the effectuation of such long-range plans, they would have no cause to fear that a particular transfer of water would work to their detriment in the future.

Another worrisome aspect of the present statutes was the description of the area, watershed, or county of origin to be protected. The Committee noted, for example, the difficulty of attempting to reserve water to various upstream counties whose boundaries were formed by a stream that ran between them. Was the reserved water to be pro-rated among counties by size, population or economic development? How was the reserved water to be allocated in the future if counties were to experience different rates of growth? The statutes did not answer these questions.

Similar criticism was directed at the term “watershed” of origin. The definition of this term depends largely on one’s frame of reference. A “watershed” to one person might be considered merely part of a larger watershed by someone else, if the first river eventually flowed into a larger one. The Committee stated:

the construction of Oroville Dam on the Feather River illustrates the future importance of the watersheds which are tributary to the Sacramento River as the true ‘watershed of origin’ to which the type of protection we are considering should be extended and to which it should be limited. To consider the entire Sacramento Valley as the watershed of origin . . . would be quite impractical.

To define the watershed as the whole river basin of a large, main stream would make the protected area almost impossible to determine and the subject of much disagreement in future years.

The lawyers’ committee and a committee of the legislature studying}

26.  Id. at 42.
the problem made various recommendations, generally centering around constitutional amendments which would guarantee that the areas of origin would have reserved to them the water necessary for their future development, while at the same time guaranteeing firm supplies for export to the water deficient areas. However, after several futile attempts the legislature finally dropped this approach and issued, instead, a proclamation that it was the "established policy of the state" that state plans for water projects give "consideration" to the "needs of the area in which water originates" and that the legislature, when authorizing a transbasin diversion project, "consider" the construction of other works to satisfy the "reasonable ultimate requirements" of the originating watershed. The legislature also passed the Burns-Porter Act providing protection to water users in southern California, and incorporated by reference the watershed-of-origin provisions of the Central Valley Project Act into the California Water Project.

Despite the persistence of doubts in both north and south the voters in 1960 approved the California Water Resources Development Bond Act providing for the financing of the Feather River Project (State Water Project). During this time the California Department of Water Resources assured the public that their fears were groundless and that future water development plans would take care of all regions of the state. To implement this policy the Department established three criteria: (1) the plan would be designed to put the area of origin in a better position than it was before the project; (2) financing would be provided to permit construction of additional projects as necessary to assure a continuing and dependable supply of water to the importing regions; and (3) financing would be provided to permit construction of additional projects as necessary to assure water for future growth of the area of origin. The law authorizing the issuance and sale of bonds

explicitly incorporated criteria one and two and implicitly incorporated criterion three.

No definitive court opinions have interpreted these area of origin statutes. Although there is a possibility that some day the statutes may be tested in court, it seems more likely that the pledges by the state of continued development will stay ahead of any such controversy.

B. Colorado

Colorado has also expressed concern over protection of areas of origin. In 1943 the Colorado legislature enacted a statute to regulate out-of-basin transfers by Water Conservancy Districts, providing:

[A]ny works or facilities planned and designed for the exportation of water from the natural basin of the Colorado river and its tributaries in Colorado, by any district created under this article, shall be subject to the provisions of the Colorado river compact and the Boulder Canyon Project Act. Any such works or facilities shall be designed, constructed and operated in such manner that the present appropriations of water, and in addition thereto prospective uses of water for irrigation and other beneficial consumptive use purposes, including consumptive uses for domestic, mining and industrial purposes, within the natural basin of the Colorado river in the state of Colorado, from which water is exported, will not be impaired nor increased in cost at the expense of the water users within the natural basin. The facilities and other means for

See Comment, State Water Development: Legal Aspects of California's Feather River Project, 12 Stan. L. Rev. 439, 443 (1960). This constitutional status is deemed highly significant in view of the greater security and permanence afforded by such status.

33. Although no court has spoken concerning their meaning, the area of origin protection statutes have been the center of two major water controversies which were settled with court approval. The East Bay Municipal Utility District had disputes with the Calaveras County Water District and the Amador County Water District. In the early 1950's East Bay had plans for a large water project and asked the Director of Water Resources to release water that the state had filed on in 1927. Both Amador and Calaveras Counties filed actions to assert their priorities under the County of Origin Statute and to enjoin these releases. The cases were dismissed upon an agreed settlement whereby East Bay paid to each county two million dollars for release of its claim to part of the water under the County of Origin Statute and to enjoin these releases. No opinion was written in the cases, so we have no further indication as to how the court viewed the county of origin statute, except that it was worrisome enough to cause East Bay to engage in a settlement agreement. For a further report on these settlements see Weatherford, Legal Aspects of Inter-regional Water Diversion, 15 U.C. L.A. L. Rev. 1299, 1310 (1968).

34. Colo. Rev. Stat. Ann. § 150-5-13(2)(d) (1963). This statute applies only to water conservancy districts and not to other municipal corporations. Thus the City of Denver, which lies east of the Rocky Mountains, would not be within the statute if it brought water from west of the mountains.
the accomplishment of said purpose shall be incorporated in, and made a part of any project plans for the exporting of water from said natural basin in Colorado.

This statute applies only to export of water from a “natural basin” and does not speak of counties of origin. One author asserts that the practical effect of the statute is to require that “a project proposing to direct water from the Colorado River Basin must construct a compensating reservoir that will have the west slope in as good condition for present and future development purposes as if the transporting project had not been constructed and the river involved had remained unregulated.”

This appears to differ from California’s area of origin protection statutes in that the needs of the basin have to be determined at the same time the export project is planned. If the origin basin’s needs are underestimated, there would be no possibility of recapture. On the other hand, if the needs were overestimated, facilities might be constructed that would never be used and water would be reserved that could never be put to beneficial use.

Another distinguishing feature of the Colorado statute is the provision that the expense of water for users within the natural basin shall not be increased by an out-of-basin diversion. Although a desirable feature, this provision poses the problem of determining at a future date the price that a given unit of water would have had if there had been no diversion.

