Uneasy Federalism—State Water Laws and National Water Uses

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In late 1979 the Associated Press disseminated the following news story:

Cedar City, Utah. (AP) Governor Scott Matheson Monday threatened to withdraw his support of the MX missile if the military tries to assert federal water rights for the proposed project in Utah and Nevada.

[Matheson was] addressing a U.S. House subcommittee hearing . . .

. . . Matheson told the subcommittee that he supports deployment of the missile in Utah, but he added that, "if at any point, the Air Force, because of difficulties or costs encountered, attempts to assert a federal water right for this project, I want them to know that I will withdraw my support for the MX project."

He demanded an "ironclad commitment" from the Air Force that it would not assert federal water rights in order to acquire project water. Matheson said that the military must guarantee to secure water in accordance with state law.¹

The proposed MX missile system will be a huge shell game, an intricate network of railway loops over which a limited number of missiles can be shuttled between thousands of launching pads or "shelters." If the Soviets should launch a strike aimed at knocking out America's capability for a counterstrike they will not know under which shell was the pea, and the sheer number of shelters would make it impossible for them to destroy all U.S. missiles. This $33 billion scheme has been called the world's largest construction project. Large amounts of water will be needed for building and maintaining it and for the workmen and military personnel who would construct and man the system, and there is not much water on the Utah desert.²

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1. The Sacramento Bee, Nov. 6, 1979, § D, at 25, col. 1.
2. To be more fair than the reporter, the news item reported approximately seven percent of the Governor's remarks, picked out of a thoughtful analysis of the social, economic, cultural, and environmental impacts of the MX, and the roles and responsibilities of the state and nation dealing with them. Hearings on Proposed MX Missile Deployment Before the Subcomm. on Military Construction Appropriations of the House Comm. on Appropriations, 96th Cong., 1st Sess. 37-49 (1979) (statement of Governor Scott M. Matheson of Utah).
The Governor's objection was not to the United States getting the water, nor to the United States getting a water right, but to the possibility that the United States would claim the water under its national defense powers rather than under Utah's water law. He said:

As Governor of the State of Utah I need an ironclad commitment from the Air Force that they at no time will assert Federal water rights, reserved or unreserved. They must guarantee that all the water obtained by the Air Force will be secured through the process outlined in Utah State law.

A complete understanding of this statement requires an examination of the uneasy coexistence of state and federal water laws.

I. WESTERN STATE WATER LAW

Western state water law grew out of the California gold rush, when thousands of '49ers crowded the diggings at the mouths of the Sierra canyons and staked their claims on the streambeds and banks. They made similar claims to the water needed to wash the gold from the gravel. Since there was neither gold nor water enough for everyone, both were put on a first-come-first-served basis. Claim jumping was discouraged by Colt and Winchester. When the Great American Desert was found to be habitable, the first settler in a valley took first choice of the land and took from the stream enough water to irrigate it; the second comer had to make do out of what was left.

The courts and legislatures of the western territories and states shaped this crude self-made law into the doctrine of prior appropriation. An appropriation had to meet but one standard: it had to be for a beneficial use.

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3. The Governor stated that the Utah State Engineer had reported that water in needed quantities was available. *Id.* at 45.

4. *Id.* at 46. When the Governor threatened to "withdraw his support," he presumably meant his political support. I am sure he had something in mind milder than either "nullification" South Carolina style, or "interposition." See Goldberg, *Interposition—Wild West Water Style*, 17 STAN. L. REV. 1 (1964). He could not, of course, block the United States from establishing a military installation in the State of Utah, although something like this was once tried by a governor of Arizona, who in 1934 impressed the ferryboat *Julia B.* into the "Arizona Navy," and transported a detachment of the National Guard up the Colorado River to the Parker Dam site, to rout construction gangs working on a dam being built by the United States for the benefit of the City of Los Angeles. A second Fort Sumter was avoided by the United States' tactical withdrawal of the construction crews. The parties adjourned to the courtroom, where Arizona won a brief Pyrrhic victory, stopping the dam on a technical defect soon to be remedied by Congress. See United States v. Arizona, 295 U.S. 174 (1935). See also R. Nadeau, *The Water Seekers* (1974).

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Practically all of the farmers, miners, manufacturers, power companies, and cities of the West met this test when they took the water, since each had a practical wealth-producing use in mind. Each use advanced the development of the resources of the country; and was an increment toward maximization of the welfare of the people, the state, and the nation. Once begun, an appropriation became a definite and identifiable piece of property, lasting as long as the beneficial use continued. Its boundaries were marked by the quantity diverted from the source, the place the diversion was made, and its date, which identified it as superior or inferior to other appropriations. This property right could be sold, and the use or place of use could be changed, if the proper formalities were observed.

To help you understand this property aspect of water law, let me teach you as I learned it. Fresh out of law school, I became an associate of L. Ward Bannister of Denver, Colorado, one of the grand old “irrigation lawyers” of a past generation. One day he called me to his office while he interviewed a farmer named Bergland, who had come into town with a water case. Bergland was obviously a hard worker; he had worn his Sunday suit in to see the big city lawyer and I noticed how his biceps filled his sleeves. Yet he was a very nervous and embarrassed man. The reason for this appeared as he told the story. He got his water from the Brighton Ditch Company, which served many farmers. One day he thought he had not received his full amount, and won the argument by beating up the ditch rider who doled out the shares. The ditch company promptly shut and locked the headgate to his lateral and would give him no more water. I thought this a funny story, but he did not, and I saw that he was not only embarrassed but that he was frightened, scared to death. Why, I wondered, did he perhaps fear jail? I heard him say “and if I don’t get water in the next two or three days my corn will wither and my beets will harden.” Then I understood: if he lost his crop he would lose a year’s income, he would miss a payment on the mortgage, and he would lose his farm. On the high plains of northern Colorado, a farm is practically worthless without water. As I watched this big, strong, scared man, I learned what water law was all about. Water law ought to give to Bergland as good a water right as property law gives him a land right to his farm.

6. Mr. Bannister represented the State of Colorado in the negotiations for the Colorado River Compact of 1922. He lectured in water law at Harvard Law School and the University of Denver College of Law.

