Application of Park City Principles to Federal-State Conflicts

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The Park City Principles: A New Paradigm for Managing Western Water

FOREWORD

*Tom Bahr**

In May 1991, the Western Governors' Association (WGA) and Western States Water Council (WSWC) organized the first in a series of three workshops, held in Park City, Utah, to address changing needs in water management in the West. Attendees included a broad, representative mix of water managers (federal, state, Indian, local and private), water interest groups, and academics. The outcome of this effort was agreement on a set of six principles which should be considered in western water resources management and policy development. These have come to be known as the "Park City Principles" among the water resources community. These principles and the process leading to their development is the subject of the first paper in this series.

Following the three Park City workshops, the WGA at their June 23, 1992 conference passed a resolution endorsing the Park City Principles, and issued a document entitled *Pioneering New Solutions: Directing our Destiny*. This report contained several recommendations, one of

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which asked cooperation with the university-based water research institutes to analyze federal statutes and clarify public interest requirements as they related to the Park City Principles.

The university-based water research institutes were authorized by Congress under the Water Resources Research Act of 1964 and comprise a nationwide network of institutes in each state, usually located at the land grant institution. Seven western institutes from the states of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming formed a consortium in the early 1970s to work on water resources problems of the Colorado River/Great Basin region and other areas of the west. This group, named the Powell Consortium, has an important research focus: to analyze water law and policy as vehicles for finding creative solutions to water planning and management in the region.

The Powell Consortium, as a participant in the Park City workshops, followed up on the WGA recommendation and began further discussions with staff of the WGA and WSWC to plan a study to examine federal statutes and their relationship to the Park City Principles. The project, titled the "Park City Federal Water Law Project," began in the fall of 1992 and was designed to prepare concise overviews of selected federal water policies and display their impact on the ability of states to manage and resolve conflicts by and between themselves.

The Powell Consortium project examined selected federal statutes, regulations and court decisions that impact the ability of non-federal entities (state and local government, interstate organizations, etc.) to manage water resources and resolve water conflicts involving competing interests. During the Park City workshops some participants observed that solutions to water conflicts which might make sense at the local, state, or regional level sometimes conflict with federal policy. Identifying these conflicts was an important task for the project. The project was not designed as a comprehensive analysis of all relevant water programs, but rather as a diverse sampling which might produce provocative talking points for focusing future discussion and debate in a workshop setting similar to those held in Park City.

The Powell Consortium selected a group of five legal scholars to prepare separate "White Papers" examining the following: 1) interstate issues; 2) water supply issues; 3) water quality; 4) hydropower; and 5) species protection. The study team included: Charles DuMars, University of New Mexico; Brian Gray, University of California; Lawrence MacDonnell, University of Colorado; George William Sherk, former Justice Department trial lawyer; and Mark Squillace, University of Wyoming. Frank Gregg of the University of Arizona provided valuable assis-

tance in the design of the overall study. Funding for the Powell Consortium "Park City Water Law Project" was provided by member institutes of the Consortium.

The five papers were presented by their authors at a WGA-sponsored workshop held in Newport Beach, California on February 18 and 19, 1993. Chuck DuMars presented three semi-hypothetical scenarios concerning interstate allocation of water specifically highlighting how present conflict resolution stacks up against the Park City Principles. Brian Gray put forth a provocative case study on the implications of transferring the Bureau of Reclamation's Central Valley Project to the State of California. Larry MacDonnell discussed the Clean Water Act and suggested ways for states to pursue their own objectives without the need to change federal law. George Sherk discussed conflicts between states and the Federal Energy Regulatory Commission. Finally, Mark Squillace covered the Endangered Species Act and suggested areas where states might become more involved. The papers and presentations sparked lively discussion and several participants were gratified to see the Park City Principles moving from "motherhood and apple pie" statements to something that could find application to the real world. This series includes four of the papers, updated to reflect developments in law and policy since the presentations.

These articles and the issues that they address are perhaps even more relevant today than when originally developed and discussed in 1993. Of course, recognizing the value of the Park City Principles to water resource management does not assure that these principles will be honored on the ground. But it is a necessary precondition. Recently, the Western Water Policy Review Advisory Commission began an analysis of federal water policy in the West, and this should offer an important opportunity for carrying the Park City Principles to a logical next step—the development of specific regulatory and legislative proposals that reflect those principles.

As the debate over the devolution of authority and responsibility to states continues, the Park City Principles offer a solid base upon which new approaches can be built. We hope that they help lead to constructive solutions to western water policy problems.

