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The Nature and Extent of Rights in Water in North Dakota

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THE NATURE AND EXTENT OF RIGHTS IN WATER IN NORTH DAKOTA*

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I. INTRODUCTION

Despite years of legislative efforts there has developed no simple, clear answer to the question: "Who owns the water in North Dakota?" From a legal viewpoint it is clearly inaccurate to simply answer: "The public." A variety of ownership and use interests have arisen and can arise in private individuals. Furthermore, North Dakota Indian tribes and the federal government are claiming various rights in waters within the state at the present time. However, no cataloging or extensive analysis of all of these interests has been attempted to date.

Before effective regulation and resource use planning can take place, it is imperative to know who has what rights in the resource and to what extent future rights can arise therein. Certainly, no fully effective management can take place without a clear delineation of what these interests are and under what circumstances they may arise. The recent pressures for energy resource development, including North Dakota's lignite coal, have spurred the need for resource planning. Energy development requires a significant amount of water, and it is necessary to have a comprehensive plan in mind to meet such heavy demands.

This article deals with the entire range of legal problems relating to identification of rights in the water within North Dakota, and its objective is to shed as much light on these rights as is practicable. For that reason, the article is fairly extensive and a table of contents has been prepared to facilitate use of the material. There is, of course, an interrelationship among the delineated categories; they indicate primary focus rather than an absolute segregation. Such categories necessitate some repetition of material, but this has been kept to the absolute minimum.

The article includes an analysis of North Dakota statutes, administrative practices, and judicial decisions. Since North Dakota courts have not had occasion to decide many of the issues dealing with water rights it has been necessary to consult court decisions in other jurisdictions to indicate possible guidelines along which North Dakota law might develop.

II. PRIVATE RIGHTS

The North Dakota Century Code declares that *all* waters in the state save for two exceptions belong to the "public" and are subject to appropriation for beneficial use.[1] The exceptions are (1) diffused surface waters in contributing drainage areas and (2)

1. N.D. CENT. CODE § 61-01-01 (1960).

privately owned waters. Diffused surface waters are waters on the surface that are not the waters of a natural stream, lake, or pond and are such as diffuse themselves over the surface of the ground, following no definite course or channel.[2] These waters are not excepted from public ownership in noncontributing drainage areas, which are defined by statute as those areas that do not contribute natural flowing surface water to a natural stream or watercourse at an average frequence more often than once in three years over the most recent thirty year period.[3] Privately owned waters "would seem to be water which has been physically separated from its natural condition so as to become personal property, i.e., water held in private tanks, basins, or receptacles in which there is no flow or drainage in the natural manner."[4]

From early territorial days it was clear that water rights in North Dakota were governed by common law and riparian doctrine principles.[5] These principles conferred sole ownership of certain groundwaters on surface landowners and equal rights to the use of surface waters and other groundwaters on those persons who owned land that bounded such water. Thus, in order to effectively determine the scope of private interests in North Dakota water, an examination must be made of common law and riparian rights to see whether any still exist, as well as of the appropriation doctrine to determine to what extent private rights may be acquired pursuant to it. Finally, a consideration must be made as to whether water rights can be acquired by prescription.

A. COMMON LAW PRINCIPLES AND RIPARIAN RIGHTS

The common law and riparian rights doctrines in North Dakota date back to territorial days. In 1866 the Territorial Legislature adopted a statute that declared the following:

> The owner of land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream formed by nature over or under the surface may be used by him as long as it remains there; but he may not prevent the natural flow of the stream or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.[6]

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2. Diffused surface waters usually are discussed in the context of drainage laws. This has already been done in North Dakota in Beck & Bohlman, *Drainage Law in North Dakota: An Overview*, 47 N.D.L. REV. 471, 472-79 (1971), and it will not be repeated herein. *See generally*, 5 WATERS AND WATER RIGHTS § 450.5 (R. Clark ed. 1972).

3. N.D. CENT. CODE § 61-01-01(4) (1960).

4. Larson, *A Local View: The Development of Water Rights and Suggested Improvements in the Water Law of North Dakota*, 38 N.D.L. REV. 243, 263 (1962).

5. See text accompanying notes 6 & 7 *infra*.

6. TERR. DAK. CIV. CODE § 256 (1866).

This law came into the North Dakota Code at statehood and remained there until repealed in 1963.[7] It appeared to express the doctrine of absolute ownership of subterranean percolating waters and diffused surface waters. Water running in a definite stream, however, whether over or under the ground, was subject to the doctrine of riparian rights, a usufructuary rather than an absolute ownership concept.

> Riparian rights have been enumerated as follows:
>
> First. The right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water.
>
> Second. The right of access to the water, including a right of way to and from the navigable part.
>
> Third. The right to build a pier or wharf out to navigable water, subject to any regulations of the state.
>
> Fourth. The right to accretions or alluvium.
>
> Fifth. The right to make a reasonable use of the water as it flows past or leaves the land.[8]

It can be seen that a change to the appropriation system would directly affect only the item "fifth" in the above enumeration. Thus while North Dakota may no longer follow the riparian approach to use of water, it does not necessarily follow that the other riparian rights have also disappeared. In fact, we know that "the right to accretions or alluvium" clearly exists in North Dakota.[9] In this article, however, the concern is with the water itself and the use of it.

The substance of the riparian rights doctrine as it related to use of the water was that the riparian landowner had the right to make a reasonable use of waters flowing through, by, or standing on his property so long as his use of the water did not adversely

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7. N.D. SESS. LAWS ch. 419 § 7 (1963). The citation in the current Code prior to repeal was N.D. CENT. CODE § 47-01-13 (1960).

8. Taylor v. Commonwealth, 47 S.E. 875, 880-81 (Va. 1904), *quoting* LEWIS ON EMINENT DOMAIN § 83 (2d ed. 1900). For recent discussions of the nature and extent of riparian rights, see 1 WATERS AND WATER RIGHTS § 16 (R. Clark ed. 1967); Note, *The Riparian Rights Doctrine in South Carolina*, 21 S.C.L. REV. 757 (1969). For cases recognizing a variety of specific uses as being riparian, see People v. Hulbert, 91 N.W. 211 (Mich. 1902) (house and farm purposes); Brummund v. Vogel, 168 N.W.2d 24 (Neb. 1969) (watering of stock); Platt v. Rapid City, 291 N.W. 600 (S.D. 1940) (irrigation); and Petition of Clinton Water Dist., 218 P.2d 309 (Wash. 1950) (boating, bathing, swimming, and fishing). While navigability of a body of water is important in determining the scope of riparian rights, *see* 93 C.J.S., *Waters*, §§ 5-14, problems and definitions concerning navigability were discussed in Beck, *Boundary Litigation and Legislation in North Dakota*, 41 N.D.L. REV. 424, 441-44 (1965), and will not be repeated herein. *See also* Beck, *Governmental Refilling of Lakes and Ponds and the Artificial Maintenance of Water Levels: Must Just Compensation Be Paid to Abutting Landowners?*, 46 TEXAS L. REV. 180 (1967).

9. For an extensive discussion of North Dakota law on this subject, see Beck, *Boundary Litigation and Legislation in North Dakota*, 41 N.D.L. REV. 424, 445-55 (1965) and Beck, *The Wandering Missouri: A Study in Accretion Law*, 43 N.D.L. REV. 429 (1967).

affect the lands of his neighbors. The rule was modified in various ways from jurisdiction to jurisdiction but the essential kernel remained the idea that abutting landowners could use water for their own purposes.

The Code's treatment of water differently depending on whether or not it is running in a definite stream is an approach that has been recognized generally by the courts.[10] "Definite stream" appears to be a reference to the common law test whether the water flows in a defined natural watercourse or not,[11] and the contrast drawn is with diffused surface waters and percolating groundwater on the other hand. In North Dakota a watercourse is defined by statute:

> A watercourse entitled to the protection of the law is constituted if there is sufficient natural and accustomed flow of water to form and maintain a distinct and well defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of permanent character.[12]

Although located in a different title of the code than the repealed riparian rights section, this definition describes "water running in a definite stream" and should have been the applicable definition.[13] Furthermore, the section on public ownership at least in part adopts the "well defined channel" test for distinguishing the two types of surface waters.[14]

In 1881 the Territorial Legislature passed a statute that read in part as follows:

> [A]ny person . . . who may have or hold a title . . . to any mineral or agricultural lands within the limits of this Territory, shall be entitled to the usual enjoyment of the waters of the streams or creeks in said Territory for mining, milling, agricultural or domestic purposes; *Provided,* That the right to such use shall not interfere with any prior right or claim to such waters when the law has been complied with . . .[15]

This statute appears to grant the right to any landowner to use waters of the state as long as he does not interfere with prior rights.