7. Mr. Bannister picked up the telephone, called his friend the attorney for the ditch company, told him some of the dreadful things that might happen to it, turned to Mr. Bergland and said, “You will have your water in the morning.” He charged Mr. Bergland a dollar for the telephone call.
There is a second aspect of water law. Modern state water codes superimpose a layer of administrative law on this property law. Rights are no longer created solely at the will of the appropriator; now the state must concur. Today's appropriator applies for a permit to construct the works and to use the water, and a state official or agency decides whether there is unappropriated water for the use and whether the use is beneficial. The state officials determine the amount of water needed for the use and oversee the construction of the works. Most important, a new requirement has been added: the state agency may deny the application if to grant the permit would be "contrary to the public interest." The agencies and courts have developed this into a very important policy which has enabled them to control water use with surprisingly modern and sophisticated economic concepts. The public interest now incorporates the economist's maximization or efficiency principle, requiring water officials to choose from competing projects the one that will produce the greatest net benefits. Social costs have been recognized as grounds for denying or conditioning permits for projects that would have very bad external effects on others. The Utah Supreme Court, for instance, employed the notion of opportunity costs in preventing a single-purpose appropriation from cutting the heart out of a great multi-purpose project. In none of these cases did the judges use the economist's language, but they had no difficulty in recognizing and applying the economic concepts. In recent years legislatures have embroidered on these themes; the Alaska and Washington prior appropriation statutes contain express cost-benefit formulae and several states identify specific recreational, fish, wildlife, and environmental values that must be considered or guarded in the water permit review process. As a result, today the permit system forces appropriators to modify their projects to preserve environmental values.

Water law is thus a planning tool, a guide to action, an aid to decision. A modern water plan is not a blueprint for every future project or use. If a proposed new water use is for a beneficial purpose, does not affect prior users, does not have deleterious side effects on other people, fish and

8. This legal device, now almost universal throughout the world, was invented by an engineer, Elwood Mead, then state engineer for the infant state of Wyoming. 1890 Wyo. Sess. Laws ch.8, § 34. Mead was later United States Commissioner of Reclamation, and his monument is Lake Mead, the water of the Colorado River stored behind Hoover Dam.
12. ALASKA STAT. § 46.15.080 (1962); WASH. REV. CODE § 90.54.020(2) (1971).
13. ALASKA STAT. § 46.15.080 (1962); CAL. WAT.E CODE § 1257 (West 1971); OR. REV. STAT. § 537.170(3)(a) (1979); UTAH CODE ANN. § 73-3-8 (1953).
game, recreation, and the environment, and if it does not foreclose better uses of the water, then it is a "planned" use, even though no one in government ever thought of it. Of course, a state water plan may reserve a stream for a specific project, or choose in advance to protect certain water from exploitation, and in this fashion the modern water planning process can be integrated with the permit procedure to provide policy guidelines that determine, in the name of the public interest, the disposition of the state’s remaining unappropriated water.15

II. FEDERAL WATER LAW

The federal government has little water law that resembles this state water law. The national government does not concern itself with the property rights of water users; it does not regulate the conduct of citizens or plan what they may do with water. Federal water law deals primarily with the powers, projects, programs, and properties of the federal government; it governs the government. When the United States regulates the rivers with huge dams to control floods and improve navigation, it has no "water rights" as such.16 When it deals with the problems of a great river basin it needs no state permit or approval.17 Yet when it acts as a water supplier and builds projects that furnish water for irrigation, municipal and industrial purposes, it usually acts very much like a private appropriator that seeks to store water for beneficial use. Most of these projects have been built by the Bureau of Reclamation (now the Water Power and Resources Service) and section 8 of the Reclamation Act of 1902 requires the Secretary of the Interior, in carrying out a reclamation project, to proceed in conformity with the laws of the state "relating to the control, appropriation, use, or distribution of water. . . ."18

The federal government often has need to use water on its own land. Until a few years ago most agencies making such uses got state water rights, almost as if there were a universal section 8. The National Park Service got permits and adjudications for the needs of its tourists and personnel, the Forest Service for its campgrounds and small impoundments, and the Bureau of Land Management for its stock water ponds.19 At least


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some military installations\textsuperscript{20} and some Indian irrigation projects obtained state permits to take needed water.\textsuperscript{21}

Yet before the turn of the century the Supreme Court had made it quite clear that the states could not deny to the United States water needed for the beneficial use of government property.\textsuperscript{22} Early in this century, when the federal government needed water for Indian reservations, it used this power to create its own "reserved rights" to irrigate the reserved lands set aside for the tribes.\textsuperscript{23} Fairly recently federal officials have become aware that water was needed to carry out federal purposes on other types of reserved lands. Instream flows are desired for recreational uses or scenic and aesthetic purposes, and the federal agencies fear that state water rights, geared to utilitarian purposes and designed for diversion and development, would not be suitable for these federal purposes.

The new federal reserved rights are a species of water right owned by the federal government, created by the federal government to authorize and protect water uses by the federal government on and in connection with federal reserved lands. Their distinctive feature is that they bear a priority as of the date the reservation of land was set aside, not when the water use was started. Thus, an appropriator downstream from federal reserved land who finds water available and puts it to use pursuant to state law may not get the top priority although he is the first taker. Since they were invented in 1955\textsuperscript{24} and first applied in 1963,\textsuperscript{25} these rights

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\item \textsuperscript{20} Nevada ex rel Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958), aff'd on other grounds, 279 F.2d 699 (9th Cir. 1960).
\item \textsuperscript{21} See United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956); Merrill v. Bishop, 74 Wyo. 298, 287 P.2d 620 (1955).
\item \textsuperscript{22} United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).
\item \textsuperscript{23} Winters v. United States, 207 U.S. 564 (1908). In 1874, a large part of Montana was set aside in the expectation that several tribes of the northern plains Indians could continue their way of life there. When the area proved too small and the buffalo disappeared, the Indians began to starve. In 1888 they were easily persuaded to gather in a smaller reservation on the Milk River where they could be given rations of beef, bacon, and flour. In order to help the Indians become self-sufficient farmers and ranchers, an irrigation project was started, but it was then found that there was insufficient water because upstream white settlers had appropriated the water to their lands. The Supreme Court came to the rescue of the Indians, saying that both the Indians and the United States had intended to reserve the water, the Indians to maintain command of the water that made their land valuable, the government to insure the purposes of civilizing the Indians. In my opinion this is pure fiction. I believe they simply forgot the water, or perhaps more accurately, did not think of it. An implied reservation of water, like many an implied term of a contract or interpretation of a statute, is an afterthought supplied by the court to fill a gap not seen by the original framers of the document. The court, armed with hindsight, supplies the provision it thinks the legislators or parties might have inserted if they had thought of it at the time.
\item Indian reserved rights present one of the knottiest problems in western water law. They are not the subject of this paper, and what is said here about federal non-Indian reserved water rights has very little to do with Indian reserved water rights.
\item \textsuperscript{24} Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955)(Pelton Dam case).
\item \textsuperscript{25} Arizona v. California, 373 U.S. 546, 600–01 (1963).
\end{itemize}
frightened the Berglands, the mining companies, and the cities of the West, for many of them had water rights dating after the reservation of upstream federal lands. If the government were to take the water for use on the reserved land, it would have the better right, though not the first use, and the first user could lose his water.