C. Nebraska

Nebraska began protecting areas of origin by prohibiting all inter-basin transfers of water within the state, but amended its law to allow transfers from streams exceeding one hundred feet in width and from which not more than seventy-five per cent of the regular flow is removed. In interpreting this amendment the Nebraska Supreme

36. See notes 78 and 79, *infra*.
37. See notes 126 and 127, *infra*.
38. Ch. 68, § 6, [1889] Neb. Laws 504 provided:
The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated.
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Court has held that a transfer of water taken from a tributary and returned to the mainstream is permissible. 40

A second statute, 41 requires owners of irrigation ditches to return unused water to the stream of origin or the Missouri River. Although this statute would seem to modify the transfer statute by allowing diversion of water for irrigation purposes outside of the immediate basin of origin as long as the transfer was within the greater basin of the Missouri, the issue has apparently never been litigated.

D. Texas

In 1965 the Texas legislature enacted a statute that required the Texas Water Board, the water planning agency for the state, to reject any state water plan that: 42

contemplates or results in the removal [of water] from the basin or area outside of such basin of origin if the supply involved in such plan or project will be required to supply the reasonable future water requirements for the next ensuing 50-year period within the river basin of origin, except on a temporary, interim basis. The Board shall be governed in its preparation of said plan by a regard for the public interest of the entire state . . . .

Although there were early fears that this statute might have the effect of establishing a 50-year moratorium on large scale, permanent interbasin water transfers within the state, no such impact is discernable. The statute does not affect plans financed by the United States, cities, or any entity other than the state itself, nor does it affect the current proposal to divert water from the Mississippi River to the high plains area in west central Texas. 43

One prior Texas statute, 44 sometimes referred to as the "Watershed

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   The owner or owners of any irrigation ditch or canal shall carefully maintain the embankments thereof so as to prevent waste therefrom, and shall return the unused water from such ditch or canal with as little waste thereof as possible to the stream from which such water was taken, or to the Missouri River.
42. Ch. 297, § 3(b), [1965] Tex. Laws 583.
Prejudice Act,” prohibits any transbasin diversion of water “to the prejudice of any person or property situated within the watershed from which such water is proposed to be taken or diverted.” This statute was discussed in a recent case where the court held that it did not impose a rigid formula for area of origin protection on the Texas Water Commission. Instead the statute was construed as providing one of several policy considerations to be weighed by the Commission in its discretion. The court said the statute was intended to “delegate discretion to the Commission which extends beyond a ‘mathematical calculation’ of unappropriated waters.”

E. Oklahoma

In 1957 the Oklahoma legislature enacted a resolution establishing guidelines for the State Water Resources Board which imposes a duty to protect the area of origin:

Before an appropriated or adjudicated right may be granted for water to be ultimately used at a distant point, sufficient reserves should be set up to take care of the present and reasonable future needs of the area of origin.

Limitations should be placed on transportation of water resources from any watershed or other source of supply until reasonable present and future beneficial needs of equal rank within the immediate area have been supplied.

No cases have discussed these provisions, but they seem to modify the normal prior appropriation rule by requiring water to be retained in the area of origin for “reasonable future needs” in spite of potential present beneficial uses elsewhere.

III. WHAT INTERSTATE PRECEDENTS EXIST FOR PROTECTING AREAS OF ORIGIN?

The concept of protecting the area of origin has been incorporated into at least one interstate compact. During the early part of this
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century California was eager to develop the lower Colorado River both to prevent disastrous floods and to obtain water for its rapidly growing southern region. Colorado and other upper basin states were concerned that their growth, which was slower than California's might eventually be hampered by a lack of water if they acceded to California's development of the lower River. They were worried that if California started beneficially using the water, the prior appropriation concept would give that state a continuing right to its use, and thus diminish proportionately the water available for future development of the upper basin states. Therefore, before agreeing to development of the Lower Colorado they insisted upon assurances that sufficient water would be reserved for their own future growth. The result was the Colorado River Compact of 1929,\(^4\) apportioning 7½ million acre feet (m.a.f.) to the lower basin states and 7½ m.a.f. to the upper basin states.\(^5\)
The lower basin states long ago put their allotment to use. Although Congress authorized several new projects in the upper basin in September, 1968,\(^6\) the full allotment for that basin has still not been utilized. The 1929 Compact did not in so many words purport to protect the area of origin of the Colorado River, but the intent was clearly to accomplish that goal.

IV. WHO WILL MAKE THE DECISION ON THE QUESTION OF DIVERSION AND FORMULATE THE POLICY AFFECTING AREAS OF ORIGIN?

As discussed below, the ultimate decision over whether a part of the Columbia River is diverted to the Southwest will be made by Congress. Other methods exist by which, theoretically, such a decision might be reached, but they are not likely to be used. One thing is clear, if Congress properly enacts a law authorizing diversion no individual, state, or group of states, will have the right to say no.

Five different methods have been used to allocate the waters of interstate rivers.\(^7\)

52. For a further discussion of these methods, see Corker, Water Rights in Interstate Streams, 2 WATER AND WATER RIGHTS 293, 296 (R. Clark ed. 1967).
A. Agreements of Water Users

Private water users can agree on the allocation of interstate waters as between themselves. This system can be used on small streams crossing a state boundary, where only a few persons are involved. Obviously it has no application to a large interstate river such as the Columbia.

B. Reciprocal Legislation

Two or more states can apportion interstate waters by reciprocal legislation. Possible repeal of such legislation by one state, however, makes this approach precarious. So far as the Columbia River is involved there are obviously too many states involved, and too much reluctance on the part of the Pacific Northwest states, to even consider this approach.

C. Interstate Compacts

Interstate compacts are provided for in the federal constitution:53

No state shall, without the consent of Congress . . . enter into any Agreement or Compact with another state . . . .

Compacts have been used 18 times during the past 50 years to resolve conflicts over apportionment of interstate rivers.54 Ordinarily an interstate compact is arrived at in three steps: first, an act of Congress is passed authorizing negotiation of the compact; second, the states negotiate the agreement acting within the terms of their own constitutions, usually requiring bills to be passed by their legislatures directing the governor or someone else to negotiate the agreement; and third, Congress assents to the compact by enacting an appropriate bill. Although this is the typical approach to the negotiation of interstate compacts other variations have been used.55 Ultimately, however, two events must occur, the states must agree on the compact and Congress must approve it.