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10. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 12 (U.S. Dept. of Agriculture, 1942).

11. *See id.* at 9.

12. N.D. CENT. CODE § 61-01-06 (1960).

13. *See* Larson, *supra* note 4, at 259-60; Froemke v. Parker, 41 N.D. 408, 171 N.W. 294 (1919).

14. N.D. CENT. CODE § 61-01-01(1) (1960).

15. LAWS OF TERRITORY OF DAKOTA ch. 142 § 1 (1881). This approach was reenforced in N.D. Sess. Laws ch. 173 (1899) which first introduced the concept of filing for water rights.

Thus, acquisition of water rights would be limited no longer to riparian or overlying lands. It seems reasonable to interpret the statute as conferring rights on nonriparian landowners since the statute directly refers to a situation where a landowner has no water on his premises, allowing him a right of way over other lands to divert and conduct water to his lands.[16] Although this statute did not directly refer to riparian rights, the United States Surpeme Court in *Sturr v. Beck*[17] considered it, as well as the 1866 statute, in determining the status of riparian rights in the Dakota Territory. In sustaining the decision of the Territorial Supreme Court and upholding the right of a riparian landowner to enjoin any interference with water riparian to his property by a nonriparian appropriator where the riparian owner's chain of title and possession predated the nonriparian appropriation, the Court referred to the water rights of the riparian homesteader as "vested and accrued."[18] The riparian landowner prevailed in this case even though he had not applied any of the water to beneficial use, the Court basing its decision on the date that the riparian landowner's patent vested as giving priority rather than the date the waters had been put to beneficial use. The Court considered significant the fact that the dispute was between two private parties: "The question is not as to the extent of Smith's interest in the homestead *as against the government*, but whether as against Sturr his lawful occupancy under settlement and entry was not a prior appropriation which Sturr could not displace."[19] The Court used the term "prior appropriation" when in fact there was and had been no appropriation for beneficial use, the sole basis for plaintiff's action being his status as a riparian landowner. Involved also was a federal statute whereunder an original patent would transfer water rights subject only to rights that had previously vested under Territorial law.[20] The Court found the conclusion consistent with "the applicable custom" of the Territory. The case raises a question as to the scope of protection to be afforded riparian rights to use of water. May the Territory or State change to a prior appropriation system and at the same time cut off riparian rights without payment of compensation?

In 1889 North Dakota adopted its Constitution which included the following as section 210: "All flowing streams and natural watercourses shall forever remain the property of the state for mining,

16. *Id.* § 2.
17. 133 U.S. 541 (1890).
18. *Id.* at 552.
19. *Id.* (emphasis added).
20. 16 Stat. 218, 43 U.S.C. 681 (1958). See, discussion at notes 223-25 and accompanying text, *infra.*

irrigating and manufacturing purposes."[21] This provision seeks to maintain permanently at least a limited state ownership theory. What effect, if any, did adoption of this provision have on the riparian rights doctrine? In *Bigelow v. Draper*[22] the Supreme Court of North Dakota had occasion to deal with this issue.

The Court in *Bigelow* affirmed the existence of riparian rights in North Dakota. The Court said that section 210 of the North Dakota Constitution had not abrogated those rights, observing that "the right to reasonable use of the stream [by the riparian owner] was as much his property as the land itself."[23] The Court thought that by virtue of the common law doctrines in force in Dakota Territory at the time of admission to statehood, riparian owners were "vested" with specified property rights in the beds of natural watercourses and in the water itself. These rights were protected by the 14th Amendment of the United States Constitution and accordingly could not be impaired except by due process of law. Such property could not be taken without compensation having been made to the injured parties, and on the facts of *Bigelow* the court required such compensation be made. In referring to the North Dakota Constitution, the Court observed: "It follows that Section 210 of the state constitution would itself be unconstitutional insofar as it attempted to destroy *these vested rights of property.*"[24] The riparian rights that the court dealt with in *Bigelow* included the right to title to the bed of a non-navigable stream and to reasonable use of the water. This right to a reasonable use of the water included the right to have the continued flow of the stream on or by the property. It is not clear from the opinion to what extent, if any, the riparian owner had been using water from the stream. Apparently the Court did not consider that factor significant.

Several subsequent North Dakota cases affirmed various aspects of common law riparian rights doctrine. In 1917 the Supreme Court of North Dakota said that the uses to which a riparian may put the water include manufacturing, agricultural, and similar purposes.[25] The right to have a stream flow "in its natural quantity and purity" is subject to the right of reasonable use by each riparian owner, and reasonableness is a question of fact for the court to decide.[26] In this case the plaintiff riparian owner was in the ice

21. N.D. CONST. art. 17, § 210. Apparently the language is taken from the Desert Land Act of 1877, 19 Stat. 377, ch. 107: "and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

22. 6 N.D. 152, 69 N.W. 570 (1896).

23. *Id.* at 163, 69 N.W. at 573.

24. *Id.* (emphasis added).

25. McDonough v. Russell-Miller Milling Co., 38 N.D. 465, 165 N.W. 504 (1917).

26. *Id.* at 472, 165 N.W. at 505.

business and had been cutting ice from the river and selling it. Defendant riparian owner had a flour mill on the river from which sufficient wastes allegedly were deposited in the river to render the water unusable for ice purposes, thus destroying the plaintiff's business. The suit was an action for damages. While referring to the riparian statute, the Court observed, "The right to the use of the water in its natural flow is not a mere easement or appurtenance, but is a natural right inseparably annexed to the soil itself, which arises immediately with every new division or severance of ownership."[27] The case deals essentially with the relative rights of two riparian owners, and the plaintiff failed in his burden of proof. In 1940 the North Dakota Supreme Court again recognized riparian rights, quoting both of the previous North Dakota cases with approval, and held that riparian rights may be severed from the land by contractual agreement, at least to the extent of possible future claims against the other contracting party, and that such a contract is binding upon subsequent owners.[28]

Thus a riparian right to reasonable use of water has been recognized in North Dakota over a long period as a property right that accompanies transfer of title to the riparian land unless severed therefrom, and regardless of whether or not the water has been used. While the decisions were to this effect in the first two cases, *Sturr* and *Bigelow*, the language in the two later cases reiterates the earlier position. Thus in the early stages of development the North Dakota Supreme Court and the Legislative Assembly entertained the view that the riparian landowner had vested rights in the water that took precedence over the rights of later appropriators and that these rights consituted property. It would seem, too, that little importance was attached to the fact that the rights had never been used; they existed solely by virtue of the riparian status of the particular landowner and "vested" when the riparian status of the land arose.

In 1905, the North Dakota Legislative Assembly passed a statute reinforcing the appropriation doctrine first introduced in 1881.[29] The 1905 legislation was ostensibly for the purpose of aiding irrigation. The essence of the appropriation doctrine is that any person needing water for beneficial use may divert water for such use and will thereby acquire a vested right to continue such use regardless of whether or not such appropriator has riparian rights in the water.

27. *Id.*

28. Johnson v. Armour & Co., 69 N.D. 769, 291 N.W. 113 (1940).

29. N.D. Sess. Laws ch. 34 (1905). This chapter is entitled: "Irrigation Code." A direct predecessor of the 1905 law was the irrigation water rights law of 1901. N.D. Sess. Laws ch. 212 (1901).

Under this type of system, priority in time plus a beneficial use, rather than location of land, gives the better right.

Clearly from 1905, if not from 1881, and until the repeal of the statute which had embodied the riparian rights doctrine, North Dakota recognized both the riparian rights and appropriation doctrines simultaneously. Arguably, when the riparian rights statute was repealed in 1963, the state changed from the combined riparian rights and appropriation doctrines to the appropriation doctrine alone. That it did so for purposes of future acquisition of water rights seems certain. But the effect of the repeal of the riparian rights statute with respect to then existing riparian water rights presents several problems, including some of constitutional magnitude.