Within the past year the federal government has come up with a claim to a new type of federal water right, what has come to be called the "federal non-reserved right." Much of the federal public domain is not reserved lands. Theoretically, much of it can still be privately acquired under a series of old land settlement and mining laws, although this is becoming increasingly difficult. The old policy of disposition of the public land to encourage settlement and development of the West has given way to a new policy of retention and management. In managing its unreserved public lands the government is discovering uses for water that it again fears will not be recognized by state laws. The new claim is that the national government can take or claim water for its national purposes without regard to whether the state recognizes that purpose as a beneficial use or whether the state laws will create and protect a right for it. The federal non-reserved water right would bear a priority as of the date of actual use or claim, so it does not threaten Mr. Bergland's vested rights. However, federal uses outside the state pattern of water rights could have a marked effect on the size and shape of future development within the states, so they do scare Governor Matheson.

The state water laws allocate water to users, the nation's laws proclaim it as a water user. The national government's reserved right presents a threat to the property-protection function of state water law, and its non-reserved rights threaten the development-guiding function. I think that Governor Matheson is, in a very different way, as frightened as Mr. Bergland. The direction and form of Utah's growth will depend to a large degree upon water—who gets it, how much, from which source, under what restraints, with what adjustments, and under what compromises. The Governor fears that the future of his state may be decided in Washington, rather than in Salt Lake City. He fears that decisions affecting the citizens of the state will be made not at the local or state level by the affected people or their legislators and agencies, but by national officers and administrators little informed or concerned about local matters.

While the states view the exercise of federal powers as a possible threat to the property rights they have established and to the development they prefer, the federal government sees state regulatory laws as potential state controls over federal functions. When Governor Matheson squares off in confrontation with the Air Force, he is reenacting an old role. State officials and federal agencies have long had a mutual distrust of the one’s
willingness or ability to fulfill the needs and desires of the other. Each jealously claims its own jurisdiction and prerogatives and resents the exercise of the other’s. When federal reserved rights appeared on the scene, they not only scared the Berglands of the West but also frightened many lawyers and law professors and inspired briefs, articles, and speeches by the hundreds. I added to the heap one book, three chapters, two articles, four speeches, and two draft laws. When I noticed that there were no Berglands selling apples on the streets, no companies bankrupted by shutdown of their mills, no cities losing population and industry because their government had taken their water, I thought I could quit. Yet each year brings a new development, and I find myself taking up the cudgel again. A new case seems to cut down reserved rights, but new claims expand them. I am not sure it is progress to move from concern over reserved rights to concern over non-reserved rights, but the latter threaten to spawn as big a controversy as the former once did.

III. FEDERAL RESERVED WATER RIGHTS

For twenty-five years the western states have engaged in a mighty struggle, first to disprove the existence of federal non-Indian reserved rights, then to secure their repeal. Both efforts have failed, and the Supreme Court has now squarely espoused the doctrine of reserved rights and has protected them as property rights of the government. A whole generation of federal bureaucrats has been educated as to their existence and trained to enforce them to the hilt. Today, in numerous courts of the Western States, a massive effort is being made to identify and quantify these new-found rights and to weave them into the pattern of private rights that date from the earliest settlements to the present.

Out of one of these state suits came the 1978 case of United States v. New Mexico. At stake were the waters of the Rio Mimbres, a small stream that serves a surprisingly large number of ranches and communities before it sinks into the desert. The United States claimed that when the Gila National Forest was set aside in 1899, the government also set


28. Appendix I to a preliminary report of the Task Force on Federal Non-Indian Reserved Water Rights lists 44 recently decided or pending cases in which federal non-Indian reserved water rights were adjudicated. Task Force 5a—President’s Water Policy Implementation, Report of Federal Task Force on Non-Indian Reserved Rights, app. I (June, 1979) (review draft) [hereinafter cited as Task Force Report]. Many of these cases involved claims to all the tributaries in a river system in a large basin.

aside some of the water. The claims were modest enough: small amounts for residential use of Forest Service personnel and campers, for road building, a tiny bit for wildlife, and an instream flow of six cubic feet per second—a small brook—through the forest for "aesthetic, environmental, recreational and 'fish' purposes." The Supreme Court gave the Forest Service enabling acts of 1891 and 1897 a strict reading. Those acts had specified only watershed protection and timber supply in stating the purposes for which the national forests were created, and the Court allowed water only for these utilitarian objectives, not for the amenities claimed. The Court seemed generally unsympathetic to the entire notion of reserved rights. It emphasized that the quantities allowed would be limited to "only that amount of water necessary to fulfill the purpose of the reservation, no more"; it held that reserved rights exist not for "secondary" or "supplemental" purposes, but only for those that qualified as "direct." "Necessary" was amplified to "essential"; the test applied was whether, if water were not provided, "the purposes of the reservation would be entirely defeated." This was a substantial victory for the water users of the West. The enemy was not defeated but he was thrown back, and substantial territory feared lost was recaptured. The decision confirmed, even strengthened, my belief that reserved rights were of little moment and not likely to harm many Berglands.