The possibility that a compact might be used to authorize a diversion of Columbia River water to the Southwest is remote. Creation of such

53. U.S. Const. art. 1, § 10.
54. A list of apportionment compacts may be found in Council of State Governments, Interstate Compacts, 1783-1956 (1956).
55. E.g., two states might arrive at an agreement, then ask for Congressional approval. If the approval were forthcoming, the compact would be as valid as if the prior consent of Congress had been obtained for the negotiation of it.
a compact would require approving legislation in at least Oregon and Washington and a number of states in the Colorado River Basin. Given the reluctance of the Pacific Northwest to consider even the possibility of a *study* of diversion, it seems unlikely that an acceptable compact could be negotiated.

Another difficulty in obtaining a compact for the diversion of the Columbia is that the out-of-basin states have little bargaining power. They cannot threaten unilateral development of the Columbia's water because none of the water flows through or along their borders. Nor can they, for reasons discussed below, seriously threaten an original suit in the Supreme Court for an apportionment of the waters.

Could the states of the Pacific Northwest, on the other hand, agree by compact to stop the Southwestern states and Congress from giving further consideration to diversion? The answer is clearly "no!"\(^56\) No compact between the states is valid without congressional assent.\(^7\) Although the agreement would have the effect of a declaration of policy by the states of the Pacific Northwest and might, as such, have some political effect, it could not deny to Congress the constitutional power to enact a law authorizing diversion. Even in the unlikely event that Congress assented to such a compact, that body would still, under the constitution, have the power to "change its mind" and authorize diversion at a later time if it so desired.

One other drawback to the compact approach on a question as large and complex as a Columbia River diversion is that compacts tend to be overly rigid and inflexible. Once a compact is entered a variety of interests become vested in its continued existence; changing it usually requires the same laborious procedure as entering it in the first place. The economic growth and development of both the Southwest and the Northwest will no doubt require a continuing review and reallocation of water and other resources and a compact may not be the most efficient means of accomplishing this.

**D. Interstate Litigation**

Under the Federal Constitution the Supreme Court of the United States has original jurisdiction in controversies between the states.\(^68\)

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The Constitution, however, requires that an actual "controversy" exist before this jurisdiction can be exercised.\textsuperscript{59} It is doubtful that this requirement could be met in a suit by Arizona or California for an apportionment of the Columbia River. Nine interstate water apportionment suits have been decided by the Supreme Court over the past years.\textsuperscript{60} Only three have resulted in actual apportionments.\textsuperscript{61} In all nine cases the rivers in question flowed along or through each of the states in the controversy and those states could have put the water to use within their borders. The Columbia does not, of course, flow through or along Arizona or California. In two of the three cases where apportionments were decreed the rivers were already overcommitted so that new projects, planned in one of the litigant states, would deprive water to existing uses in another state.\textsuperscript{62} This would not be true of a Columbia diversion. In the other case\textsuperscript{63} where apportionment was decreed the river was not yet actually overcommitted, but each of the contending states claimed rights to it arising out of specific compacts or statutes, and the request to the Supreme Court was to construe these documents. No such compact or statute can be called upon by the Southwestern states in claiming a right to water from the Columbia River. No harm is presently occurring in the Southwest because of a lack of water and probably none will occur before 1990.\textsuperscript{64} It seems unlikely that the Supreme Court would find a justiciable controversy under these circumstances.

The need for advance planning raises the last objection to the use of Supreme Court litigation for resolving the diversion issue. The question of whether the Columbia River should be diverted to the

\textsuperscript{59} Id.


\textsuperscript{64} See statement of Northcutt Ely, Special Assistant Attorney General State of California and Special Counsel to the Colorado River Board of California in Hearings on H.R. 3300 and Similar Bills Before the Sub-Comm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs, 90th Cong., 1st Sess. 227 (1967).
Southwest requires consideration of a vast number of inter-related social, economic, political and legal factors. Were the Court to hold for diversion, it would be incapable of fashioning relief. The planning and execution of the project would take twenty to thirty years, and the total cost would probably be billions of dollars. The Supreme Court is simply not properly constituted to carry out such functions.

E. Congressional Allocation

Not too long ago legal arguments raged over the constitutional limits of congressional action in the water field. It was argued that the Federal Constitution did not grant to Congress the power to allocate interstate waters, and, therefore, Congress could not allocate the water of a river which flowed along the boundaries of, or through, a state without that state's consent.

The 1963 decision in Arizona v. California put these arguments to rest. The Court held that the Constitution does not limit Congress' power to allocate interstate waters. Taking vested rights may require compensation although these rights are limited by both the "navigation servitude" and the "reservation" doctrines. The method by which Congress carries out its intentions is also subject to constitutional limits, but if proper procedures, preambles, and forms are observed, the chance that congressional water legislation will be struck down as unconstitutional is exceedingly remote.

In Arizona v. California the Court held that Congress, in the Boulder Canyon Project Act of 1928, had constitutionally allocated the water of the Colorado River among the lower basin states. Therefore, it appears that Congress can allocate the water of the Columbia River if it chooses to take such action.

As indicated above, no interstate compact can deprive Congress of the power to legislate the diversion of a portion of the Columbia

68. One difference, not of apparent legal significance, between the congressional apportionment of the Colorado River and the proposed apportionment of the Columbia River is the Columbia River will be apportioned to states lying entirely outside the basin of origin.
69. See notes 55 to 57 and accompanying text, supra.
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River. Likewise, no law enacted by any individual state or group of states can deny to Congress that power. Any conflict between state and federal statutes is resolved by the supremacy clause\textsuperscript{70} of the Federal Constitution which has been interpreted by the Supreme Court to mean that "whenever the constitutional powers of the federal government and those of the state come into conflict the latter must yield."\textsuperscript{71}

Congressional allocation has some distinct advantages over the other methods outlined above because Congress has the power to hold hearings, retain experts, coalesce public and political opinion, and engage in long-range planning. More importantly, Congress can appropriate the funds to carry out its decisions.