The 1905 enactment clearly was more significant for the appropriation system than any previous enactment because of its broad scope. It declared that "all water within the limits of the state from all sources of water supply belong to the public and, except as to navigable waters, are subject to appropriation for beneficial use."[30] It established priority in time of appropriation for beneficial use as the test to determine who had the better right to use water.[31] It declared that application of water to beneficial uses constituted a public purpose so that the power of eminent domain could be used when necessary, and it created administrative machinery to supervise the system.[32] The language of the 1905 Code was consistent with a dual system of water use; it did not state that prior appropriation was the only method. This conclusion seems particularly correct when the primary focus of the 1905 statute is viewed as support for irrigation and the discussion of other uses therein seems to be only incidental to this primary focus. When that statute stated: "Beneficial use shall be the basis, the measure, and the limit of the right to use of water. . .", it undoubtedly meant as to the water appropriated pursuant to the statute for irrigation purposes and not as to any and all purposes.[33] In substance this law continued in force until the mid-1950's. In 1955[34] and 1957[35] amendments to the law enlarged the scope of the 1905 act and made it more specific by a delineation of the types of water that belong to the public and are subject to appropriation.

The 1955 amendment changed the 1905 language to read as follows:

30. N.D. Sess. Laws ch. 34, § 1 (1905).

31. *Id.* § 2.

32. *Id.* §§ 3, 5-65.

33. *Id.* § 2. Not only is the chapter entitled "Irrigation Code," but all specific relevant references to water uses throughout the chapter are to irrigation.

34. N.D. Sess. Laws ch. 345 (1955).

35. N.D. Sess. Laws ch. 372 (1957).

> All waters within the limits of the state from the following sources of water supply, namely:
>
> 1. Waters on the surface of the earth excluding diffused surface waters but including surface waters whether flowing in well defined channels or flowing through lakes, ponds, or marshes which constitute integral parts of a stream system, or waters in lakes; and
>
> 2. Waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground waters;
>
> belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use, shall be acquired pursuant to the provisions of chapter 61-04 of the Revised Code of North Dakota of 1943 and acts amendatory thereof.[36]

The Legislative Assembly also added the following provision to the law:

> The several and reciprocal rights of a riparian owner, other than a municipal corporation, in the waters of the state comprise the ordinary or natural use of water for domestic and stockwatering purposes.[37]

It seems clear that the legislation was intended to affect riparian rights.[38] The first provision stated that the right to use of the public waters was to be pursuant to the specified Code provisions, and by implication, *in no other way*. The second provision then provided a special exception by indicating that riparian rights would continue "for domestic and stockwatering purposes for the general public." Were municipal corporations being treated more or less favorably than the general public? It appears that the 1955 Legislative Assembly said if a vested riparian right has not already been acquired, such a right could be acquired only for domestic and stock watering purposes.

The 1957 amendment changed the first quoted provision of the 1955 law to read as follows:

> All waters within the limits of the state from the following sources of water supply, namely:
>
> 1. Waters on the surface of the earth excluding diffused surface waters but including surface waters whether flowing in well defined channels or flowing through lakes, ponds, or

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36. N.D. Sess. Laws ch. 345 § 1 (1955). The 1905 Act language is quoted in the text at note 30.
37. *Id.* at § 2.
38. *See* Larson, *supra* note 4, at 264-65.

marshes which constitute integral parts of a stream system, or waters in lakes; and

2. Waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground waters; and

3. All residual waters resulting from beneficial use, and all waters artificially drained; and

4. All waters, excluding privately owned waters, in areas determined by the state engineer to be noncontributing drainage areas. A noncontributing drainage area is hereby defined to be any area which does not contribute natural flowing surface water to a natural stream or watercourse at an average frequency oftener than once in three years over the latest thirty year period;

belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use, shall be acquired pursuant to the provisions of chapter 61-04 of the Revised Code of North Dakota of 1943 and acts amendatory thereof.[39]

The second provision of the 1955 amendment quoted above was not repealed until 1963 at the same time that the original 1866 riparian rights statute was repealed.[40] As a result of the 1957 amendment, the only waters specifically exempted from appropriation are (1) certain diffused surface waters and (2) privately owned waters.

Two relevant North Dakota Supreme Court cases have been decided recently. Early in 1963 the Court decided *Volkmann v. City of Crosby*.[41] *Volkmann* involved the right of a landowner to prevent interference with an artesian well in *subterranean percolating groundwaters* underneath his property. The Court recognized the previous North Dakota cases dealing with natural streams, quoted them with approval, and noted the distinction between those cases and the present one with the observation:

> Certain it is that the rights of the landowner provided by this statute[42] with respect to subterranean waters not forming a definite stream, are no less than those which he has in definite streams flowing on the surface that were under consideration in the cases from which we have just quoted.[43]

The Court might well have concluded that his interest would be greater, in other words not just a reasonable use but absolute own-

39. N.D. Sess. Laws ch 372 § 1 (1957).
40. N.D. Sess. Laws ch. 419 § 7 (1963). For the 1955 Amendment language see text at note 37, *supra*. For the 1866 statute see text at note 6, *supra*.
41. 120 N.W.2d 18 (N.D. 1963).
42. N.D. CENT. CODE § 47-01-13 (1960), *repealed*, N.D. Sess. Laws ch. 419 § 7 (1963).
43. Volkmann v. City of Crosby, 120 N.W.2d 18, 22 (N.D. 1963).

ership. However, it chose not to do that: "His property right, however, is not an unlimited one, but is subject to the rule of reasonable use and may be appropriated by him for beneficial use."[44] Cases relied on by the Court indicate that perhaps this reasonable use language is to be interpreted in relation to other landowners overlying the same pool of water so as to constitute a correlative rights doctrine. In *Volkmann*, the defendant, City of Crosby, was not an overlying landowner and did not use the water it withdrew on overlying land. If it had been an overlying landowner, it is doubtful that the Court would have allowed it to use the water off the premises to the detriment of a previous beneficial use by another overlying landowner. In any event, the most that this case can be said to hold is that an appropriation of percolating groundwater by someone who is not an overlying landowner and for use on premises other than overlying land cannot interfere with a previous beneficial use of the ground water by an overlying landowner on his premises. The case suggests that the overlying owner is not entitled to any further protection; he must have a prior beneficial use to have a vested right. But the facts did not call for such a holding.

The nature of the interference should be noted also. What defendant's tapping of the groundwater did was to reduce the water pressure so that plaintiff's artesian well which was adequate before was no longer adequate to satisfy needs. The Court made no determination that defendant's use of the water would leave plaintiff without an adequate supply of groundwater. Plaintiff might well have been able to readily sink a shaft and obtain water. So what the Court appears to be doing is not only protecting plaintiff's supply, but plaintiff's existing access to it as well.

The clear import of the 1963 repeal of the 1866 statute declaring ownership in the overlying landowner of percolating groundwaters and the existence of riparian rights was that from 1963 no further rigarian rights to use of water could be acquired in North Dakota;[45] previously vested riparian rights were not affected. But what was the scope of previously vested riparian rights? Were they, according to *Sturr v. Beck*[46] and *Bigelow v. Draper*,[47] abstract rights to reasonable use of water by anyone who had acquired riparian land or were they only to use such amounts as had been put to actual beneficial use in connection with the riparian land prior to the effective date of the 1963 repeal?

In 1968, in *Baeth v. Hoisveen*,[48] the North Dakota Supreme Court

44. *Id.*
45. N.D. CENT. CODE § 47-01-13 (1960), *repealed* N.D. Sess. Laws ch. 419 § 7 (1963).
46. 133 U.S. 541 (1890) (discussed in text accompanying notes 17-19, *supra*).
47. 6 N.D. 152, 69 N.W. 570 (1896) (discussed in text accompanying notes 22-24, *supra*).
48. 157 N.W.2d 728 (N.D. 1968).

adopted the view that although a riparian owner had rights in the water, these rights are vested only if and when the riparian owner makes actual use of the water for a beneficial purpose and until that time prior appropriators may acquire a better right. It should follow that as of 1963 all riparian rights to use of water that had never been exercised were abolished or were treated as never having existed.