30. Id. at 704 (quoting Mimbres Valley Irrigation Co. v. Salopek, 90 N.M. 410, 412, 564 P.2d 615, 617 (1977)).
31. 438 U.S. at 705-13. For example, the government argued, id. at 707 n. 14, that the Organic Administration Act of 1897, as codified in 16 U.S.C. § 476, should be read establishing three purposes for national forests, one general and two particular: "No national forest shall be established, [1] except to improve and protect the forest within the boundaries, or [2] for the purpose of securing favorable conditions of water flows, and [3] to furnish a continuous supply of timber . . . ." 16 U.S.C. § 475 (1976). The Supreme Court demonstrated that the legislative history showed that this should be read as intending only two purposes: "Forests would be created only 'to improve and protect the forest within the boundaries,' or, in other words, 'for the purpose of [1] securing favorable conditions of water flows, and [2] to furnish a continuous supply of timber.' " 438 U.S. at 707 n.14 (emphasis in original).
32. Id. at 700 (quoting Cappaert v. United States, 426 U.S. 128, 141 (1976).
33. 438 U.S. at 702-03, 714.
34. Id. at 700.
35. This opinion is not necessarily infallible dogma, nor even received doctrine. In an excellent note, Quantification of Water Rights Claimed Under the Implied Reservation Doctrine for National Forests, 54 WASH. L. REV. 873 (1979), it is asserted that the decision does not provide adequate protection for the national forests and deprives the implied reservation doctrine of the flexibility which rendered it useful in balancing state and federal interests in water adjudications. With deference, I still believe that the national government can give its forests all the protection they need (see text accompanying notes 67-68 infra), although it may have to pay for appropriated water it needs and takes, and that the reservation doctrine is not a flexible balancing of interests but an owner-take-all enforcement of property rights. Cappaert v. United States, 426 U.S. 128 (1976).
United States v. New Mexico did not dampen the spirits nor reduce the efforts of the federal agencies. About that same time President Carter decided to announce a definite written water policy, which he described as an attempt to achieve "enhanced Federal-State cooperation" in water policy, and to "deepen the partnership" between the two levels of government. He instructed the federal agencies to "work promptly and expeditiously to inventory and quantify Federal reserved . . . rights," focusing on high priority areas and working in "consultation with the States and water users . . . emphasizing negotiations rather than litigation wherever possible." Pursuant to directives that accompanied the policy statement, a task force of water using agencies was set up, and in June, 1979, it released a draft report for review. The report recommends a unified approach by all federal agencies, each furnishing a description of the types of claims to reserved rights, an inventory of reservations, purposes and water sources, and an estimate of the cost of completely identifying and quantifying all water rights. It sets a timetable of five years for current consumptive uses of water, ten years for "actual" non-consumptive uses of water and reasonably foreseeable future consumptive and non-consumptive needs, extendable to fifteen years if management plans require. The report's procedural recommendations add to court adjudications a process of "notification" of the right identified and quantified by agencies and the negotiation of agreements for incorporating these into state systems.

The Task Force Report adds one possibly disturbing element to the federal reserved rights picture. It contains an assertion that there is a federal reserved right to sustain "a groundwater level for general ecosystem maintenance." This right is identified only by stating that there is a complete lack of information about the groundwater necessary to maintain range land, forest, and fluvial systems or to prevent salt water intrusion in coastal areas such as national seashores or coastal wildlife refuges.

37. Id. at 1043-44.
39. Id.
40. TASK FORCE REPORT, supra note 28. Task Force 5a consisted of representatives from the Department of Interior, the Department of Agriculture, the Department of Defense, the Department of Energy, and the Department of Justice. The Task Force was chaired by one Associate Solicitor for Interior and coordinated by another, and representatives of the Department of Interior formed a majority of the staff of the task force. Id. at 3-4.
41. Id. at 36-41.
42. Id. at 43-49.
43. Id. at 41.
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If this means that groundwater levels must be maintained at or near the ground surface for subirrigation of large areas, it could result in locking up potentially valuable resources.44 Perhaps swamps and marshes reserved as duck refuges or moose ranges must stay wet, but this grab at the total groundwater may far exceed the “necessary and essential” amount allowed in New Mexico. Coastal areas should be protected from salt water intrusion, of course, but in Alaska, Washington, and Oregon there are state groundwater laws that could handle the matter.45 and in California, where it has been a serious problem, the federal government might well enter into the local institutional arrangements that are operating a successful program of recharge,46 thus achieving the objective without sacrificing total use of the resource.

Simultaneously with the draft Task Force Report, the Solicitor of the Department of Interior issued an opinion to guide the National Park Service, the Fish and Wildlife Service, the Water Power and Resources Service, and the Bureau of Land Management in making their claims to water rights.47 The reserved rights claimed by the Solicitor are fairly modest. There are no surprises in the claims he makes for reservations of water for national parks, monuments, recreation areas, and other areas administered by the National Park Service, nor for the preserves and refuges administered by the Fish and Wildlife Service. Indeed, following the “specific purpose” test formulated in the New Mexico case, the Solicitor finds that public recreation is not a specific purpose of the National Wildlife Refuge System; instead, it is a secondary purpose for which no water is reserved.48 He also finds that Bureau of Land Management (BLM) lands designated as ranges “to protect and manage wild free-roaming horses and burros” are not reserved lands, though designated and maintained as sanctuaries,49 so that the horses and burros will have to drink water obtained under state law.

The Solicitor’s one broad claim of a reserved right relates to “public water holes and springs.” In 1916 Congress authorized the President to

45. ALASKA STAT. §§ 46.15.010-020 (1962); OR. REV. STAT. §§ 537.505-795 (1974); WASH. REV. CODE §§ 90.44.020-025 (1979).
47. Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 Interior Dec. 553 (1979) [hereinafter cited as Opinion]. This opinion was the first of the reports of individual agencies called for by the Task Force Report, intended to guide the agency in the application of the report and to be attached to appendices to the report.
48. Id. at 607.
49. Id. at 593-94.
reserve "[l]ands containing waterholes or other bodies of water needed or used by the public for watering purposes. . . ." The legislative history shows that this law was needed "so that a person can not monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity." Most reserved springs and water holes were withdrawn by an executive order in 1926. For these the Solicitor abandons the restricted New Mexico approach. He states that the purposes for which the public water holes and springs were withdrawn "include stock watering and human consumption." He goes on to add such other purposes as:

(1) water for growing crops and sustaining fish and wildlife to allow the settlers on the public land to obtain food for their families and provide forage for their livestock; and (2) water for flood, soil, fire and erosion control, the control of which was essential to protect the public and to allow the new patentees and settlers on the public domain to make a viable living in this arid and semi-arid region of the Nation where, for example, an uncontrolled prairie fire could completely destroy a home, life, belonging [sic], livestock and forage.

"Springs and water holes" are held to include those tributary to streams. Furthermore, the Solicitor opines that the quantity of water reserved at each public water hole or spring was the total yield of such source. Out of this cloth he would create a new type of federally granted private water right, a system that rivals the state system of appropriation. Persons who have acquired nearby lands may receive permission from the Department of Interior to use these reserved waters beyond the area of land reserved. This invention seems totally at war with the "primary purpose" doctrine of New Mexico, totally inconsistent with the rule that only so much water is reserved as is essential for the purpose.