V. WHAT METHODS HAS CONGRESS PROPOSED FOR PROTECTING AREAS OF ORIGIN?

The fact that area-of-origin protection language has appeared in a number of federal bills enacted by Congress and in other bills that have received serious consideration in Congress testifies to the importance of this issue in regional water planning.\textsuperscript{72} These bills provide a catalogue of the different ways the Pacific Northwest, as an area of origin, might be protected.

A. Early Legislation

The notion of area-of-origin protection did not begin with the Columbia River diversion issue. It has existed at the state level for many years,\textsuperscript{73} and can be found in several federal projects. The Fryingpan-

\textsuperscript{70} U.S. Const. art VI. This Constitution, and the laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

\textsuperscript{71} Florida v. Mellon, 273 U.S. 12, 17 (1927).

\textsuperscript{72} It also testifies to the political power of the areas of origin. It is appropriate to note, for example, that any discussion of a Columbia River Diversion must proceed from the political reality of the power of two Senators from the State of Washington, Senators Henry M. Jackson and Warren G. Magnuson. These two men are both senior members of the Senate and hold chairmanships of two of the most powerful senate committees. Senator Jackson, in particular, as Chairman of the Senate Interior Committee, is in a position to exercise great influence on federal water legislation.

\textsuperscript{73} See discussion in Section II of the text, supra.

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Arkansas project provided protections for the area of origin, reflecting essentially Colorado state law. A similar, though less specific guarantee, was provided in an amendment to the New Melones Project Act.

B. Pacific Southwest Water Plan

Following the 1963 Supreme Court decision in Arizona v. California, the Secretary of the Interior announced the first Pacific Southwest Water Plan. This ambitious plan was an attempt to solve the Southwest's water problems with a single comprehensive program. It provided for the long distance transfers of water from areas of abundance to areas of shortage. Northern California was designated as one area of abundance. Its "surplus" water was to be transported east of the Sierras into Lake Havasu on the Colorado River where it would be made available to Arizona.

California was quick to express its doubts about the plan generally,
and specifically about the inadequate protection for areas of origin. The Resources Agency of California rejected any notion of protecting an area of origin by some kind of "legal right," and suggested that if the plan were adopted, stronger protections were needed to provide a "guarantee that costs of water development in the areas of origin will not be greater than they would have been had there never been an export from these areas under the Pacific Southwest Water Plan . . . [and a] [g]uarantee that costs of water development to users within the states of origin will not be increased because of effectuation of the plan." The 1964 revision of the Pacific Southwest Water Plan contained guarantees for areas of origin which reflected substantially the suggestions made by California.

The Pacific Southwest Water Plan was incorporated into the bill for the Central Arizona Project proposed in 1964 by Senator Hayden of Arizona. Although it contained the revised area-of-origin protection provisions, it met vigorous opposition in the Senate from Senator

78. RESOURCES AGENCY OF CALIF., COMMENTS OF THE STATE OF CALIFORNIA ON THE "PACIFIC SOUTHWEST WATER PLAN" 6 (1963).
79. Id. at 3. A Colorado statute provides a similar provision. See note 36 and accompanying text, supra.

If waters are to be exported from areas of surplus to southern California, it is mandatory that protection from any damage be afforded the areas of origin. Accordingly, to effect this policy the following are proposed: (1) a guarantee to the watersheds of origin that diversions of water would be subordinate to all existing and anticipated future needs, including the retention of water in the watersheds of origin if estimates of future needs prove insufficient; (2) financial assistance from the Development Fund for the construction of any future projects in the watersheds of origin, if such assistance is not otherwise provided; and (3) a guarantee that any additional costs of future projects, caused by the pre-emption of lower-cost water sources which otherwise would benefit the areas of origin, or the State of California insofar as its water supply is diminished, would be offset by Development Fund revenues to the extent that the costs chargeable to such projects would be no greater than if there had been no export under the Pacific Southwest Water Plan.

82. Id. at § 103(a)(2):
[The Secretary of the Interior is authorized and directed to] investigate alternative sources in the State of California and various methods such as weather modification and desalinization of water as means of supplying water to meet the current and anticipated water requirements in the Lower Colorado River Basin, and prepare preliminary plans to accomplish such purpose. In planning any works to import water into the Lower Colorado River Basin from alternative sources in California, the Secretary shall give due consideration to existing and future needs within the areas of origin of the imported water and the State of California and the means of offsetting the additional costs of future projects within said areas of origin and State of California caused by the pre-emption of the lower cost water sources that
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Kuchel of California because the prospective area of origin was limited to Northern California.\textsuperscript{83} The Bill languished, but its consideration gave the proponents of the Pacific Southwest Water Plan a new approach. To subvert the fear that northern California's water supply was being spread too thin, they proposed reducing the number of projects to be included in the plan and looking to other areas for additional sources of water. This approach was incorporated in the various bills proposed in 1965 which came to be known as the Lower Colorado River Basin Project (LCRBP) Bills.

C. The Lower Colorado River Basin Project Act

The LCRBP bill that attracted most attention in the 1965 hearings was H.R. 4671.\textsuperscript{84} A number of similar bills were also considered.\textsuperscript{85} For the first time these bills introduced the idea of studying water diversion from the Columbia River or some other basin. They contained area-of-origin-protection provisions similar to those of the amended Pacific Southwest Water Plan. Section 201(a)(2) of H.R. 4671 provided:\textsuperscript{86}

\begin{quote}
[The Secretary is authorized and directed to] investigate alternative sources and various methods including desalinization of water, weather modification, water renovation, and reduction in losses as means of supplying water to meet the current and anticipated water requirements in each basin, and prepare preliminary plans to accomplish such purpose. In planning works to import water into the Colorado River Basin from sources outside the natural drainage area of the Colorado River System, the Secretary shall make provision for adequate and equitable protection of the interests of the states and areas of origin, including assistance from the devel-
\end{quote}

otherwise would have benefited said areas of origin and State of California including the use of the development fund for this purpose.

\textsuperscript{83.} S. Rept. No. 1330, Pt. 2, 88th Cong., 2d Sess. 6 (1964). Senator Kuchel contended that limiting the search to Northern California was wholly unacceptable . . . [to him] . . . and to anyone genuinely interested in regional water development. . . . Importation should be from that area which affords the least expensive and otherwise best supply. How can we tell if we do not examine them all? No one proposes harm to any area of origin. Making Northern California the only candidate for furnishing water to feed the Central Arizona project's new demand is ridiculous.