96-03

Application of Park City Principles To Federal-State Conflicts

Charles T. DuMars[*]

INTRODUCTION

This article applies the Park City Principles to typical water management institutions which have evolved to address three federal/state areas of conflict arising from the United States Constitution. The first federalism conflict is between states over aliquot shares of common river systems. It is based upon the principle of state sovereignty under the Tenth Amendment. A state has the right to control water resources passing within its boundaries.[1] As an aid to peaceful resolution of interstate disputes over resources, including water, the Compact Clause[2] of the United States Constitution permits states, as sovereigns, to enter into interstate compacts. Such compacts, when approved by Congress, are federal law. More than thirty interstate compacts currently exist.[3] The majority of these are governed by compact commissions. Compact commissions are composed of designated representatives from the states and occasionally contain a representative from the federal government. Interstate compacts and the disputes arising under them are the subject of the first institutional inquiry.

The second federalism principle is established by the Commerce Clause[4] of the Constitution. This principle addresses the balance of federal and state regulatory power when water resources are allocated as market or quasi-market commodities. The Supreme Court has held that if water is a freely-traded commodity within the boundaries of a state, the state cannot close that market to out-of-state bidders who choose to purchase

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1. For an excellent discussion of the principles of federalism engendered by the Tenth Amendment, see *National League of Cities v. Usery*, 426 U.S. 833 (1976).

2. The Compact Clause provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ." U.S. CONST. art. I, § 10, cl. 3.

3. *See, e.g.*, the Upper Colorado River Basin Compact of 1948, ARIZ. REV. STAT. ANN. § 45-1321 (1987); COLO. REV. STAT. §§ 37-62-101 to -106 (1990); N.M. STAT. ANN. §§ 72-15-26 to -28 (1985); UTAH CODE ANN. §§ 41-12-401 to -402 (1977) (all approved by Congress in the Act of Apr. 6, 1949, ch. 48, 63 Stat. 31) [hereinafter Upper Colorado River Basin Compact].

4. The Commerce Clause provides, "The Congress shall have the Power . . . to regulate Commerce . . . among the several states . . . ." U.S. CONST. art. I, § 8, cl. 3. In the context of water disputes it was definitively interpreted in Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982).

that commodity and transport it out of state.[5] While a state may apply even-handed rules respecting water conservation and public welfare, these rules must be applied to out-of-state and in-state users equally. The interest of an unrestrained national market for resources has been held to outweigh a state's parochial economic interests in preserving the supplies for its citizens.[6] The failure of litigation at local levels over Commerce Clause issues, at least in some instances, has given rise to interstate institutions for allocating the water among states. This article explores the function of a joint water commission, formed as an alternative to Commerce Clause litigation, that has authority over the groundwater within the lower Rio Grande aquifers in New Mexico.

The third issue examined involves litigation over federal Indian reserved water rights. The principle is simply stated but complex in its application: The United States, as sovereign, is a trustee for the Native American tribes and has a duty to ensure the tribes have sufficient water resources to fulfill the purposes of the reservations on which they reside.[7] Likewise, the tribes, as sovereigns, have a duty to their members to protect and preserve the natural resources of the tribes. This duty is most often manifested by the tribe's responsibility to claim for its people the full use of the waters touching and concerning the tribal lands under the *Winters* doctrine.[8] These tribal and federal duties often directly confront the state's obligation to maximize the water rights not only for the tribal members, but also for the non-Native Americans residing within the state. The institution most frequently employed for resolving these conflicts is a state or federal court, and generally a special master is appointed by the court to administer a water rights adjudication suit.[9]

In this discussion paper, all of these issues are addressed by first stating the respective Park City Principle, providing a hypothetical typical of the circumstances where conflicts may arise, and then analyzing the institution and its response in terms of the Park City Principles.

ISSUE I. THE INTERSTATE COMPACT COMMISSION

A. *Constitutionally Mandated Federal Principle*

Because of the nature of our federal system, and the fact that numerous streams cross boundaries between the states, it is preferable that states

5. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982).
6. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
7. *See* Winters v. United States, 207 U.S. 564 (1908).
8. *Id.*
9. *See* Arizona v. California, 373 U.S. 546 (1963).

enter into binding perpetual interstate compacts and form compact commissions to address the issues that arise over the use of the common river resources.