In *Baeth* the plaintiff held title to lands with a continuous chain of title dating back to a patent issued in 1898. In 1961 plaintiff applied for a permit to draw water from a stream that flowed under his property. Because of other pending applications, the State Engineer allowed plaintiff only 20 per cent of the water sought in the permit application. Plaintiff then brought an action pursuant to statute seeking to have additional water rights declared in his favor. In response, the Court outlined the scope of the rights acquired under the statute. The Court said that a landowner acquires a water right in an underground stream "*following* withdrawal and application of said groundwater to a beneficial use."[49] The Court held that the 1866 riparian rights statute merely codified a usufructary right; the Court referred to the 1955 amendment that specified all groundwaters as being within the public domain[50] and said that since the plaintiff had not applied the groundwater to beneficial use before 1955 his riparian right to use of the water had not vested. However, because of that portion of the 1955 amendment recognizing riparian use for domestic and stockwatering purposes, this conclusion of the Court should be read to mean that the right to acquire further riparian rights to use of water ended in 1955 for all except domestic and stockwatering purposes. The right to acquire further riparian rights to use water for domestic and stockwatering purposes ended in 1963 with the repeal of all riparian rights authorization statutes.

The Court in *Baeth* held that there was no unconstitutional deprivation of property despite the language of *Bigelow v. Draper* and other earlier North Dakota cases. The Court neither distinguished nor overruled *Bigelow*, but treated it as follows:

> Notwithstanding what this court said in Bigelow v. Draper . . . and in subsequent supporting decisions which may be construed to the contrary to what is said in the instant case, we hold that there is no deprivation of a constitutional right or rights, and that the action taken by the legislature in enacting Section 61-01-01, N.D.C.C., is within the police power of the state, as a reasonable regulation for the public good.[51]

49. *Id.* at 732 (emphasis added).
50. N.D. Sess. Laws ch. 345 (1955) (discussed in text accompanying note 36, *supra*).
51. Baeth v. Holsveen, 157 N.W.2d 728, 733 (N.D. 1968).

Hopefully the Court is not seeking to distinguish these earlier cases on the basis that they dealt with surface streams whereas *Baeth* deals with an underground stream. The riparian rights should be the same and that would seem to be the intent of the statute repealed in 1963. However, it must be recognized that *Baeth* dealt with an underground stream and that therefore we do not have a holding with reference to a surface stream. It may be that the Court meant only to say that the *Bigelow* and other early language was overly broad and unnecessary.

Regardless, based on the general comments of the Court in *Baeth* to the effect that landowners only acquire "vested" rights in water upon application to beneficial use,[52] it seems likely that the same rule will be applied to riparian rights in surface waters if such litigation is brought before the Court. Finally, since *Volkmann* suggests that ownership rights to percolating subterranean groundwaters are vested only if applied to beneficial use, it may be that the only riparian and common law water rights that will be valid in North Dakota are those rights proven to be based on a beneficial use prior to the enactment of the 1955 statute or repeal in 1963 of the statutes previously discussed.[53]

Constitutional problems are overcome by treating the riparian water uses as inchoate until such time as they are used.[54] The North Dakota statutes do not attempt to abolish all riparian rights. They do only three things: (1) limit the creation of new riparian rights to use of water between 1955 and 1963 to domestic and stockwatering uses; (2) prevent the creation of any new riparian rights to use of water after 1963; and (3) bar the exercise of inchoate or unused riparian rights subsequent to 1955 and 1963, except as noted in (1).

All other riparian rights continue such as to ownership of the bed underlying non-navigable waters, to alluvion formed by accretion and reliction and so on, as well as to the continued use of water that had been applied to beneficial use. The scope of the legislative acts can therefore be seen as police power regulation rather than taking of property.

Assuming then that the only remaining riparian rights to use of water are those that vested by having been put to beneficial use prior to 1955 and 1963 respectively as discussed previously, several problems arise. What if a riparian landowner used the stream to

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52. *Id.*

53. Existing riparian rights are recognized in current North Dakota Century Code provisions. N.D. CENT. CODE §§ 61-02-22, 61-02-45 (1960). However, the scope of these existing riparian rights is not defined by the statutes.

54. This reasoning has been used in other areas of the law such as in restricting or abolishing dower and possibilities of reverter. *See, e.g.*, Opinion of the Justices, 151 N.E.2d 475 (Mass. 1958) (dower); Trustees of Schools of Township No. 1 v. Batdorf, 6 Ill. 2d 486, 130 N.E.2d 111 (1955) (possibility of reverter).

feed cattle from 1943 to 1948, but has not done so since? Does he have a vested riparian right to use the water for feeding cattle at the rate used from 1943 to 1948? Can vested riparian rights be abandoned?[55] The present Code provision on abandonment of water rights after three years of nonuse does not appear intended to apply to riparian rights.[56] It applies to the appropriated rights acquired pursuant to the North Dakota Code. If it is permissible to treat riparian rights to use of water as vesting only when water is applied to beneficial use, it would seem equally permissible to treat them as continuing vested only during the period that they are being applied to beneficial use.

When do riparian rights to use of the water for recreation or aesthetic purposes vest? When has there been beneficial use for these purposes? Are these accepted riparian uses of the water?[57] It is perhaps desirable and likely that these, like navigation, would be held to be public rather than private uses of water, thus not within the scope of riparian rights. It is true that current North Dakota appropriation law recognizes recreation and wildlife purposes as a beneficial use,[58] but that is not necessarily inconsistent with a finding that for riparian purposes they are public and not private uses of water. Such a decision would facilitate the statute's regulatory scheme.

In summary, it is clear that private ownership rights in waters within North Dakota have existed in the past through common law and riparian rights doctrines. The relevant conclusions appear to be as follows:

1. Riparian and overlying landowners had a usufructuary right to a reasonable use of the water in all bodies of water on, under, or flowing past their lands and the use extended to domestic, agricultural, and manufacturing purposes.

2. The usufructuary right did not vest until the water had been put to one of the beneficial uses and then only to the extent of that beneficial use.

3. The ability to create new vested uses ceased in 1955 with reference to all sources of water except that riparian owners could continue creating vested use rights to riparian waters for domestic and stockwatering purposes.

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55. Are they *profits a prendre* and therefore separate from but appendant to the riparian land fee or are they an unseparated integral part of that fee? Hornbook law says that *profits* can be abandoned whereas fee estates cannot be. W. BURBY, REAL PROPERTY 91-92 (3d ed. 1965).

56. N.D. CENT. CODE § 61-04-23 (Supp. 1973). The reference therein is to "appropriations of water" and the context seems to be the appropriation made pursuant to the Code provisions.

57. *Cf.* Cases cited note 8 *supra*. In petition of Clinton Water Dist., 218 P.2d 309, 312 (Wash. 1950), the Court treats "boating, bathing, swimming, and fishing" as riparian uses.

58. N.D. CENT. CODE § 61-01-01.1 (Supp. 1973).

4. The ability to create new riparian vested use rights for domestic and stockwatering purposes ceased in 1963.

5. The persons who acquired such vested use rights prior to 1955 and 1963 respectively still own such rights unless they have been lost through failure to continue the beneficial use.

6. While it might be constitutionally permissible to enact legislation requiring that such riparian use rights be registered within a stated period of time or lost through forfeiture, no such statute presently exists in North Dakota.

Thus, the State of North Dakota when seeking to plan water resource use may not know the extent of such previously vested common law and riparian rights unless it undertakes an independent inventory.

B. RIGHTS OF APPROPRIATORS UNDER THE NORTH DAKOTA STATUTES

The North Dakota Century Code provides:

> All waters within the limits of the State from the following sources . . . belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use shall be acquired pursuant to the provisions of . . . [the . . . Code of North Dakota]. . .[59]

This provision makes it clear that private parties may acquire rights to use of the public waters. Three specific limitations are given: (1) the acquisition must be by appropriation, (2) it must be for beneficial use, and (3) it must be pursuant to the Code provisions. Thus, the rights of private appropriators in the public waters of North Dakota are governed primarily by specific provisions of the North Dakota Century Code.[60] This section of the article discusses the rights or interests in water that can be created through the application and interpretation of the Code provisions. One of the basic principles of the appropriation doctrine incorporated into the Code is that priority in time gives priority in right.[61] Even riparian rights are subject to appropriations which vested prior in time to the riparian rights.[62]

The two principal North Dakota agents or agencies involved in

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59. N.D. CENT. CODE § 61-01-01 (1960).

60. N.D. CENT. CODE chs. 61-01 to 61-04 (1960), *as amended* (Supp. 1973). N.D. CENT. CODE § 61-01-01 (1960) in using the word "shall" implies that rights to use the stated waters cannot be acquired by any other method.