\textsuperscript{84.} H.R. 4671, 89th Cong., 1st Sess. (1965).

\textsuperscript{85.} See list of bills considered at the same time at the August and September hearings, \textit{Hearings on H.R. 4671 and Similar Bills Before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs, 89th Cong., 1st Sess. 9 (1965)} [hereinafter cited as \textit{Hearings on H.R. 4671)].

\textsuperscript{86.} H.R. 4671, 89th Cong., 1st Sess. § 201(a)(2) (1965).
operation fund established by Title IV of this Act, to the end that water supplies may be available for use therein adequate to satisfy their ultimate requirements at prices not adversely affected by the exportation of water to the Colorado River System.

Here, again, an attempt was made to provide financial protection for the area of origin so that the future price of water would not be adversely affected by exportation. The Development Fund was to provide such financial support, and the money for the fund was to come from power-producing dams on the Colorado.87

The importation and area-of-origin protection provisions of the bill were criticized in the House hearings by the Bureau of the Budget, whose Deputy Director, Elmer Staats, argued:88

[Although the] long-range problems of the [southwest] . . . are recognized as serious, they are by no means limited to this area. They are becoming increasingly critical for other parts of the country—the Great Lakes area, the Northeast, and the Southwest are examples. Under these circumstances, the Bureau of the Budget believes that this is the appropriate time to review the water resource development problems and opportunities of the Nation as a whole. Therefore, the Bureau recommends establishment of a National Water Commission to review water supplies and requirements on a national basis. Only a national commission can effectively assess the many common aspects of water problems that we face, and only such a commission can outline the consistent courses of action which must be followed if this nation is to achieve the most efficient utilization of its precious water resources.

The national commission should be requested to review, among other things, the proposal contained in S. 1019 [same as H.R. 4617] to guarantee areas of origin against higher prices because of the exportation of water to another river basin. We believe the guarantee contemplated in the bill needs further study and that it would be premature to provide such a guarantee at this time. Similarly, the Bureau believes that it would be unwise for the Federal Government to commit itself to the importation of water pending the completion of this study.

Senator Kuchel testified in favor of the bill before the House Com-

87. Lengthy provisions for the creation and maintenance of this development fund were contained in H.R. 4671, 89th Cong., 1st Sess., §§ 401-05 (1965).
88. Hearings on H.R. 4671, supra note 85, at 18.
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mittee, stating that all "necessary arrangements ... [could be made] ... to prevent adverse effects on such areas [of origin],"89 and Mr. Northcutt Ely, Special Assistant Attorney General for California, put into the record the agreement of the seven Colorado Basin states that:90

[I]mportation of substantial quantities of water into the Colorado River Basin is essential to adequate development of both the upper and lower Colorado Basins. It is recognized that this importation must be accomplished under terms which are fair to the areas of origin of the water so imported.

The statement by the Southern California Water Conference purported to show that the Pacific Northwest would be benefitted by the proposed Columbia River diversion. The Conference, representing all seven of the Colorado Basin states, urged three principal findings in support of H.R. 4671:91

1. There are large areas in the West that need water which can be found only in watersheds lying across the mountains and beyond the boundaries of the thirsty states.
2. Only that water which is surplus to the areas of origin is needed or requested by the areas of need.
3. The areas of states of origin want and expect something in return for the exportation of water, and the areas of import are agreed that this bounty shall be paid for in full measure by the projects to be built.

The statement of the Conference further commented:92

Given these three principles, the precise format of any regional bill passed by this Congress is of secondary importance. The

89. Id. at 92.
90. Id. at 303-04.
91. Id. at 303-04.
92. Id. at 303-04.

It is interesting to note the change in view of the California Department of Water Resources between 1957 and 1965 on the adequacy of California's water supply. In 1957 the Department had said:

The waters originating in California, together with the rights of California in and to the waters of the Colorado River, are adequate in quantity and quality to satisfy all water requirements of the State after it has reached full development, if the waters are properly controlled, conserved, protected, and distributed.


91. Hearings on H.R. 4671, supra note 85, at 447.
92. Id.
target is water, a fair and sensible redistribution of the resources of this land. There is no desire to take from any area the water which it needs for its present and future growth. The redistribution will require large sums of money, but these moneys, as in all reclamation projects, can and will be returned to the United States by the beneficiaries of the project. The flood control, recreation, fish and wildlife benefits to the areas of origin, as well as incidental conservation works for irrigation, municipal and industrial use, will bring wealth and prosperity to these sections of the country as the exportation works will bring sustained life to the dry areas of need.

Another proposal aimed at protecting the area of origin by a more direct method was put forth by Secretary of the Interior Udall. He argued that the most logical place for the Columbia diversion to occur would be “at the mouth of the . . . River,” and that if the diversion occurred at that location, the people of the Pacific Northwest could not complain because they would have finished using the water. Questions directed at the Secretary during the House hearings from both Representative Wyatt of Oregon and Representative Foley of Washington reflected a distrust of this position and a belief that once a study of diversion got under way the Bureau of Reclamation would find economic and hydrological reasons to consider diversion higher up the river. In 1966 H.R. 4671 underwent important changes. The Report on the Bill of August 11 indicates that by then the Bill had incorporated the idea of a National Water Commission which would make a six-year study of national water problems. The responsibility for studying diversion of the Columbia River or other waters into the Colorado Basin was placed “under the direction of the Commission” and pursuant to “principles, standards, and procedures” established by the Water Resources Council created by the 1965 Water Resources Planning Act. In language somewhat different from the 1965 version of H.R. 4671 the Secretary would be directed that:

93. Secretary Udall made an even stronger statement concerning the diversion of the Columbia River below Bonneville in 1967, at the Senate Hearings on S. 1004 reported in S. REP. No. 408, 90th Cong., 1st Sess., 102 (1967).
96. Id. at 3.
97. Id. at 4.
(a) In planning works to import water into the Southwest from sources outside the natural drainage areas of the Southwest, the Secretary shall make provision for adequate and equitable protection of the interests of the States and areas of origin, including (in the case of works to import water for use in the lower basin of the Colorado River) assistance from the development fund established by Title IV of this Act, to the end that water supplies may be available for use therein adequate to satisfy their ultimate requirements at prices to users not adversely affected by the exportation of water to the Colorado River system.