Necessity and political compromise have created these congressionally approved charters. However, mistrust, inadequate hydrologic knowledge at their inception and increased water demand have placed these compacts, and the commissions that enforce them, under a great deal of pressure for institutional change.[10]

B. Hypothetical

The states of Utopia and Forlornia share a common boundary. Utopia bounds Forlornia on the north. The Seco River starts high in the mountains in the north of Utopia and bisects the state on its way south. In the State of Forlornia, the river continues in a southerly direction but eventually disappears before it reaches Forlornia's southern boundary, having been used up in agriculture.

A dispute arose in the mid-1930s when the farmers in upper Utopia began to appropriate a great deal of water for farming use, thus diminishing the amount arriving at the border of Forlornia. Utopia also had plans for some substantial federal projects to fully put the water to beneficial use. Forlornia approached Utopia and proposed that the states discuss the issue. Utopia had no interest in working with Forlornia because Utopia was upstream. However, Utopia needed federal dollars to build its federal projects.

The Forlornia senators were successful in stopping the funding of any projects in Utopia, so the discussion began. The idea was to draft an interstate compact between the parties and to form a commission. Both states were very mistrustful. They would not have talked at all, except for the fact that a federal agency, which had a great deal of interest in building dams in the area, promised them each a reservoir and irrigation project on the Seco River if, and only if, they arrived at an interstate compact.

The agreement was made that they would draft a compact which stated that Utopia would not deplete, by man's activities, the flow of the river below what was flowing at the border as of the date of the compact. They agreed further that they would form a compact commission composed of one Utopian representative, one Forlornian representative and

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10. The litigation over interpretation of compacts is legion. *See, e.g.*, Texas v. New Mexico, 462 U.S. 554 (1983); Oklahoma v. New Mexico, 501 U.S. 221 (1991).

one federal representative, but the federal representative could not vote. They agreed that each state would hire its own staff and that the compact commissioner had to be an engineer. They agreed to meet on a quarterly basis. This compact divided the river by putting a ceiling on the State of Utopia's new diversions, thus protecting existing uses and providing a mechanism to carry out the mandate of the compact.

In the first twenty-five years of its operation there was little population growth in Forlornia. The commission met on a quarterly basis, but neither side would agree as to the methodology for calculating the flow of the river. The commission could not agree as to what "to not deplete the river by man's activities" meant, nor could they agree as to what degree the compact applied to stream-related groundwater, or whether credits should be given for phreatophytes that were removed in Utopia. The commission could not agree as to what to do when underdeliveries occurred. The compact contained no provisions for debits and credits, and it did not mention water quality. Initially, there was no need to reach agreement on these issues.

The State of Utopia was of the view that Forlornia should be perfectly happy with irrigation return flows so long as the quantity reflected the amount under similar conditions of use in the upstream state as of the date of the compact.

Since the compact, a number of things have happened. Farmers have shifted to groundwater use in Utopia. The commission now knows that the year in which the compact was drafted turned out to be an exceptionally wet year with a great deal of flood flows, making it the worst possible year to determine compact deliveries. In addition, the economies of the states through which the river flows are diverse, such that water is much more valuable in one state than another.

When, in Forlornia's view, Utopia was not delivering enough water under the compact, Forlornia went to the United States Supreme Court seeking to force Utopia to comply with the compact. As it turns out, Utopia was in fact underdelivering because of groundwater pumping by farmers. Groundwater users did not know they were violating the compact. Utopia's choices were either to force the farmers to cut back pumping and lose their capital investment or to use state funds to buy and retire rights from fertile farmland in Utopia to make water available to Forlornia for use on much less fertile land. Once water is delivered to Forlornia the new water will be stored in a reservoir with a very high evaporation rate, and en route to the reservoir in Forlornia, saline encroachment makes the use of water in Forlornia much less efficient from an agricultural perspective than if it were used in Utopia.

Also, a recently discovered endangered species in Utopia desperately needs wetlands to survive. The wetlands are now covered by willows, salt cedars and cottonwoods, all of which make delivery of the amount under the compact virtually impossible.[11] The only solution to all of this has been a suit in the United States Supreme Court.