The Solicitor says that any appropriation under state law of the water of a spring or water hole on federal land is a nullity, and that any entry on the land for that purpose is a trespass. This will certainly create conflicts with those users of the public domain such as oil companies, mining claimants, and ranchers who have appropriated water which is surplus over stock water needs. Irrigators and other users of water downstream

54. Id. at 581–82.
55. Id. at 587.
56. Id. at 582.
57. Id.
58. Id. at 588.
from tributary springs may find their water taken under the newly created “federal water rights law,” if and when the federal government authorizes others to use its new-found water wealth—wealth never discovered, claimed, or used in the sixty-four years since the Stock Raising Homestead Act was enacted and the fifty-four years since the lands surrounding the water holes were reserved.

In another respect this portion of the Solicitor’s opinion is in conflict with United States v. New Mexico. There too the Forest Service had claimed the power to allocate water to private users, in that case cattle ranchers, outside the structure of state water law, on the theory that the United States had reserved the water. The New Mexico Court analyzed several acts and administrative interpretations demonstrating turn-of-the-century thinking that the state had exclusive control of the distribution of water on public lands, and said, “there is no indication in the legislative histories of any of the forest Acts that Congress foresaw any need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited.”59 Exactly the same thing should be said of the Stock Raising Homestead Act and the executive order reserving the water holes.

IV. THE FEDERAL NON-RESERVED WATER RIGHT

The real bombshell in the Solicitor’s opinion came in the assertion of “federal water rights obtained through appropriation and use for Congressionally authorized purposes”—federal rights to take unreserved but unappropriated water for use on unreserved federal lands, or for “secondary” uses on reserved lands, without complying with state law.60

The Solicitor first justifies such rights with variations on an old theme: the myth that the federal government owns the unappropriated water. I do not know why some lawyers and judges find it necessary to start with “ownership.” I do not believe anyone owns the water in the ocean, in a cloud, in the raindrops, or in a stream. It is res nullius, the property of no one, a concept that has been with us since Roman times. If I catch it in a bucket, or behind a dam, perhaps it becomes mine, but if a state or nation can permit me to or prevent me from doing so, perhaps it can be called theirs. This “ownership,” however, is obviously a conclusion, not a starting place.61 But the Solicitor begins with “ownership of all rights appurtenant to” federal lands,62 leans heavily on the rule that “only Con-

60. Opinion, supra note 47, at 574.
gress . . . has the authority under the Property Clause to control the disposition and use of [property] owned by the United States." 63 and ends where he began, with the opinion that the United States "retains a proprietary interest in those waters that have not been appropriated pursuant to state law." 64 He even embroiders on the myth, saying, quite erroneously, that the common law rules of natural flow riparian rights originally applied to federal lands. 65 Then, in a tortuous trip through cases dealing with the nineteenth century land laws, he finds, primarily from what they do not say, "an assertion of inchoate federal water rights to unappropriated waters. . . ." 66

63. Id. at 563, 575.
64. Id. at 575.
65. Id. at 565. The Solicitor cites United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899), but the Court was there referring to state law and the lack of power of the states to change the common law to the detriment of the United States. In other cases the Court has said that riparian rights do not attach to federal lands. In Atchison v. Peterson, 87 U.S. 507, 512 (1875), the Court said: "[T]he government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of those streams." And in Sturr v. Beck, 133 U.S. 541, 551 (1890), the Court quoted this statement and added, "when, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded."

It is clear from the rest of the opinion that it attached in that case because of the Dakota Civil Code which stated the riparian doctrine, not because of federal law. See also Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339, 344 (1909).

66. Id. at 565–66, 566–71. I used to think that one of the best and most useful works I had performed was to lay to rest the ghost of the myth that the United States "owned the unappropriated water on the public domain" because the Desert Land Act "severed the water from the land" and gave the states some power over water but reserved the surplus to itself. See F. Trelease, Federal State Regulations in Water Law (Legal Study No. 5, prepared for the National Water Commission) 111–116, 147–148 (including 147a through 147m), 306–309 (Sept. 7, 1971). Apparently, however, no one has ever read these pages, and the theory continues to haunt me. I must have seen it since in a half dozen law review articles. The Solicitor depends upon it heavily. A contemporary government report repeats it. General Accounting Office, Reserved Water Rights for Federal and Indian Reservations, CED–78–176 (1978). If Congress had clearly and unequivocally granted to the states the power to dispose of some of the waters, or granted to members of the public water rights obtained by complying with state law, then it would have impliedly acted on the theory that it owned all the water, and therefore retained an interest in what was left. But since there was no real grant, as I showed in Legal Study No. 5, to imply a grant and from the implied grant imply a claim to what was not granted seems one bridge too far. The Solicitor's opinion waffles through the Mining Act of 1866 and the Patents Act of 1870 (now combined as 43 U.S.C. § 661 (1976)), and concludes that since they "in effect" validated appropriations under state law and "in effect" waived U.S. claims to appropriated water, they therefore asserted "inchoate rights to unappropriated waters that exist at any point in time." Opinion, supra note 47, at 565. The Desert Land Act he finds a puzzlement, and puzzling it is, if you try to read it as a federal water law, with its partial severance of some kinds of water from some kinds of federal lands in some states, instead of as a land law with a provision that the seller should get a state water right for as much as he needed, saving the surplus for others. Though he despairs of finding authority for his thesis in the inconsistent "dicta . . . at war with one another" in the cases construing these laws, he tenaciously clings to the United States' "inherent power and control over its property" and predicts that the Supreme Court will resolve the conflict by finding that nowhere in these acts, nor in the many disclaimers of intent to effect state water law, nor
When he moves from proprietorship to supremacy, he is on firmer ground. The Solicitor notes that the federal Constitution and laws are "the supreme law of the land," and quotes the National Water Commission: "Anytime the United States needs water . . . to carry out a program authorized by the Constitution, it has ample power to acquire it." This of course comes from impeccable and irrefutable subordinate authority.

It is the theory I advanced to undercut the notion, quite prevalent a decade ago, that if the United States did not have reserved rights, the purposes of the reservations could be frustrated, state officials could deny water rights for purposes the national government had reserved the land for but which the state government did not regard as beneficial. I pointed out that under the Supremacy Clause this simply could not happen, and that the nation could acquire the water. I thought that if this myth were exposed, if the need to use the reserved rights doctrine was shown to be non-existent, Congress might be persuaded to eliminate the no-compensation feature of reserved rights so that if and when the United States took the water from Bergland's farm he would be paid the value that had been taken from him.

Now the Solicitor wants to keep the federal cake and eat it too. He wants federal reserved water rights for reservations, and federal non-reserved appropriations for non-reserved lands. The Solicitor thinks that the federal non-reserved right looks very much like a state water right, with a priority as of the date of actual use, and that there would be no conflict with state systems except in some situations in which a state would not recognize a federal use as beneficial or where instream flows needed for federal purposes were not recognized as an appropriation under state law.