(b) All requirements, present or future, for water within any state lying wholly or in part within the drainage area of any river basin and from which water is exported by works planned pursuant to this Act shall have a priority of right in perpetuity to the use of the waters of that river basin, for all purposes, as against the use of the water delivered by means of such exportation works, unless otherwise provided by interstate agreement.

In a section by section analysis the House Report said that Section (a) meant that if the Columbia River Basin were the source of water for export to the Colorado River Basin and, if at some future date new projects in the Columbia Basin would be more expensive because of the export, any additional costs to the Columbia Basin projects would be borne by the development fund.98 Regarding subsection (b), the Report said that the bill provided a priority for the state and area of origin in "about as sweeping terms as could be devised."99 Citing an example of the scope of protection proposed, the Report stated:100

For instance, if the exported waters are diverted from any point in the Columbia River Basin, any state which has any portion of its area in that Basin has a perpetual priority (which can be exercised at any time in the future) to the use of Columbia River system water for any and all purposes as against any user of water exported from the Columbia River system by any project that may result from the planning conducted pursuant to this legislation. This is so even though the water so exported is being devoted to consumptive use in the Colorado River Basin by projects whose initiation is prior in time to the future projects in the Columbia

98. Id.
99. Id.
100. Id.
Basin on whose behalf the priority is asserted or though the use in
the Columbia Basin is a non-consumptive use such as power,
navigation, fish preservation, or pollution control. No Columbia
Basin State could be deprived of this protection except with its
own consent.

None of these area-of-origin-protection provisions appears to have
received much comment by congressmen from the Pacific Northwest.
Their objections, expressed in the House Report, went rather to the
whole idea of a Columbia River diversion. They argued that such a
proposal, so “revolutionary in concept, staggering in expense, and
dangerous in precedent” should not be undertaken until the National
Water Commission could make an “objective” and “independent” study
of relevant national water policies.

During 1966 the prospects for passage of the LCRBP looked reason-
ably bright because of a carefully nurtured coalition of congressmen
from the Southwestern states. However, this coalition fell apart in
August and prospects for the bills disintegrated.

During the 1967 Congressional session several bills were again
introduced proposing studies of interbasin divisions. For the most
part these bills contained the same guarantees for the areas of origin
set out in H.R. 4671 of 1966. Hearings were held during March,
1967, but opposition to the idea of such a comprehensive program
had increased and none of the bills was enacted by either House.

During the second session of the 90th Congress still further changes
were made in H.R. 3300, and similar bills, to strengthen and refine
the area-of-origin-protection provisions in what proved to be a final
attempt to obtain the acquiescence, if not support, of the Pacific North-
west states to a study of a Columbia River diversion.

As in earlier versions of the bills, the Water Resources Council was
directed to prescribe principles, standards, and procedures for the

101. See comments by Pacific Northwest Congressmen Foley, Wyatt, White, and
Hansen. Id. at 146-57.
102. Id. at 150 (Congressman Foley).
103. See Joint Statement of Representatives John J. Rhodes and Morris K. Udall,
released September 9, 1966.
104. See, e.g., H.R. 9, H.R. 722, H.R. 3300, and H.R. 6271, discussed in Hearings
on H.R. 3300 and Similar Bills Before the Subcomm. on Irrigation and Reclamation
105. Id.
investigations by the Secretary of the Interior, and the Secretary was
directed to investigate out-of-basin sources of supply for the Colorado.
A new proviso was added: 107

Provided, that the Secretary shall not, under the authority of
this clause or anything in this Act contained, make any recom-
mandation for importing water into the Colorado River system
from other river basins without the approval of those states which
will be affected by such exportation, said approval to be obtained
in a manner consistent with the procedure and criteria established
by section 1 of the Flood Control Act of 1944 (58 Stat. 887).

The House Committee on Interior and Insular Affairs, in its Report
on H.R. 3300, 108 expressed disappointment that the diversion study
provisions in the bill were not “acceptable to the Pacific Northwest
states” 109 although every attempt to make them acceptable had been
made. In its section by section analysis the Committee explained that
even if the Secretary of Interior’s study showed that importation from
the Pacific Northwest was desirable, “no recommendation may be
included in the feasibility report unless the states affected approve, and
the feasibility report must include provisions for protecting the inter-
ests of the areas of origin.” 110

Considerable discussion occurred on the floor of the House concern-
ing this “veto” provision. Mr. Reinecke of California argued: 111

Some people believe we are trying to take what is their water.
That is not the case. The bill specifically includes a provision
whereby the Secretary of the Interior could not recommend an
importation program, unless he has the approval of the states to be
affected. In other words, the governors of those states would have
a veto power over any such recommendation.

Other congressmen from the Southwest expressed similar views on
the effectiveness of the area-of-origin-protection provisions, 112 arguing
that the three elements of state veto power, price guarantee, and right
of recapture, were sufficient to protect the Pacific Northwest.

107. Id.
109. Id. at 42.
110. Id. at 71.
112. 114 CONG. REC. 3774, 3777, 3792, 3818 (daily ed. May 15, 1968) (remarks of
Representatives Aspinall, Hosmer and Rhodes.)
Representatives from the Pacific Northwest countered by discrediting the "veto" provision, denying that it accorded "any vestige of a so-called veto power to the states of origin." They emphasized that the Secretary of the Interior need only obtain approval of the states of origin "in the manner consistent with the procedure and criteria established by Section I of the Flood Control Act of 1944 (58 Stat. 887)" and that contrary to statements in the Majority Report [about the states veto power under this act] the Flood Control Act of 1944 merely provided:

(1) "to the extent deemed practical" the affected states may receive information on the studies and have an opportunity to consult and cooperate in the investigations.
(2) the states' plans for use of the water resource will be set out in any report to the Congress.
(3) the "written views and recommendations of each affected state . . . may be submitted to [the Secretary] and that they will be transmitted with the Secretary's report and such recommendations as he deems appropriate."