C. *Application of the Park City Principles*

1. Recognize Diverse Interests

The first principle holds that in developing and operating an institution for water management there should be meaningful legal and administrative recognition of diverse interests in water resource values. The principle is particularly relevant in this case where there are environmental issues related to wetlands and endangered species and where economic interests are receiving secondary benefits from economic development involving water resources within each state. Further, the farmers and other water users have a direct concern for their own capital investments and certainly do not want to be undercut by an agreement that failed to apprise them of the long term future for their investments in water infrastructure. Unfortunately, interstate compacts rarely recognize diverse interests, in part, because they are limited by the parties along the river managing the river such as state engineers of the states. The governments of the two states also have an interest and participate through their negotiators, but negotiator selection is not necessarily based upon the probability that the negotiator will represent a broad spectrum of interests. There is also an occasional federal agency that has an interest and is represented, but often its mission is limited to its special federal authorizing legislation. There is no mechanism for integrating these interests into the existing compacts, and the commissions do not have the staff or capacity to integrate these concerns.[12]

2. Problemshed Approach

Interstate compacts often operate basin-wide and they are designed to regulate water quantity throughout the basin at the macro level. There is

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11. This hypothetical is modeled after the Pecos River Compact, 63 Stat. 159 (1949), and the litigation surrounding the Compact in Texas v. New Mexico, 462 U.S. 554 (1983).

12. In more recent decisions, the breadth of issues that can be raised in decisions regarding conflicts between two states under the equitable apportionment doctrine has been expanded to include water conservation. *See* Colorado v. New Mexico, 467 U.S. 310 (1984). There is no reason why in this context environmental issues might also be raised to some degree. However, the court has less discretion in a compact case where the compact expressly does not include these other issues.

often, however, a lack of clarity as to the connection to groundwater withdrawals or as to the nature of the delivery obligation. This is generally a result of the inability to reach an accord on the difficult political issues when the compact was drafted.[13] Furthermore, as to water quality and non-consumptive uses, the compacts are almost always silent. Thus, they approach only one part of the problemshed—water quantity—and even in this area their language is often so broad as to leave room for final definition by the courts. They do not address the ecological issues presented by compliance with the compact, nor do they address the economic consequences of decisions made under the compact.

3. Flexible, Predictable, Adaptable

The compacts themselves are generally designed to be inflexible. This inflexibility, in theory, allows certainty as to a fixed amount of water for the participating states so that economic development can proceed as the water is needed. The expected predictability, however, does not always follow. Often the compacts reflect political compromises that intentionally left the difficult issues for future legal decision, or were based upon inaccurate views as to the quantity of water available and the hydromorphology of the river basin itself.[14] Finally, from a structural perspective, they are not adaptable as to form or content. Compacts are congressional enactments that can only be changed by new negotiations and new legislation. A reopening of negotiations is unlikely unless some external motivation promotes it, such as the carrot of another water project, the possibility of a fine for violating some federal policy, or a Supreme Court decision ordering compliance by one of the parties.

4. Decentralize to the States

The compacts are decentralized to the states. However, in some ways this is an illusion, because there is no dispute-resolution mechanism and the language of a compact is fixed by an act of Congress. Thus, while each state may arrive at its own interpretation of the compact, the

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13. For example, even though the Pecos River contains marshes and wildlife areas and passes through a municipality which relies on its scenic beauty as a part of the town center, and there are endangered species involved, the Pecos River Compact makes no mention of any issues other than water quantity for the irrigation projects served North and South of the border. Pecos River Compact, 63 Stat. 159 (1949).

14. For example, Article III of the Colorado River Compact obligates the upper basin states to share a delivery obligation to Mexico with the lower basin, but does not state where the upper basin water is to be delivered at the border with Mexico or at a midway delivery point halfway up the river. 42 Stat. 171 (1922). The text of the Compact appears in 70 CONG. REC. 324 (1928).

only entity with the power to make any binding decision is the United States Supreme Court in exercise of its original jurisdiction.[15] In some senses, the power of enforcement is in fact not decentralized to the states, but is vested exclusively in the United States Supreme Court.

5. Negotiation and Market-Like Approach

Negotiation between states as to some issues regarding an existing compact is a possibility. However, the negotiation leverage is unclear because the language of the compact is set and the only method for achieving change without negotiation is a Supreme Court decision. Also, while persons living within the basin may be interested in negotiation, the state signatories to the compact may have different interests. For example, the governor of a large state may wish to trade off compact compliance or rights under the compact for other political issues he views as more important.[16] The feasibility of a market-like approach exists insofar as a state may buy and retire water rights to meet its demands under the compact. But an interstate market for compacted water is problematic, at best, since the right to ensure compacted water is used exclusively within a state belongs to the state under the compact, not to any particular individual. A private holder of water subject to an interstate compact may desire to transfer his private water right into the interstate market, but compacts give veto power to the state with respect to that option.[17]

6. Joint Policy Participation

The federal government's role in a compact varies depending upon the federal interests affected. In general, however, it is on the sidelines, providing data and not usurping state choices except under the color of some other congressional mandate such as the Clean Water Act[18] or the Endangered Species Act.[19] In addition, some compacts call for a voting

15. Article III of the United States Constitution restricts legal actions between states to the United States Supreme Court. It could be no other way, since a court in either state would obviously not be a neutral forum. U.S. CONST. art. III, § 2.