He distinguishes substantive state water law and procedural state water law and says that when the United States makes such an appropria-

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in the few directives to federal agencies to use state water law, is there any general direction to comply with state law. Id. at 569–70. He ignores the fact that a year previously the Supreme Court had said that aside from reserved water the United States should acquire water in the same manner as any other appropriator. See note 72 infra.


68. Trelease, supra note 66, at 147i–47i.

69. Opinion, supra note 47, at 574–76. The Solicitor does not say why this should be so. It might be that if the United States merely seizes water in a manner inconsistent with state law, rather than taking over a state created right which can be measured by existing contours, or clearly establishing a right that would fit in with state right patterns, harm could be done to many other persons. See Trelease, supra note 66, at 227–30. We might be thrown back to the unhappy situation that existed in Dugan v. Rank, 372 U.S. 609 (1963), in which state water law was relegated to the sole function of determining the property rights for which compensation must be paid. But see California v. United States, 438 U.S. 645 (1978).
tion, the federal water right should be protected under state procedures as a matter of policy, though not as a legal requirement.\footnote{Opinion, supra note 47, at 577.}

He says this is the teeth of the Supreme Court’s most recent pronouncement on the subject—Mr. Justice Rehnquist’s statement in United States v. New Mexico, that when the United States has not reserved water, “there arises the . . . inference that Congress intended . . ., that the United States would acquire water in the same manner as any other public or private appropriator.”\footnote{United States v. New Mexico, 438 U.S. 696, 702 (1978).} The Justice thus finds an “implied section 8” that requires the government to proceed in conformity with state law rather than to seize the water as an exercise of raw power.\footnote{Id. at 701–03. See note 18 and accompanying text supra.} The Solicitor labels this “dictum”\footnote{Opinion, supra note 47, at 576.} and prefers to rely on the statement in a prior case dealing with the reserved right: “Federal water rights are not dependent upon state law or state procedures. . . .”\footnote{Id., quoting Cappaert v. United States, 426 U.S. 128, 145 (1976).} This is surely a dictum when applied to non-reserved rights. Yet Justice Rehnquist’s statement seems far more than mere dicta, in that it is aimed directly at the claimed water right that brought the New Mexico case to the Supreme Court. It could very well have been a deliberate attempt by the Justice to settle this phase of federal-state controversy. He says that a careful examination of the purposes for reserved rights is required “because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water.”\footnote{United States v. New Mexico, 438 U.S. 696, 701–02 (1978).} He continues: “Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress’ express deference to state water law in other areas, that the United States intended to reserve the necessary water.”\footnote{Id. at 702.} But then, if that intent cannot be found, “there arises the contrary inference. . . .”\footnote{Id.} He notes that Congress has appropriated funds for the acquisition under state law of water to be used on federal reservations. He notes that the agencies responsible for administering the federal reservations have recognized Congress’ intent to acquire under state law any water not essential to the specific purpose of the reservation. He rendered this opinion on the same day that he delivered the opinion in California v. United States, which held that under the Reclamation Act of 1902 a state may impose any condition on the control, appropriation, use,
or distribution of water in a federal reclamation project which is not inconsistent with clear Congressional directives respecting the project.\textsuperscript{78}

All this is brushed aside as dicta, given no weight or credence, on the basis that it is inconsistent with federal supremacy. The Solicitor does not recognize that Mr. Justice Rehnquist is saying that Congress has exercised its supreme powers by impliedly acceding to state law for the establishment of instream flows. He is too intent on finding a "congressionally authorized program" on which to base federal appropriations of such flows. He finds authority to claim them for the BLM in section 102 of the 1976 Federal Land Policy and Management Act:

(a) The Congress declares that it is the policy of the United States that—

. . . .

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

. . . .

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.\textsuperscript{79}

On March 5, 1980, the United States filed in a Wyoming court a Statement of Claims that asserts the first "federal non-reserved rights." The suit is one brought to settle all water rights to the Big Horn River and its tributaries, all waters in a basin that covers one-fifth of the state.\textsuperscript{80} Over half the land is national forest or federal grazing land, but on the private lands are cities, towns, ranches, irrigated farms, oil fields, coal mines, and uranium mines—a prosperous and growing economy. The document consists of seventeen pages of computer printout, listing on each line a claimed appropriation of what seems to be the base flow of every creek and rivulet in the basin that touches BLM land. The claimed priority date is October 21, 1976, the date of the Federal Land Policy and Management Act. The purpose claimed is to preserve and enhance the fisheries and

\textsuperscript{78} California v. United States, 438 U.S. 645 (1978).
\textsuperscript{80} In re General Adjudication of All Water Rights to Use Water in the Big Horn River System and Other Sources, Civ. No. 4993 (Dist. Ct. Wyo., filed Mar. 5, 1980).
wildlife habitat on the federal land. After a preliminary survey, the State Engineer of Wyoming said if these claims are sustained there will be no water for any new appropriations for any private purpose.81

It seems doubtful that these claims can rest on the quoted section of the Act. That section does not, on its face, authorize anything; it is a declaration of policy. To implement the policy the federal lands must be inventoried and identified,82 and the Secretary of Interior must then develop plans which can be implemented with "management decisions" after public involvement and coordination with state and local plans.83 The plans will then control sales, withdrawals, acquisitions, exchanges, and conveyances of the lands, and reservation and conveyance of minerals.84 None of this has been done. Even if it were there is nothing in the Act to authorize the appropriation of water. There is no section comparable to the express authority given to the Secretary of Agriculture to appropriate water for the national forests.85 There is not a word about water in the sixty-three pages of legislative history, nothing to indicate that Congress intended such sweeping powers with such drastic effects. Most important, another section of the Act seems directly to forbid the exercise of such power. Section 701(g)86 provides:

(g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or
(1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;
(2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control;

Yet the federal government’s Statement of Claims87 asserts that on the day the Act was passed, by virtue of the Act itself, all these instream appropriations sprang into life. Is not the United States claiming that a federal right to water on public lands has been affected, that federal interests or rights have been expanded, and that state jurisdiction has been diminished?

A similar exception might be taken to the Solicitor’s claims to non-reserved rights for public accommodations and recreation on the lands

81. Telephone conversation with George Christopolus, State Engineer of Wyoming (Mar. 27, 1980).
87. See notes 80–81 and accompanying text supra.
administered by the Fish and Wildlife Service. Claims of federal rights for the National Wildlife Refuge System seem out of line, since the Organic Act for that system provides: "Nothing in this act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws." Is not the United States expressly claiming exemption from state water law?