They concluded:

It is clear beyond contradiction that the so-called "veto power" merely gives the affected states an opportunity to review and comment upon the reports . . . .

. . . If an affected state objects or fails to approve the plan, the Secretary cannot "formally" recommend the adoption of the feasibility plan for importation in his letter transmitting the report. The report is, nevertheless, transmitted to the Congress. All that the proviso does is to give the affected states the power to prevent the Secretary from saying in his letters of transmittal to the House and Senate that "I recommend this plan." Instead, he would have to say, "I transmit this detailed construction plan, but cannot officially recommend its authorization because an affected state does not approve it."

The proposal for studies of diversion of the Columbia River were laid temporarily to rest by the adoption in 1968 of a ten year morato-

114. Id. at 168-69.
115. Id. at 169.
rrium on any "reconnaissance studies of any plan for the importation of water into the Colorado River Basin from any other natural river drainage basin lying outside the states of Arizona, California, Colorado, New Mexico, and those portions of Nevada, Utah, and Wyoming which are in the natural drainage basin of the Colorado River." The Secretary can still study possible importation of water from other drainage basins located within those states, but he is required to provide the same area-of-origin-protections, except for the so-called "veto" power, that were included in the revised versions of the LCRBP.

VI. HOW EFFECTIVE ARE THE PRESENT PROPOSALS FOR PROTECTING AREAS OF ORIGIN?

In considering the utility of area-of-origin-protection schemes proposed to date it is wise to remember that Congress can always change its mind. It can say in legislation enacted in 1970 that a given state or group of states shall have a right "in perpetuity" to recapture Columbia River water transported to the Southwest or that an exporting state has an "absolute veto power" over any diversion project before construction on that project can be started, and then a few years later repeal these laws, or pass others amending them. Although it is true that a constitutional amendment could bind future Congresses, passage of an amendment protecting areas of origin is unlikely.

At the same time it is wise to keep in mind that Congress can, and has in the past, bound itself to a variety of programs reaching far into the future. Examples of such commitments can be found readily in the social security and medicare programs, as well as in the long-range contracts regarding water and power entered into by the Tennessee Valley Authority, the Bonneville Power Administration, and other federal water entities. Theoretically Congress might undo those programs, but the practical possibility of this occurring is virtually nil.

117. Id.
118. A proposal for perpetual royalty payments has recently been given serious consideration by Congress in connection with the Alaskan native land claims. See, e.g., S. 1830, 91st Cong., 2d Sess. (1970). Conceivably a similar "perpetual royalty" could be considered for paying the Pacific Northwest for water transferred to the Southwest.
The key to their permanence lies in the sound financing institutions created to effect the programs, the widespread public expectation of their continuation, and the legally enforceable rights to benefits created in various individuals and organizations.

It is entirely possible that similar conditions could be created to guarantee the legitimate expectations of the area of origin in the event of a Columbia River diversion. Concern over this issue is not, of course, limited to the area of origin. Experience in implementing the California Water Plan has shown that the importing region is equally concerned about long-term assurances that the imported water, on which it has come to depend, will not be shut off. The California experience demonstrates, however, that the mere creation of legal rights by the legislature does not provide adequate assurances to the interested parties. In the Feather River Project, California was required to establish a financial reserve to be available in the future, if and when further construction might be needed, either to meet the growth demands of the area of origin, or to assure continued delivery of water to the area of import.\textsuperscript{119}

It would be possible to create a similar financial arrangement in the event of Columbia River diversion.\textsuperscript{120}

In applying the criteria of permanence to the area-of-origin protection provisions in the Columbia River diversion study bills, it will be noted that none of the bills provides for enforceable legal rights or sound financial arrangements. Furthermore, the bills are essentially negative in character, purporting to protect the Northwest from future harm, but not assuring the Northwest of any future benefits. In light of these general criticisms, the specific proposed methods for protecting the area of origin will now be examined.

\textsuperscript{119} CAL. WATER CODE § 12938 (West Supp. 1968).

\textsuperscript{120} One proposal based solely on the economic vitality of an interbasin water transfer is that the exporting states sell water to users, or to some entity, in the importing states. Although the initial capital outlays required of the exporting states to build the requisite facilities would be prohibitive, this approach has the advantage of focusing attention on the central issues of diversion of Columbia River water to the Southwest. The questions which need to be answered are whether the Pacific Northwest has water that it can afford to spare for exportation, and whether the Southwest really has an economic need for additional water from outside of the Colorado River Basin, \textit{i.e.}, is a major interbasin transfer really the least expensive way of solving the Southwest's water problems? The answers to these questions are beyond the scope of this paper. \textit{See} note 3, \textit{supra}.
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A. Priority of Right in Perpetuity or Right of Recapture
The 1968 Colorado River Basin Project Act provides:121

Sec. 203(b). All requirements, present or future, for water within any state lying wholly or in part within the drainage area of any river basin from which water is exported by works planned pursuant to this Act shall have a priority of right in perpetuity to the use of the water of that river basin, for all purposes, as against the uses of the water delivered by means of such exportation works, unless otherwise provided by interstate agreement. (Emphasis supplied.)

Several problems are presented by this provision. The first, mentioned above, is that Congress can change its mind, changing this perpetual right into a temporary right, in spite of the permanent looking form of the quoted language. Second, before such a right in perpetuity could actually be exercised, further congressional action would be required. No federal institutional machinery has been created to handle the administration of claims arising out of this right, leaving several critical questions about the provision unanswered. How does an area of origin exercise its prior right? Who, other than Congress, could order the flow of water stopped? Who, other than Congress, could authorize a different use of the water? If Congress is the essential decision maker, is the right in perpetuity merely a right to petition Congress and plead a special case?