16. For example, assume the water delivered under the Pecos River Compact arrives at an area that does not generate a sufficient amount of the GDP of Texas in comparison to Houston, Dallas and Austin. In that case, the interests of the State as a whole may differ widely from those of the local delivery point of the water under the compact.

17. This is true because the Supremacy Clause of the United States Constitution preempts local laws with respect to water allocation. U.S. CONST. art. VI, § 2. *See* Arizona v. California, 373 U.S. 546 (1963).

18. 33 U.S.C. §§ 1251-1387 (1988).

19. 16 U.S.C. §§ 1531-1544 (1988).

federal member.[20] The federal government role traditionally has been that of a referee and not a player, unless and until a distinct federal interest is affected by a state-driven compact decision.

ISSUE II. THE COMMERCE CLAUSE, INTRASTATE WATER MARKETS AND THE JOINT COMMISSION

A. Constitutionally Mandated Federal Principle

Water is an article of commerce in the United States. No state can hoard its groundwater resources from another state under the ruse of water conservation when it is in fact engaging in economic protectionism. Any state that passes a law that hoards its water resources with the goal of protecting its own economic circumstance at the expense of a sister state will have that law struck down as violating the Commerce Clause of the United States Constitution.[21] A state attempting to hoard water resources faces a real possibility of losing in court. Additionally, litigation is likely to be ineffective and expensive for the state seeking to import water. As a result, in at least in one instance, a joint commission has been created to solve this fundamental problem of federalism.[22]

B. Hypothetical

The State of Nordica lies just north of the State of Hueco.[23] In the State of Nordica, a large groundwater aquifer is hydrologically connected to the Rio Salado. The Rio Salado runs southward from Nordica into Hueco, bisecting the aquifer. The aquifer does not extend into Hueco. While they are hydrologically connected, the river itself is separated from the large aquifer by a layer of barely permeable clay at a depth of about two hundred feet. Thus, the aquifer is an excellent source of domestic water.

The town of Vado in the State of Hueco is only about thirty miles from the aquifer in Nordica. Vado is relying on a confined groundwater aquifer in Vado that has a useful life of only about thirty more

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20. *See* Upper Colorado River Basin Compact, *supra* note 3.

21. *See, e.g.*, Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

22. A New Mexico/Texas water commission grew out of the interstate litigation over New Mexico's groundwater. When the matter was settled on appeal, a product of the settlement was an agreement to create the commission. *See* City of El Paso v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).

23. This hypothetical is taken from the facts in the case of City of El Paso v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).

years. Fortunately, the Rio Salado passes through Vado, flowing from north to south. Unfortunately, much of its water is used up by irrigating farmers in both Nordica and Hueco who are part of an interstate irrigation project that straddles the border along the Rio Salado. There is a Nordica Irrigation District in Nordica and a Hueco Irrigation District in Hueco. Also, domestic users upstream live in Nordica in municipalities along the Rio Salado.

In summary, Vado would like to get access to the aquifer in Nordica and move water across the state line to its domestic customers. The Nordica Irrigation District does not want to see this happen, nor do the municipal users in Nordica, nor does the State of Nordica. Vado filed suit to get the water because Nordica won't let it go out of state. But after the expenditure of more than $10 million in experts' and attorneys' fees, without much real success, and a change of heart in the politicians of Vado and of Nordica, the action was settled. The court, as a part of the settlement, appointed a joint settlement commission to attempt to resolve the issues. The parties agreed in the settlement documents to conduct studies and evaluate the possibility of providing surface water from the Rio Salado to Vado, and to evaluate the impact of the Vado wells on the flow of the river in Nordica.

The parties to the settlement agreement are the city of Vado for the Hueco side of the border and, for the Nordica side, the Nordica Irrigation District and a major university that has a sizeable well field. To give symmetry to the commission, representatives from the irrigation district in Hueco have been added as well as representatives of municipal users in the state of Nordica. The parties have met and have begun to evaluate the engineering feasibility of moving water from a surface water source eighty miles up river on the Rio Salado to Vado. If this solution is successful, it would obviate the need for groundwater from Nordica. The parties have already agreed to evaluate whether adjusting storage rules in the upstream reservoir on the Salado could allow year-round deliveries of surface water to Vado.