V. THE FUTURE FOR RESERVED AND NON-RESERVED RIGHTS

In the quarter of a century since the United States Supreme Court discovered the federal non-Indian reserved right, a great deal of energy has been devoted to the effort to eliminate this "sword of Damocles" hanging over western water rights. Perhaps not all that effort was tilting at windmills, but the fact remains that we have yet to discover a single case of harm to the holder of a state-created water right resulting from the exercise of a federal reserved right. One of the new developments that prompted this paper confirms the belief that the federal non-Indian reserved right is *de minimis*; the case of *United States v. New Mexico* severely restricts its size to the minimum quantity essential to maintain the reservation.

The two recent claims to new types of reserved rights do not seem to add much of a threat. Quite probably no harm will result from the new reserved right to groundwater for ecosystem maintenance (subirrigation?) discovered by Task Force 5a or from the expanded water hole reservation asserted by the Solicitor. As for the former, only in a very few parks, monuments, and wildlife refuges would maintenance of surface vegetation be so essential that the purpose of the reservation would fail unless it were maintained. As for the waterholes, an unpleasant surprise might be in store for post-1926 appropriators who take from these small sources the surplus over stock water needs when they are challenged as trespassers, yet the likelihood seems small that the courts will uphold the Solicitor’s extravagant claims. The claim of the total available supply seems inconsistent with the *New Mexico* stricture and it is hardly believable that in 1910 Congress set up a system of federal private water rights that supersedes the state system of appropriation in this tiny area.

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89. Statement of Northcutt Ely, on behalf of the American Bar Association, before the National Water Commission (Nov. 6, 1969).
90. See notes 29–34, 71–72 and accompanying text *supra*.
91. See notes 43–46 and accompanying text *supra*.
92. See notes 50–58 and accompanying text *supra*.
93. See note 58 and accompanying text *supra*.
A similar question must be raised as to the practical importance of the federal non-reserved water right. Will it be used by the government to justify large federal projects? I think the answer is yes, in the sense that the government will exercise national powers when it undertakes new basin-wide or interstate projects or uses water incidental to flood control and navigation improvements, as it has in the past.\(^9\) I think the answer is no, if they are reclamation projects subject to the section 8 conformity requirement, unless Congress gives a clear directive inconsistent with the application of state law.\(^9\) Will federal non-reserved rights be used to provide water for giant new steam power facilities, coal slurry pipelines, coal gasification plants, and synthetic fuel plants constructed and operated by the coal, electric, and energy industries but authorized and licensed by federal legislation? The answer is no, if present readings of the mood of Congress are accurate. Alert western congressmen have inserted into pending bills for coal slurry pipelines and priority energy projects ("fast track" legislation) provisions that require the United States or its permitees or licensees to acquire water rights by complying with state laws.\(^9\) President Carter has stated his concurrence with these provisions.\(^9\) Will federal non-reserved water rights be used to supply water for the construction and operation of the MX missile system? Possibly. An Undersecretary of the Air Force stated to a congressional committee that the Air Force would prefer to comply with state water laws; but the White House has not yet worked out a firm administrative position on this sensitive issue.\(^9\) No, said the Congressman from Nevada, legislation authorizing the system will include the similar amendments to protect western interests, including explicit congressional recognition of state rights in water allocation.\(^9\)

\(^9\)See notes 16–18 and accompanying text supra.


\(^9\) On October 10, 1979, at a "working dinner" attended by the President and six Western Senators, the President stated:

I have and will continue to support legislative language to make it clear that federally-supported energy development should be accomplished without preemption or change of state water laws, rights or responsibilities. . . . We must respect the rights and responsibilities of our state governments—and when the issue is priority of water use in a state, the state must and does have the ability to say "no" through existing state water allocation systems.


\(^9\) The Sacramento Bee, Jan. 28, 1980 (AP dispatch).

\(^9\) Id.
VI. INSTREAM FLOWS

What is left, of any importance? The entire effort of the Task Force and the Solicitor seems devoted to the establishment of instream flows on the public lands administered by the Bureau of Land Management. Throughout the Task Force Report the instream flow is identified over and over again as the area of federal need most likely to suffer from state laws that do not recognize the type of water right needed for federal programs. The Solicitor’s major claim is to instream flows to meet the “management objectives” of the 1976 Federal Land Policy and Management Act.

One might think from this federal sense of urgency that as a whole the western states were inimical to instream flows. It is true that the West has had a long struggle making the transition from pure utilitarianism to recognition of these amenities. The history of this movement and the rich variety of state authority available for the purpose are well documented. The precedents go back over half a century, when the Oregon legislature took the first step in 1915 and withdrew from appropriation the streams forming the beautiful waterfalls along the Columbia River gorge. That state has since withdrawn many waters famous for steelhead and salmon fishing. Idaho uses a similar technique; the legislature has authorized the Governor or the State Park Board to appropriate specific beautiful lakes and streams in trust for the public. In Colorado the State Water Conservation Board can appropriate minimum flows “to preserve the natural environment to a reasonable degree,” while in Montana, the state, any political subdivision or agency, or the United States may apply to the Board of Natural Resources for a reservation of water to maintain a minimum flow. In California and Oregon, wild rivers and free flowing rivers have been legislatively established. In California attempts by the state fish and game officials and a sportsmen’s organization to appropriate instream water for fishing have been blocked by the

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100. TASK FORCE REPORT, supra note 28, at 13-16, 39, 44, 48, 73-74.
101. Opinion, supra note 47, at 615. See notes 79-86 and accompanying text supra.
103. OR. REV. STAT. § 538.200 (1979).
courts for lack of diversion, but the Water Resources Control Board is studying regulations that could limit or prohibit further diversion permits on certain streams. In Washington, one instream appropriation by a private person has been allowed, and minimum flows can be set by administrative agencies. In California and Alaska every permit application is reviewed by fish and game officials. Not every state has such laws. In some Rocky Mountain States, where the streams are fully or over appropriated and there is little activity in the granting of new permits, no action has been taken. In both Wyoming and Alaska bills to establish procedures for obtaining minimum flows have been rejected by the legislatures, but even this represents a conscious choice by the policy-making body of the state. One reason for lack of interest in the Wyoming legislation was that early downstream priorities guarantee upstream instream flows; prior rights on the prairies insure that water will flow in the mountain canyons. And in all of these states the water officials can protect an instream flow by denying or conditioning a permit in the name of the public interest.