A third objection to this provision is the ambiguity of its terms. It provides that all requirements for all purposes in the states of origin shall have a priority of right in perpetuity. The House Report on this provision clarifies the term all purposes by including within its definition such nonconsumptive uses as “power, navigation, fish preservation, or pollution control.”122 Restated, the clause provides that all requirements of the Pacific Northwest for power, navigation, fish preservation, and pollution control shall have priority over any use of the water by the Southwest. The ambiguity arises in the term all requirements. No criteria are provided for determining the requirements of the North-
west. The ambiguity is not lessened by saying that requirements mean needs.\textsuperscript{123} Certainly any criteria for requirements should include quality as well as quantity standards. Some experts already believe that the ecology of the Columbia River has been detrimentally affected by extensive dam construction and other alterations on the river, and that any significant diversion of water out of the basin will cause further damage.\textsuperscript{124} Even if these experts are wrong, important questions remain as to how much damage would have to occur before the right in perpetuity could be exercised, and who decides when that level of damage has been incurred or is threatened? Without answers to these questions it is doubtful whether this right could ever provide any real assurance to the area of origin.

B. Veto Provision

Section 201(a)(2) of H.R. 3300, which was deleted from the 1968 Colorado River Basin Project Act, provided:\textsuperscript{125}

The Secretary shall not, under the authority of this clause or anything in this Act contained, make any recommendation for importing water into the Colorado River system from other river basins without the approval of those States which will be affected by such exportation, said approval to be obtained in a manner consistent with the procedure and criteria established by section 1 of the Flood Control Act of 1944.

Although it has been said that this provision would have given the states of origin a "veto" power over any proposed diversion before construction of the diversion works can begin, such could not have been the case. The criticism of the Pacific Northwest congressmen discussed above is accurate.\textsuperscript{126} Disapproval of diversion by one or more of the

\textsuperscript{123} Some writers have questioned the ambiguity of the term "needs." See, e.g., Weatherford, \textit{Legal Aspects of Interregional Water Diversion}, 15 U.C.L.A. L. Rev. 1299, 1341 (1968):

Economists recognize that such factors as "need" and "surplus" are relative to demand; as such, they cannot be defined in permanent or absolute terms. This is one reason why reliable long-range economic forecasts in the water resources field are difficult, if not impossible, to make.


\textsuperscript{124} \textsc{State of Washington Water Research Center, Report No. 5, \textit{The Columbia River as a Resource}} (May, 1970).

\textsuperscript{125} H.R. 3300, 90th Cong., 2d Sess. § 201(a)(2) (1968).

\textsuperscript{126} See notes 112-14 and accompanying text, \textit{supra}.
states of origin would not necessarily stop Congress from authorizing diversion. It would not even prevent the Secretary of the Interior from transmitting the plan to Congress but would only prevent the Secretary from formally approving the plan in his letter of transmittal.

This so-called "veto" does not allay the fears of the Pacific Northwest that once the Bureau of Reclamation began making studies of diversion neither the Congressmen from the Pacific Northwest nor anyone else would be able to stop eventual authorization. Undertaking such studies is a massive and expensive project. If the Bureau recommended that the project be built, it seems doubtful that any "veto" by a Pacific Northwest state or states could stop it.

Certainly the "veto" provision would not legally bar Congress from enacting an authorization bill if it saw fit to do so. The "veto" provision is nothing more than a structured way of allowing the states to voice their opinions on diversion; in no sense can it be said to give the states a true veto over diversion.

C. Financial Guarantee

Section 203(a) of the 1968 Colorado River Basin Project Act provides:127

> In the event that the Secretary shall ... plan works to import water into the Colorado River system from sources outside the natural drainage areas of the system, he shall make provision for adequate and equitable protection of the interests of the States and areas of origin, including assistance from funds specified in this Act (the Development Fund which is to be supplied with moneys from the operation of various projects in the basin, and from congressional appropriations) to the end that water supplies may be available for use in such states and areas of origin adequate to satisfy their ultimate requirements at prices to users not adversely affected by the exportation of water to the Colorado River system. (Emphasis supplied.)

The financial guarantee is probably the most realistic of the area of origin protection provisions,128 but the provision above has a fatal flaw in that the Development Fund has no adequate source of funds to meet

128. See notes 118 and 119 and accompanying text, supra.
the various claims against it. This failure can be attributed to inadequate Congressional Appropriations and the fact that Bridge and Marble Gorge Dams were not included in the overall project and thus their revenues were not available for the Development Fund. Unless the Development Fund were soundly financed, and unless the Pacific Northwest were to have a satisfactory priority on that fund, the dependability of this proposal is questionable.

A second defect is the Act's ambiguous language. What does it mean to say that *adequate* water will be provided to meet the area-of-origin's *ultimate* requirements "at prices to users not adversely affected by the exportation of water to the Colorado River system?" How much water is *adequate*? Does the word *ultimate* refer to time, to amount, or to both? How can anyone intelligently estimate at some distant future date, what the price of a given unit of water might have been if no diversion had occurred? So many factors other than diversion will have affected the price of water by that date that the effect of this particular factor will be impossible to isolate.

The Act is deficient not only because of these ambiguities, but also because no machinery has been provided to resolve the questions they pose. Will the states of the Pacific Northwest decide whether their *ultimate* requirements are being *adequately* met? Will they decide what the price of water would have been if no diversion had occurred? Will this decision be made by Congress? Who initiates inquiries into these questions? What if no *price* for the water is involved, but instead the people of the Pacific Northwest believe they are losing potential recreational or wildlife uses, which are generally neither priced nor sold.

**CONCLUSION**

What policy should the Pacific Northwest adopt to develop its own resources in the event of a renewed proposal to divert part of the Columbia River to the Southwest? First, it is questionable whether the region should continue its policy of total resistance to any and all studies having to do with diversion. If, indeed, the Southwest is approaching an ever-deepening water crisis, one which will seriously impair its future growth and prosperity unless water is imported, then the chances are that one day Congress will vote for a diversion of part
of the Columbia River. This possibility could, of course, be obviated by a major technological breakthrough such as economical desalinization. But certainly it is a possibility that will not go away simply because it is unpopular in the Pacific Northwest. It is real enough to require this region to undertake affirmatively to analyze the various ways its interests might be most effectively advanced if a diversion occurs, and to articulate the conditions that it believes essential for its acquiescence, if not support of such a project. At this juncture it is crucial that the Northwest analyze the benefits that might legitimately be claimed if such a project were to go forward and how those benefits might actually be realized. If the Southwest finds other solutions to its water problems those studies may one day be considered only interesting history, but if the Columbia is diverted they will provide a critical bit of water wisdom beneficial to both the Pacific Northwest and the nation.