Unfortunately, like most court-created commissions, there is no independent funding or legislative authorization. Nor does the commission have any direct federal participation in the decision-making process.

As with all compromises, many questions remain unanswered. If the Nordicans have groundwater, it is not clear how much benefit they would receive by providing financial help to Vado to obtain Vado surface water. Other concerns involve the environmental impacts of moving excess water out of the river bed and into a concrete pipe or ditch. Less water in the river might affect the NPDES permits of the municipalities in Nordica if

the river was made dry at their points of discharge because of the use of a pipe or a ditch to deliver water rather than the river bed. While there are concerns, all agree compromise is an improvement over litigation. Thus, this interstate commerce dispute is being mediated through a joint commission.

C. *Application of the Park City Principles*

1. Recognize Diverse Interests

The litigation arising under the Commerce Clause over allocation of groundwater among states often includes diverse interests because in virtually every state, the court is entitled to evaluate the impact of moving water out of state on the "public welfare" of the moved-from state.[24] However, the parties actually carrying the litigation are often limited to the major economic interests. For example, the joint commission discussed in this hypothetical contains only the consumptive water users because they alone had the financial capacity to see the case through. In this sense, while litigation may provide a voice for offering testimony by diverse groups, the focus of the settlement is often much narrower. In the hypothetical, the commission's focus is narrow. However, unlike a compact, it is not constrained by an act of Congress. Thus, as the commission progresses, nothing forecloses other, more broad input should the existing members elect to allow diverse participation.

2. Problemshed Approach

Litigation under the Commerce Clause rarely starts from the proposition that it seeks to implement a problemshed approach to problem-solving. It is generally bottomed on just the opposite principle. One state seeks to deny water to another, usually in the same geographic region or problemshed, but across the state line. The party seeking the water wishes to limit the affected interests in the litigation as much as possible and minimize the opposition. The out-of-state party has no interest whatsoever in the impacts of its water diversions on the place of origin. However, those living in the area do, and those affected can go far beyond those who merely have a consumptive use for the water. Consequently, to bolster their argument that removal of the water harms the public welfare of the region, the traditional diversionary water users will often solicit the help of the non-traditional users, environmental groups and others to stave off the out-of-state demand.

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24. *See e.g.*, N.M. STAT. ANN. § 72-12-7 (Michie 1978).

3. Flexible, Predictable, Adaptable

The litigation leading to a compromise commission strategy for obtaining water across state lines is in no way predictable. The legal principles of the Commerce Clause, while easy to state, do not yield predictable outcomes, and the cost, as noted in the hypothetical, can be extremely high. Out-of-state water transfer issues take on an emotional life of their own and are fought with more vehemence than an analysis of the economic value of the resource would indicate is justified. More importantly, there is no sharing of data, except by the cumbersome and secretive discovery process.[25] The suspicion of opposing experts often lives on far beyond the litigation and continues into the commission phase. Nor is a judicial solution flexible, assuming a win in court. Even if the matter were settled by a court and a legal solution framed, the remedy of injunction is narrow and the court is not inclined to usurp the functions of the State Engineer or become an ombudsman for environmental and social issues. In contrast, the joint commission created in this hypothetical has a great deal of flexibility. It is also adaptable to meet changing hydrologic facts because it was created at the immediate-problem level. The outcomes of its deliberations, although not wholly predictable because they depend upon changes in newly discovered scientific facts, nevertheless are not a complete surprise because the parties are working together and sharing data. Unfortunately, the strength of adaptability is also a weakness because without authorizing legislation funding sources may leverage choices in favor of vested interests. Further, no sense of overall mission is mandated by any document other than the settlement documents themselves.

4. Decentralize to the States

Commerce Clause litigation is decentralized to the states. There is very little federal involvement, although some have suggested introducing legislation at a federal level to overturn the Supreme Court on this issue. This legislation is likely to fail because there are as many importing states as there are exporting states. Federal involvement is not always a good thing. The lack of financial resources is a serious problem because the cost of no federal involvement is no federal agenda and hence no federal dollars.

25. As any litigator knows, the act of taking a person's deposition in a lawsuit is hardly a conversation. It involves the expert saying as little as possible and the lawyer trying to extract as much as possible, usually in a form most damaging to the witness. This hardly leads to open communication.

5. Negotiation and Market-Like Approach

Commerce Clause litigation arises as a direct result of a market-like approach taken by the United States Supreme Court obligating water to flow in an interstate market. However, the vigorous protective litigation by the exporting states shows that they are not in favor of a pure market-like approach at the interstate level. The litigation in the hypothetical has created a negotiation approach which thus far is superior to litigation. The exporting state has a vested interest in helping the importing state solve its problem of water scarcity. In this case, the solution is an attempt to facilitate movement of surface water, already committed to the importing state, in hopes of reducing the demand for exported groundwater.