61. N.D. CENT. CODE § 61-01-01.1 (Supp. 1973). For a thorough discussion of the early development of the appropriation doctrine, including the central role of the first in time concept, *see* Hutchins, *Background and Modern Developments in State Water-Rights Law*, in 1 WATERS AND WATER RIGHTS 57, 74-83 (R. Clark ed. 1967).

62. Larson, *supra* note 4, at 251-53.

administering this appropriation system are the State Engineer[63] and the State Water Conservation Commission.[64] The Code provides that for some beneficial uses an application for a permit must be filed with the State Engineer and, if approved, it will result in a conditional and/or perfected water permit;[65] on the other hand, for some beneficial uses an individual simply may proceed to appropriate the water. The Code specifically provides that "neither a conditional nor a perfected water permit shall be required of a landowner or his lessee to appropriate water from any source or any constructed works for domestic and livestock uses."[66] This privilege is qualified in that a permit must be secured before constructing impoundments that can hold more than twelve and one-half (12½) acre feet of water, even though the water might be used solely for livestock or domestic purposes.[67] The exemption or privilege does mean that the primary thrust of the permit system is for irrigation and industry uses.

In planning for water use it makes sense not to be overly concerned with nonconsumptive uses or with consumptive uses that require only a small amount of water, assuming there is a substantial water resource. The more paperwork and processing the regulatory agency needs to do, the more man-hours that have to be expended. However, in some areas of North Dakota water shortages may occur more readily than in others, and it might be desirable in those areas to have more control over small consumptive uses and even nonconsumptive uses of the water.[68] The Code also provides that anyone

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63. N.D. CENT. CODE ch. 61-03 (1960), *as amended* (Supp. 1973).

64. N.D. CENT. CODE ch. 61-02 (1960), *as amended* (Supp. 1973). Several aspects of the work of the State Water Conservation Commission have been explored in a previous article: Bard & Beck, *An Institutional Overview of the North Dakota State Water Conservation Commission: Its Operation and Setting*, 46 N.D.L. REV. 31 (1969).

65. N.D. CENT. CODE ch. 61-04 (1960), *as amended* (Supp. 1973). These procedures were discussed in some detail in Bard & Beck, *supra* note 64, at 39-43, and will not be repeated herein. Furthermore, by saying that a permit is not required for some users, the Code implies its necessity for other ones.

66. N.D. CENT. CODE § 61-01-01.1 (Supp. 1973). Both domestic and livestock uses are defined in the Code: " 'Livestock use' shall mean the use of water for drinking purposes by herds, flocks or bands of domestic animals." N.D. CENT. CODE § 61-01-01.1(2) (Supp. 1973). Since this definition includes only drinking purposes it does not include sanitary purposes. In some livestock operations it may be necessary to use water to flush pens or feeding areas. "Domestic use" shall mean the use of water by an individual or by a family unit, or household, for personal needs and for household purposes, including, but not limited to heating, drinking, washing, sanitary and culinary uses; irrigation of land not exceeding one acre in area for noncommercial gardens, orchard, lawns, trees or shrubbery; and for household pets and domestic animals kept for household sustenance whether the water is supplied by the individual, a municipal government or by a privately owned public utility or other agency." N.D. CENT. CODE § 61-01-01.1(1) (Supp. 1973).

N.D. CENT. CODE § 61-04-02 (Supp. 1973) adds "fish, wildlife and other recreational uses" to those not requiring a permit.

However, as soon as any "constructed works" have been completed for any of the foregoing purposes, the water users must notify the state engineer of the location and acre-feet capacity of such works. *Id.*

67. N.D. CENT. CODE § 61-01-01.1 (Supp. 1973).

68. Water conservation is identified as one of the three reasons for enacting the North

> intending to acquire the right to the beneficial use of any waters, before commencing any construction for such purpose or before taking the same from any constructed works, shall make an application to the state engineer for a water permit unless such construction or taking from such constructed works is for domestic or livestock purposes or for fish, wildlife and other recreational uses. However, immediately upon completing any constructed works for domestic or livestock purposes or for fish, wildlife and other recreational uses the water user shall notify the state engineer of such constructed works, dam or dug-out's location and acre-feet capacity. Regardless of proposed use, however, all water users shall secure a water permit prior to constructing an impoundment capable of retaining more than twelve and one-half acre-feet of water.[69]

So the law seems to do three things. First, the law in general says that a permit is not necessary to use water for domestic or livestock purposes. Second, it says that in general if water is to be used for domestic, livestock, or for fish, wildlife and other recreational uses, it is not necessary to get a permit to construct works, but once there is a "constructed works, dam or dug-out" the State Engineer must be notified of its location and acre-feet capacity. However, the law does not specify any penalty for failing to so notify the State Engineer. Third, any impoundment of more than 12½ acre-feet capacity will require a permit.

If then a permit is required for certain beneficial uses, two important questions arise: (1) What are the prerequisites for obtaining the permit, and (2) Once the permit has been acquired, what is the nature of the use right and of the protection that the permittee will receive for his water use? These two questions will be discussed in that order.

What are the prerequisites for obtaining the permit? The Code specifies the procedural format for filing an application with the State Engineer.[70] Assuming these procedures are followed, is the applicant entitled to a permit? The answer is, not necessarily. On what basis then may the State Engineer deny a permit? First, "If, in the opinion of the state engineer, no unappropriated water is available, he shall reject an application."[71] Second, "He may refuse

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Dakota water law. N.D. CENT. CODE § 61-02-01 (1960). *See also* N.D. CENT. CODE § 61-02-26 (1960).

69. N.D. CENT. CODE § 61-04-02 (Supp. 1973).

70. N.D. CENT. CODE ch. 61-04 (1960), *as amended* (Supp. 1973). *See also* Bard & Beck, *supra* note 64, at 39-43.

71. N.D. CENT. CODE § 61-04-07 (1960). Baeth v. Hoisveen, 157 N.W.2d 728 (N.D. 1968), raises a substantial question whether the State Engineer can continue to approve appropriation requests which may result in the appropriation of all of the water from a given source while there still remains land associated with that water source that has not received a fair share of the water. Must there be "equitable apportionment"? A strong argument can be made from *Baeth* that there must be such apportionment where there are several pending applications from one source.

to consider or approve an application . . . if, in his opinion, the approval thereof would be contrary to the public interest."[72] Apparently "public interest" is a sufficient standard to meet constitutional challenges,[73] but to what does the public interest criteria here relate, to the use of the water resources or to some more general public issues? Suppose, for example, that a private entity discriminates against certain minority groups, could the state engineer deny a water permit on the basis that he objects to this discrimination as being against the public interest? Or must his "public interest" objection be water related? The statute is not clear; arguments can be made either way. Public interest will provide a more substantial standard if it related to the use of water. For example, the State Engineer might decide that when an applicant requests all of the remaining unappropriated water from a particular source and other lands remain to be developed, it would be against the "public interest" to appropriate it all to one applicant.[74] In any event, if the State Engineer denies the application, the applicant may appeal to the district court.[75]

Once the permit has been acquired, what is the nature of the use right and of the protection that the permittee will receive for his water use? Several subsidiary questions arise: (1) How long may the use continue? (2) May the use be transferred to another party? (3) May the use be changed from one purpose to another?

The Code specifically provides that "water rights of whatever character" can be condemned by the State Water Commission.[76] While this clearly includes riparian water rights, it would appear to include appropriated rights as well. If it does include appropriated water rights, it constitutes a recognition by the Legislative Assembly that such use rights can constitute "property," and in all probability the issuance of a perfected water permit establishes a property right. This would be a usufructuary right to the continued use of the water except as qualified by the then existing law or any conditions expressly attached to the permit.

Any analysis of the nature of a permit must begin with an analysis of the permit. The custom has been to grant the right to perpetual use of the water.[77] No express provision of the Code requires

72. *Id.*

73. *See* K. DAVIS, ADMINISTRATIVE LAW 26-30 (3d ed. 1972); New York Central Sec. Corp. v. United States, 287 U.S. 12 (1932).

74. Perhaps this sort of policy view motivated the North Dakota Supreme Court when it criticized the permit allocation system as applied in Baeth v. Hoisveen, 157 N.W.2d 728 (N.D. 1968). *See* discussion *supra* note 71.