These decisions and processes are planning tools, the devices used by states to control and manage their future. A state may plan for economic growth and development, and it may plan for outdoor enjoyment and recreation. It can do both, since prosperity and progress demand recreation and a pleasing environment. Some uses of water are private and create wealth, while others are public and produce other satisfactions. The proprietary uses are usually for irrigation, municipal, manufacturing, food processing, and power production purposes, although resorts may cater to vacationers and sportsmen. The public uses are primarily for recreation, scenic, boating, fishing, swimming, hiking, fish propagation, wildlife habitat, and environmental and ecological values. Instream flows mean homes for trout and salmon, a delight to the eye, sport for the fisherman. They may also mean locked-up streams—no water for increased irrigation and food production, for industry, jobs, or city growth. The question is, who decides the mix?

111. E.g., WASH. REV. CODE § 90.22.010 (1979).
112. ALASKA STAT. § 46.15.080 (1977); CAL. WATER CODE § 1257 (West 1971).
All of the devices for reserving streams, establishing free flowing rivers, controlling appropriations, appropriating instream flows, setting minimum flows—and even the lack of any of these—are choices made by legislatures, officials, and agencies of the states. In each state these decisions, processes, and results represent a balance between public and private interests, between the wealth-producing and the amenity-preserving pressures faced by local politicians.

What Governor Matheson and state water administrators all over the West fear is that in the future these balances will not be tested. The sole question may be: “Will this piece of federal land be benefitted by maintaining a flowing stream?” In large areas of the West there will be no opportunity to balance interests, compare uses, choose between uses, or choose alternative uses. The development of a particular state could be controlled not by what state legislators, officials, and agencies feel is good for the state, but by what federal regional officials think is good for the public land within the state. Where the state has struck a balance it may be upset. If no provision has been made for instream flows because of a desire to use the water for the future growth of cities, food production, or energy production, the waters will nevertheless be withdrawn. Where the state has struck its balance in favor of some instream uses with its program of wild rivers, state-selected recreation sites, and state-set minimum flows, it may find that balance upset by a large federal program added on top of the state program, going far beyond the line the state authorities have drawn.

VII. CONCLUSION

The Task Force and the Solicitor argue that if the federal agencies must follow state law, the application of federal law will not be uniform throughout the states, and the effect of federal programs will differ from state to state. This is anathema to the Task Force. Its report asserts a “national interest in management of federal lands which cannot be limited by state lines.” The report points out that Congress has designated purposes as diverse as protecting fish and wildlife habitat, safeguarding lands through watershed protection, producing food and fiber for the nation’s needs, meeting national energy goals, providing for the national demand for outdoor recreation, and preserving ecosystems in their natural condition. Yet even if these are national purposes, quite obviously there cannot be national uniformity in their implementation. The same measures

115. TASK FORCE REPORT, supra note 28, at 13.
116. Id.
would not be taken in Arizona as in Alaska. We are back to the same question: "Since there will inevitably be differences, who will decide the proper local use of water?"

At least for the Forest Service these differences are to be resolved according to the different state laws. The Supreme Court said in United States v. New Mexico\(^{117}\) that, in establishing the national forests, Congress intended that for certain purposes the Forest Service should have reserved rights, but for other purposes it must look to state law. Congress' intention was to allow instream flows in the forests to the extent that state law allows them. Although the Solicitor thinks Mr. Justice Rehnquist's statement was dictum, he said very clearly that when the Forest Service wants an instream flow, Congress intended that the United States would acquire the water right in the same manner as any other public or private appropriator—according to state law.\(^{118}\) This appears to be a deliberate choice between nationwide uniformity and intrastate conformity.

In California v. United States,\(^{119}\) the Court emphasizes the physical and climatic differences between the western states as justifications for section 8 of the Reclamation Act, which mandates that state law shall govern reclamation projects for the production of food and fiber. Why should not the same be true of instream flows? Considering that Mr. Justice Rehnquist handed down California v. United States, and United States v. New Mexico on the same day, and that in New Mexico he cited California, it seems reasonable to believe that his justification for state-to-state variation of federal reclamation projects carried over to justify his quite specific ruling that national forests' claims to instream flows should be governed by state law. Is there any reason to believe that the Court will not apply this same treatment to BLM lands? Since the Solicitor does not admit the possibility, he gives no argument against it. Since my sympathies are obviously elsewhere, I find it difficult to think of any.

I think it very likely that the federal non-reserved right to appropriate instream flows on the public domain without regard to state law will have a short life. But if I am wrong on the law of federalism and the Solicitor's arguments carry the day in court, other voices might carry the day in Congress. If federal uniformity means that claims such as those filed in the Big Horn Basin of Wyoming\(^{120}\) will blanket the western public lands, Governor Matheson will surely raise his voice, and he will be leader of a chorus. Although a generation of "Barrett bills" to abolish reserved

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118. See notes 72–78 and accompanying text supra.
120. See note 80 and accompanying text supra.
rights failed in Congress, a bill to restrict non-reserved rights might well fare better. Congress is alert to the problem, as the slurry pipeline and energy mobilization bills demonstrate. We in the West no longer fear that "the Feds" will take Bergland's water from him and set him to selling apples in the street. But we know that the federal government has the power to override state laws, because we have seen it in air and water pollution control. If Congress decides this country needs the MX missile and authorizes its construction in Utah, Governor Matheson and the Utah State Engineer know that they could not (and of course they would not try to) block it by denying the water to the federal government because they wanted the water to be used for other purposes. The national security has supremacy over the interests of a single state.

But if there is real ground for Governor Matheson and the rest of us to fear that "the Feds" will take our future from us and override our plans and our decisions in the name of single-purpose management of the federal lands, I believe Congress would be willing to say that federal supremacy over desert and tundra, barren mountain and sagebrush grassland, does not require federal domination of water to the exclusion of state desires for multiple-purpose development. The time may well be ripe for the enactment of a universal "section 8" calling for conformity to state law whenever the government, as a land manager, is in competition with other land and property managers.

122. See note 96 supra.
124. A commendable new approach to such legislation is being drafted by Charles B. Roe, Jr., Senior Assistant Attorney General for the State of Washington, and Wilbur Hallauer, Director, State of Washington Department of Ecology. The unpublished draft bill in part calls for (1) quantification of all reserved rights, (2) termination of unexercised non-Indian reserved rights, (3) a federal water project fund to provide water to Indian reservations. Both the National Association of Attorneys General and the Conference of Western Attorneys General have endorsed the concepts of the bill in principle.