6. Joint Policy Participation

Initially, Commerce Clause litigation offers virtually no chance for joint policy participation. However, when both sides have acknowledged the inefficiency of litigated solutions, they may turn to joint policy participation to optimize the possibility of making both parties better off. That joint policy participation occurs through the joint commission. While the federal government is not a joint participant in policy, its willingness to fund studies related to water quality, endangered species and other federal interests may give it a role as well.[26]

ISSUE III. THE TRADITIONAL APPROACH TO ADJUDICATION OF THE WATER RIGHTS OF NATIVE AMERICAN TRIBES

A. Constitutionally Mandated Federal Principle

The United States has a duty to protect Native American water rights as trustee for Native Americans because tribes are "domestic dependent nations"[27] and because the Treaty Clause[28] of the United States Constitution, at times, requires it.[29] Likewise, tribal governments have a duty to their people and their culture to protect their natural resources including water.[30]

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26. It is always difficult, however, to integrate a federal agency into an ongoing effort where the original agenda of the effort did not include value offered by the agency. The federal agency will often be accused of trying to take over the process to its own ends, only because its presence was not anticipated at the outset.

27. Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (holding the Supreme Court lacked jurisdiction, while establishing the status of tribes as domestic dependent nations).

28. U.S. CONST. art. VI, cl. 2.

29. *See* U.S. v. Winans, 198 U.S. 371 (1905).

30. *Id.*

B. Hypothetical

The Molino Indian Reservation lies along the Bonito River in a thickly forested area in the mountains in the state of Azuza.[31] The river passes through several towns in route to the sea and generates hydropower in two small dams. The river is used for irrigation farming on a vast alluvial plain and high-value specialty crops are grown in the area.

About five years ago, the State Engineer of Azuza filed suit in state court seeking to adjudicate the rights of all persons using water on the Azuza River, including the Molino Indians. As a result of the suit, the State Engineer began a hydrographic survey of the area to determine water use. He also hired an engineering firm to work with his staff to determine the quantity and quality of water originating on the Molino reservation. The Molino Indians have in turn hired their own hydrologists and engineers to determine these same questions.

For the first three years of the case, the state and the Molinos litigated numerous issues, including whether the action should be in state or federal court, who should pay for service of process, the order in which the action should proceed, whether all counsel for all parties should be present at all depositions, whether all parties should be served all documents, whether environmental groups should be allowed in as parties, and whether either side should be allowed to view the other's expert testimony based upon the "work product" doctrine.

As a result of all of this litigation, the tribal council, which has retained its own legal counsel, has seriously depleted its treasury, and numerous non-Native Americans have been forced to drop out and let their interests be represented by others because of the expense of attorneys fees. A financial settlement for the tribe has been discussed in Congress, but the Office of Management and Budget indicates little money is available, and the tribe wishes to use the water. The non-Native Americans simply want to know what resource is available to them, and the State Engineer's office has since put the hydrographic survey on hold because of the expense of other more pressing litigation elsewhere.

At this point, as part of the litigation, two separate scientific studies of the same basin are going on, the experts are not allowed to talk to each other, and the parties are not allowed to talk to each other on advice of counsel. The special master cannot serve as a mediator because he will be

31. This hypothetical is not taken from any particular case, but the fact pattern is often repeated throughout the western United States.

the initial decision-maker. The case is at a standstill but hangs heavy over everyone's heads.

C. *Application of the Park City Principles*

1. Recognize Diverse Interests

While the typical adjudication suit recognizes the interests of current and potential water consumers, it has virtually no place for non-consumptive users or other affected third parties. If the water users involved have in mind a potential in-stream or wetland use, they may be involved. Thus far, adjudication litigation is simply not designed to provide standing to parties who are affected but do not claim a water right. Those interests are protected, if at all, by the fact that the State Engineer's office is a party to the action. Of course, the typical State Engineer's office has its hands more than full in addressing the pure quantity issues and rarely represents other cultural or environmental values.[32]

2. Problemshed Approach

The adjudication suit is designed, under the McCarren Amendment,[33] to adjudicate entire stream systems. In this sense an adjudication is broad in scope; however, the suit provides no place for the myriad problems that arise involving endangered species or other riparian concerns. Indeed, the adjudication may be so broad from a hydrologic standpoint as to be unwieldy and unworkable because of the number of participants, but so narrow in scope as to avoid central problemshed issues relating to land use, endangered species or protection of the values of traditional peoples.[34]