75. N.D. CENT. CODE § 61-04-07 (1960).

76. N.D. CENT. CODE § 61-02-22 (1960); N.D. CENT. CODE § 61-02-23 (Supp. 1973). *See also* N.D. CENT. CODE § 61-01-04 (1960); N.D. CENT. CODE § 61-02-40 (1960).

77. In Volkmann v. City of Crosby, 120 N.W.2d 18, 21-22 (N.D. 1963) the Court states that the permit granted was for " 'a perpetual right . . . to the use of ground water.' "

this result. The only basic discussion of the time element in the Code relates to the amount of time a permittee is to have between the receipt of his conditional permit and the time he actually puts the water to beneficial use.[78] Even the issuance of a 10 year permit with an option to renew in the permittee by refiling before expiration of the permit term would be beneficial. The affirmative action required of the permittee would bring him into contact with the State Engineer and would give evidence that the use was active. If no application came forth, the Engineer could investigate and if it showed no oversight on the permittee's part terminate the water right. Also, the State Engineer may attach conditions to a perfected water permit and failure to abide by these conditions could result in a forfeiture of the permit. The Code provides: "The state engineer shall issue the perfected water permit, setting forth the actual capacity of the works *and such limitations upon the water permit as shall be warranted by the condition of the works and to the extent and under the conditions of the actual application of the water to a beneficial use.*"[79] It is perhaps an understatement to say that this language is unclear, but it is the only Code language giving express authority to attach conditions to water permits. In response to the energy crisis and because of the possible environmental damage from strip mining, a variety of conditions have been attached to conditional water permits recently issued to companies that would be heavy consumers of strip-mined coal.[80]

The only specific statutory reason for termination of a water use permit is failure to put the water to beneficial use for three successive years, and even then there will be no forfeiture if cessation was due to unavailability of water, justifiable inability to complete the works, "or other good and sufficient cause."[81] Permits held by a state agency, department, board, commission, or institution can be forfeited only through legislative action.[82] The Code contains provisions relating to notice, hearing, and appeal to the district court in case of such termination.[83]

An argument can be made that the phrase "beneficial use" is

78. N.D. CENT. CODE § 61-04-14 (Supp. 1973).
79. N.D. CENT. CODE § 61-04-09 (Supp. 1973) (emphasis added).
80. Recent conditional permits issued to Minnkota Power Cooperative, Inc., contain several conditions including: "9) The applicant shall require his coal suppliers to accomplish total reclamation of the lands mined or disturbed while furnishing coal for plant operation and shall make water available at a reasonable cost to the coal supplier in the event that the reclamation agency requires the application of supplemental water to aid new plant growth on lands to be reclaimed in the total reclamation process." SWC Water Permit No. 1963. A similar condition was included in SWC Water Permit No. 1964 also issued to Minnkota Power Cooperative, Inc.
81. N.D. CENT. CODE §§ 61-04-23; 61-04-24 (Supp. 1973). *See also*, N.D. CENT. CODE § 61-03-21 (Supp. 1973) for forfeiture of water permit based on failure to maintain and operate adequate water reservoir structures.
82. N.D. CENT. CODE § 61-04-23 (Supp. 1973).
83. N.D. CENT. CODE §§ 61-04-24; 61-04-25 (Supp. 1973).

open to interpretation and that, for example, the use of water for coal gasification is not a beneficial use because the process encourages strip-mining and pollutes the air and water. The Code does assign a key role to this concept: "Beneficial uses shall be the basis, the measure, and the limit of the right to the use of water."[84] However, because of the specified general uses in the Code,[85] it is unlikely that a court would say anything other than that the permittee must be using the water for domestic, livestock, irrigation, industry, fish, wildlife, or other outdoor recreational uses. If the water is being used for one of these purposes, it is a beneficial use of the sort the Code is referring to.

The Code contains only one provision dealing with the transfer of water rights.[86] Under it, several matters are dealt with. First, transfer or assignment of any water permit issued for irrigation purposes may be accomplished only with the approval of the State Engineer. Second, any transfer of title to land carries with it all rights to the use of water appurtenant to that land for irrigation purposes, unless such rights have been severed from the land in accordance with the statute. Third, any water permit, whether for irrigation or not, may be transferred by the owner from one parcel of his land to another parcel with State Engineer appoval. Fourth, and finally, any state agency, department, board, commission or institution that holds a permit may temporarily transfer such permit as approved by the State Water Commission. The varied nature and specificity of these provisions suggest that no other transfers of state water permits may be made.

The Code does not contain any provisions specifically dealing with the question of whether a permit obtained for one use may be changed to another use. One Code section does provide that irrigation water use rights continue appurtenant to the land "unless such rights to use water have been severed for *other beneficial uses* as provided by section 61-04-15."[87] The difficulty with this provision is that except for situations where state agencies are permittees, section 61-04-15 does not say anything about change of use. The earlier analysis relating to transfer of permits suggests that they may not be so changed.

Related to the foregoing questions is another: What if there is insufficient water to meet the needs of all appropriators?[88] Is the

84. N.D. CENT. CODE § 61-01-02 (Supp. 1973).
85. N.D. CENT. CODE § 61-01-01.1 (Supp. 1973).
86. N.D. CENT. CODE § 61-04-15 (Supp. 1973). *Cf.* N.D. CENT. CODE § 61-02-38 (Supp. 1973) indicating that a water right owner may turn it over to the Commission for "control of the diversion."
87. N.D. CENT. CODE § 61-01-02 (Supp. 1973) (emphasis added).
88. The State Engineer has a basic duty to avoid such a situation arising because "if, in . . . [his] opinion . . . no unappropriated water is available, he shall reject an application made under the provisions of this chapter." N.D. CENT. CODE § 61-04-07 (1960). Of course, times of extreme drought may arise. See also the discussion in note 71, *supra*.

matter to be handled on a straight forward, first-in-time is first-in-right basis or is a distinction to be made depending upon the nature of the beneficial use? The phrase "priority in time shall give the better right" occurs only twice in the relevant Code provisions.[89] The first appearance is in the context that "as between appropriations *for the same use*,"[90] first in time is first in right. The second appearance is in a section that refers only to irrigation uses of the water although the first-in-time is first-in-right concept is stated in a sentence by itself and not expressly related to the irrigation reference.[91] In contrast to these limited references, there is the Code provision that provides: "In *all* cases where the use of water for different purposes conflicts such uses shall conform to the following order of priority:

1. Domestic use
2. Livestock use
3. Irrigation and industry
4. Fish, wildlife and other outdoor recreational uses."[92]

Despite the seeming general applicability of this provision, it may well be intended to apply only in situations where conflicts arise before a permit has been issued.[93] Under such interpretation, the provision would perform a function, yet not render inoperative the basic principle of the appropriation system: first in time is first in right.[94]

If protection of the permit right depends on priority of time, its effective date is important. In this context, the Code provides for the relation back to the date use began of a water right based on a beneficial use existing prior to the 1905 appropriation statute upon presentation of satisfactory proof that the water was applied to a beneficial use as of the date claimed.[95] Otherwise, a right will have priority from the date of receipt of an application for a permit in the office of the State Engineer.[96] If a use has become obsolete and a permittee is allowed to change to a modern use without filing a new application, the old priority would be maintained. This may be inequitable to others seeking to use water from the same source,and a strong argument can be made that all requests for new uses of the water should stand on an equal basis.

89. N.D. CENT. CODE §§ 61-01-01.1; 61-01-02 (Supp. 1973). *Cf.* N.D. CENT. CODE § 61-02-31 (1960) (dealing with the priority of a water right acquired by the Commission).
90. N.D. CENT. CODE § 61-01-01.1 (Supp. 1973) (emphasis added).
91. N.D. CENT. CODE § 61-01-02 (Supp. 1973).
92. N.D. CENT. CODE § 61-01-01.1 (Supp. 1973) (emphasis added).
93. *See* Bard & Beck, *An Institutional Overview of the North Dakota State Water Conservation Commission: Its Operation and Setting*, 46 N.D.L. REV. 31, 72-74 (1969).
94. See text accompanying notes 59-62, *supra*.
95. N.D. CENT. CODE § 61-01-03 (1960).
96. *Id.*

Apparently the same rules as to priorities would apply to the uses that do not require permits, but rather than depending on the date the application appears in the office of the State Engineer, the priority would depend on the date that physical use began.[97] Problems of proof could arise, and it might be wise for such users to apply for water permits in order to have a clearly established priority date.[98] At least it appears that it would be permissible to obtain such a permit. The statute merely says that one does not need a permit to appropriate for domestic or livestock use;[99] it does not say that one cannot obtain a permit for these purposes. However, it would be better for all concerned if the statute specifically provided that any person applying water to beneficial use can obtain a permit for purposes of protecting the priority of use. The applicant would, of course, have to prove the priority date to the satisfaction of the Sate Engineer.