3. Flexible, Predictable, Adaptable

The adjudication mode is neither flexible, predictable nor adaptable. It is not flexible because of the rigidity of the rules relating to discovery and intervention of parties. It is not predictable because of the host of preliminary

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32. An additional problem is that the length of time it takes to end these adjudications is incredible. For example, the decision in New Mexico v. Aamodt has celebrated its twentieth anniversary and the rights to groundwater have not been evaluated in any substantial way. 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, New Mexico v. United States, 429 U.S. 1121 (1977).

33. This amendment allows these adjudication actions to be filed in state court, and requires that they cover complete stream systems. 66 Stat. 560, 43 U.S.C. § 666 (1982).

34. For a discussion of the inadequacy of the legal system to accommodate concerns other than hydrology, see Charles T. DuMars and Michele Minnis, *New Mexico Water Law: Determining Public Welfare Values in Water Rights Allocation*, 31 ARIZ. L. REV. 817 (1989).

issues that can affect the entire outcome of the case, including findings as to water supply, the connection between groundwater and surface water, and the methodology for quantifying Native American water rights. There is also the inevitable desire to "make new law" by taking the case to the United States Supreme Court to see if the so-called "current" court views the issues in the same way as its predecessors.[35] It is not adaptable because an attorney who feels that any deviation from the traditional legal mode set out in the rules of civil procedure might hurt his clients is free to object and require that the court follow the law to the letter.

4. Decentralize to the States

The issues are not always decentralized to the states since the United States and the tribes themselves have an affirmative duty to protect the interests of the tribes in their own resources. These decisions may be consistent with state interests or they may be in conflict. Irrespective of the reality, they are almost universally viewed as being in conflict. The decisions within the Department of Interior are likely made in Washington, D.C., and the tribal choices are made within tribal self-government.[36] While a state judge may hear the case, and a state will have input at this level, the fundamental policy decisions as to the legal position to take vis-a-vis water rights issues are often made in Washington in the Solicitor's Office.

5. Negotiation and Market-Like Approach

When federal dollars or federal projects are available, negotiation is always a possibility. Negotiation has worked successfully in many cases; however, it remains to be seen exactly how many of these settlements will result in "wet water"[37] or substantial federal dollars in times of economic shortage in Washington. Nevertheless, outside-the-courtroom settlement has been, and will continue to be, the most effective technique for solving problems. Within the litigation itself there is virtually no chance of market solutions. Outside litigation, market-like approaches may be the future if no independent source of federal funds is available to solve problems.

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35. *Id.*

36. In these matters the Department of Interior may have its own legal counsel to enforce its trust responsibility and the tribe may have its own legal counsel to protect its interest as tribe qua tribe. *See* State of New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, New Mexico v. United States, 429 U.S. 1121 (1977).

37. The phrase "wet water" is often utilized in normal conversation to distinguish actual utilization of water on the ground ("wet water") from so-called "paper water rights," meaning a legal right to water but no federal money to put it to beneficial use.

A true "free" market exists where the parties have not been placed in a weakened bargaining position by federal policies. This is plainly not the case for the tribes. It is far from clear that absent financial help, tribes will have the economic leverage to participate on a level playing field with other entities that seek a market transaction. This being the case, litigation alone will not bring about a "market" solution.

6. Joint Policy Participation

Joint policy participation in the adjudication mode is virtually non-existent. Within an adjudication context, not only can the parties not reason together, they cannot even speak. Nor can they share data or expert opinions. Only after the parties to the adjudication have spent a great deal of the money does joint policy participation begin. If the negotiations remain within the adjudication, the issues may turn on solving the immediate problem of quantifying rights, rather than finding long-term planning solutions for the basin as a whole. However, if in the prelitigation stage the federal government, the tribes and the state entities can engage in good faith negotiations, joint policy participation may occur.

CONCLUSION

Interstate compacts and litigation over federal Indian reserved water rights in some instances have served the purposes for which they were designed. However, their historical purposes are narrow. They are ill-suited to solving modern day regional water management problems. A better fit may be joint commissions, such as the New Mexico/Texas water commission, arising out of litigation. However, litigation is not the best method for beginning collaborative efforts. The Park City Principles appear to be best adapted to regional water planning processes that preempt conflict, rather than to conflicts that have already risen to the level of litigation or that have been resolved by a compact addressing only a few of the issues in the dispute.