A different type of private interest in water rights may arise in the form of a lien against water rights appurtenant to real propery. Since water rights are declared by statute to be appurtenances to real property, at least when they are used for irrigation,[100] it is reasonable to conclude that an encumbrance against the land, for example a judgment lien or assessment, becomes a lien on the water rights as well. Furthermore, it is reasonable to argue that one who acquires the water rights takes them subject to encumbrances. This reasoning should follow even when a water right becomes appurtenant to the land subsequent to the attachment of a judgment lien. The problem is whether water rights that are severed from the encumbered land are freed from the encumbrance.

The Code allows the State Water Conservation Commission to issue bonds for the purpose of acquiring lands for irrigation.[101] Such bonds may be secured by lands or works involved in the project. A question arises as to whether water rights appurtenant to such lands are subject to a security interest in favor of the holders of said bonds.

The Code also provides that the "owners of works proposing to store or carry water in excess of their needs for beneficial use may make application for such excess, and shall be held as trustees of such right for the parties applying the water to beneficial use. . . ."[102] This language appears to create an equitable interest

97. See N.D. CENT. CODE §§ 61-01-01.1; 61-01-02 (Supp. 1973) (note its general language).

98. N.D. CENT. CODE § 61-04-02 (Supp. 1973) which states when applications *must* be made does not limit applications solely to those instances nor does any other provision of the Code.

99. N.D. CENT. CODE § 61-01-01.1 (Supp. 1973).

100. N.D. CENT. CODE § 61-01-02 (Supp. 1973).

101. N.D. CENT. CODE § 61-02-46 (Supp. 1973).

102. N.D. CENT. CODE § 61-04-03 (1960).

in water. If such an interest is created, there does not appear to be any method of determining when and if water rights are held in trust, who they are held for, when an equitable interest has been transferred, whether the equitable interest in the water is appurtenant to land, and whether the equitable or legal interest in a water right is subject to encumbrances. Similarly, the Code creates a lien against property of an owner for failure to pay fees for inspection of impoundment works;[103] if such owner holds water rights in trust for others, and the use of such rights is made possible by the impoundment, it is unclear whether the lien is an encumbrance upon the water rights held in trust.

An additional type of water right is the right created when a contract is entered for the delivery of water. The statutes specify that irrigation districts[104] as well as municipalities[105] may enter into contracts for the sale of water to private users. Furthermore, in recent months there has been substantial progress in developing rural water delivery districts; apparently they are being incorporated as nonprofit corporations. Undoubtedly delivery contracts will be associated with them. This aspect of private water ownership rights through contract has not been explored in this paper.

While the discussion in this section has raised questions as to duration and transferability of permits and has pointed out ambiguities in the Code provisions, and while it might be desirable for the Legislative Assembly to resolve these, it should be pointed out that the Legislative Assembly has given both the State Engineer and the State Water Commission rule making power for purposes of administering the water laws.[106] It appears that these powers are sufficiently broad to allow the State Engineer and the State Water Commission to resolve the questions and ambiguities without waiting for the Legislative Assembly to act. Furthermore, should serious problems ever arise as to existing rights, the Code provides for law suits to adjudicate water rights in watercourses, stream systems, and other sources.[107]

C. PRESCRIPTIVE WATER RIGHTS

In 1957 the North Dakota Legislative Assembly enacted a bill

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103. N.D. CENT. CODE § 61-04-11 (Supp. 1973).

104. N.D. CENT. CODE § 61-07-29 (1960). For a discussion of the Garrison Diversion contracting process see Beck & Newgren, *Irrigation in North Dakota Through Garrison Diversion: An Institutional Overview*, 44 N.D.L. REV. 465, 472-487 (1968).

105. N.D. CENT. CODE § 40-33-13 (1960). *See also* Satrom v. City of Grand Forks, 163 N.W.2d 522, 527 (N.D. 1968).

106. N.D. CENT. CODE §§ 61-02-14(2) (Supp. 1973); 61-03-13 (1960).

107. N.D. CENT. CODE § 61-02-23 (Supp. 1973) gives the Commission ample authority to adjudicate such water rights. But in addition, N.D. CENT. CODE §§ 61-03-16 through 61-03-19 (1960) provide for adjudication of water rights on stream systems after hydrographic surveys have been completed.

entitled: "Prescriptive Water Rights."[108] The substantive portion thereof read, in its entirety, as follows:

> § 1. Prescriptive Water Right. Any person, firm, corporation or municipality which used or attempted to appropriate water from any water course, stream, body of water or from an underground source for mining, irrigating, manufacturing or other beneficial use over a period of twenty years prior to January 1, 1934, shall be deemed to have acquired a right to the use of such water without having filed or prosecuted an application to acquire a right to the beneficial use of such waters. Such use or attempted use of the waters is hereby declared to be a prescriptive water right and is hereby confirmed and established as such. Any such prescriptive water right acquired under this Act shall be subject to forfeiture for nonuse as prescribed by law.[109]

The primary question that has been raised about this Act is whether it purported to change vested riparian rights into prescriptive rights.[110] It is certainly not necessary to so conclude in order to give operative effect to the statute, and it is very likely that it does not do so. The basic difference between riparian and prescriptive rights in general should first be noted. Riparian rights have already been defined.[111] A prescriptive right to the use of water would be a right acquired by analogy to the doctrine of adverse possession.[112] It would depend on a continuous, open, notorious, and adverse user of the water for a prescribed period of time. Clearly any riparian owner that had been using water prior to January 1, 1934, for even just a one year period has acquired a vested right to continue that use. For this statute to convert the right of riparian owners who have used water for more than twenty years into prescriptive rights and make them subject to forfeiture for nonuse, while keeping intact the riparian rights to use of water for those who have used it for less than twenty years, would not make sense. The statute must be intended to apply (a) to nonriparians who have not applied for the required permit and (b) to riparians who are using the water on nonriparian lands and therefore would have no vested interest absent a permit. When it is considered that the reason for the enactment of the statute

108. N.D. Sess. Laws ch. 375 (1957).

109. *Id.* § 1.

110. *See* Note, *North Dakota Water Law: A Constitutional Comparison*, 41 N.D.L. REV. 545 (1965).

111. See text accompanying notes 6-14, *supra.*

112. "The Courts are agreed that the right to use the water of a stream in a particular manner is one which can be acquired by prescription." 2 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 1744 (1904). "[I]n general it may be stated that to acquire such rights the user must be continuous and uninterrupted, actual, open, notorious, and exclusive." *Id.* at 1745.

was a concern over the water rights of many municipalities, irrigation projects, and industries, this latter conclusion is the more sensible.[113] These are the users most apt either to be nonriparians or riparians using water to benefit nonriparian lands.

Perhaps prescriptive rights to use water could have been acquired absent the statute, but the statute makes it clear that they can be acquired. If they were obtainable before the statute, the question arises whether the statute depreciates the value of any that may have vested before its passage, by making them subject to forfeiture for nonuse. Since, if a prescriptive water right was treated like an easement or profit *a prendre*, it would have been subject to abandonment anyway, it would not appear to be appreciably changed in character.[114]

While the Act refers to "or other beneficial use," this probably would not include domestic and livestock uses since permits are not required for these uses in the first place. Another question that must be raised is whether the Act purports to do away with the traditional requirements for prescriptive rights, that is showing a continued, open, notorious, and adverse user.[115] The statute is subject to differing interpretations on this point.

In 1963 the prescriptive water rights statute was amended to allow any member of the same class included in the prior statute who had applied water to a beneficial purpose for a period of twenty years prior to the effective date of the Act to acquire a right to appropriate water that related back to the date of its first application to a beneficial use.[116] However, in order to obtain such a right and priority, such person had to file for an appropriation permit within two years from the effective date of the Act of forfeit the claim. The State Engineer's determination as to the validity of the claim was made subject to court review. A 1965 amendment clarified "effective date of this Act" by substituting the date July 1, 1963.[117]

The 1963 amendment did enlarge the class of persons eligible to acquire prescriptive rights by changing the time requirement. Previously a person had to have appropriated water for twenty years prior to 1934, or a total of 43 years, since that statute was enacted in 1957. Under the 1963 amendment an appropriation need only have been made during a twenty year period prior to July 1, 1963.

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113. *See* Eleventh Biennial Report of the State Water Conservation Commission July 1, 1956 to June 30, 1958, in 2 N.D. P. Doc. 1957-58, 1585, 1670.
114. *See* W. BURBY, REAL PROPERTY 91-92 (3d ed. 1965).
115. See *supra* note 112.
116. N.D. Sess. Laws ch. 419 § 2 (1963).
117. N.D. Sess. Laws ch. 447 § 10 (1965). For the current version, see N.D. CENT. CODE § 61-04-22 (Supp. 1973).

Apparently the 1963 amendment also seeks to divest prescriptive rights that had vested under the 1957 statute and which, according to the 1957 statute, could only be subject to forfeiture for nonuse, by requiring that they too be filed within the two year period. If the amendment did not intend this result, then unrecorded prescriptive rights might well still exist in North Dakota.

One point seems clear whether or not unrecorded prescriptive water rights still exist in North Dakota, new prescriptive rights cannot be acquired. July 1, 1963 was the last day for the acquisition of prescriptive rights under the North Dakota statutes. Since the North Dakota Legislative Assembly has legislated on the subject there should be little argument about the existence of any future common law prescriptive rights.

III. STATE OR PUBLIC RIGHTS

Since the power to govern the acquisition and control of private water rights is not specifically granted to the federal government by the Constitution of the United States, power to control such water rights is reserved to the states by the Tenth Amendment.[118] This doctrine has been applied consistently by the United States Supreme Court.[119] In effect, the only limits placed on the state in such regulation are the limits of consitutional rquirements such as equal protection and due process[120] as well as controls resulting from the delegation by the United States Constitution of certain powers to the federal government.[121]

The focus of this part of the article will be on the various interests in waters within North Dakota that belong to the people of North Dakota and are controlled by the state government on the people's behalf. Public rights in the waters within North Dakota must be examined from three aspects or bases. First, the administration of the waters within the state by the State Engineer or the State Water Commission for the public benefit; second, the acquisition by various public agencies of water use permits for specific public purposes; and third, the common law right of the public to use the waters in common for navigation, fishing, hunting, swimming, boating, and similar activities.

Any meaningful discussion of public rights in North Dakota waters must begin with the North Dakota Constitution which provides:

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118. Larson, *supra* note 4, at 245.
119. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935); Kansas v. Colorado, 206 U.S. 46 (1907); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).
120. *See* Bigelow v. Draper, 6 N.D. 152, 163, 69 N.W. 570 (1896).
121. *See generally* Trelease, *Federal Limitations on State Water Law*, 10 BUFFALO L. REV. 399 (1961); Martz, *The Role of the Federal Government in State Water Law*, 5 KAN. L. REV. 626 (1956).

"All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating, and manufacturing purposes."[122] The Supreme Court of North Dakota has interpreted this clause as having the effect of maintaining the integrity of the waters of the state beyond the control of individual owners and providing for the exercise of state sovereignty if the need should arise to protect the waters of the state.[123]

Several questions arise concerning this provision. First, does it mean that flowing streams may not be used for domestic and livestock purposes? The answer should be a clear no. The language is taken from the Desert Land Act of 1877.[124] It certainly was not the intent of that Act to prevent the acquisition of water for domestic and livestock use.[125] Quite the contrary, the intent was to preserve the excess water after those uses to these other public benefits. The Constitutional provision should be interpreted as making it clear that mining, irrigating and manufacturing purposes are all beneficial uses for public water, and not interpreted for purposes of excluding other uses.

Second, is the grant of perpetual use permits of flowing waters by the State to private parties consistent with the admonition that those flowing streams "remain the property of the state"? It is difficult to see how the waters could be used practically for these purposes without granting use permits to private parties, and in order to make the use practical the duration should be long enough that any permittee should be able to realize a fair return on any investment made in commencing the use. It remains questionable, however, whether perpetual use permits are justified; certainly they are not required by the Constitutional provision. In exercising authority, the State Engineer should be attuned to balancing the present private interests against future public needs.

Third, is the state permitted to favor one of the three designated uses over the others? North Dakota's present priority statute places both irrigation and industry in the same category level.[126] Apparently mining is included within the term "industry."

Turning then to the North Dakota Code, the relevant provision previously discussed specifies that "all waters within the limits

122. N.D. CONST., art. 17, § 210.

123. Bigelow v. Draper, 6 N.D. 152, 69 N.W. 570, 573 (1896). *Cf.* Larson, *supra* note 4, at 260 n.101.

124. "[A]ll surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." Desert Land Act, 19 Stat. 377 (1877).

125. The Desert Land Act, 19 Stat. 377 (1877) (allows water "necessarily used for the purpose of irrigation and reclamation.")

126. N.D. CENT. CODE § 61-01-01.1(3) (Supp. 1973).

of the state,"[127] save for two exceptions, "belong to the public and are subject to appropriation for beneficial use."[128] Thus, as also previously discussed, private rights may be acquired in North Dakota waters.[129] Once these private rights are obtained, they will in all probability constitute property, and the state is prohibited from depriving anyone of property except by due process of law.[130] Also, however, no permits for appropiation are to be granted by the State Engineer if in his opinion it is against "the public interest" to do so.[131]

The North Dakota legislative assembly provided for the establishment of the State Conservation Commission and charged it with almost total responsibility for management, conservation, and development of the waters of the state.

The Commission is delegated the functions of (1) investigating, (2) constructing, (3) maintaining, (4) regulating, (5) supervising, and (6) controlling any system of works concerning: (1) conservation and control of waters (a) public or private, (b) navigable or non-navigable, and (c) surface or subsurface; (2) control of floods; and (3) regulation of water pollution.[132] The Commission as created is a public corporation with the power to contract in its own name as well as hold and dispose of property.[133]

Among the specific powers granted to the Commission are the power to impound water and control and regulate flood flow. Under the flood control power the Commission is granted authority to conserve and develop waters within a watershed, or remove waters from a watershed, subject to *vested* water rights within the watershed.[134]

The powers of the Commission also permit it to establish regulations regarding (1) sale of waters and water rights, (2) pollution control, and (3) financing of water development projects.[135] It is also empowered to sell, lease, or otherwise distribute any waters that are developed or impounded under its authority.[136] In conjunction

127. N.D. CENT. CODE § 61-01-01 (1960).
128. *Id.* A perusal of the varied uses of the terms "public" and "state" (*see, e.g.*, 35 Words and Phrases 27-30; 40 Words and Phrases 17-19) strongly suggests that "the property of the state" language in N.D. CONST., art. 17, § 210, and the "belong to the public" language in N.D. CENT. CODE § 61-01-01 (1960), are equivalents. In this context "public" would mean "the whole body politic, or all the citizens of the state," 35 Words and Phrases 80, and "state" would mean "the whole people united in one body politic," 40 Words and Phrases 17.
129. *See* text accompanying notes 59-107, *supra*.
130. U.S. CONST. amend. XIV.
131. N.D. CENT. CODE § 61-04-07 (1960) (discussed at note 72, *supra*).
132. N.D. CENT. CODE § 61-02-01 (1960).
133. N.D. CENT. CODE § 61-02-09 (1960).
134. N.D. CENT. CODE § 61-02-14(1d) (Supp. 1973).
135. N.D. CENT. CODE § 61-02-14(2) (Supp. 1973). This may be the appropriate time for the commission to undertake a study of a charge system for private user of public waters. It is difficult to find justification for free users regardless of amount.
136. N.D. CENT. CODE § 61-02-14(4) (1960).

with its power, the Commission is given authority to condemn any property necessary for its operation. The statutory authority for condemnation provides that riparian rights may be condemned without the necessity of condemning the land as well, thus severing the riparian water rights from the land.[137] The statute implies that the authority shall extend to all waters, intrastate, interstate, or international.

In determining the scope of public interest in the waters located within the state, attention must be focused upon the right of the state to take waters for a public purpose and to cancel water rights and return them to the public domain. The question of taking used or unused riparian rights was discussed earlier in connection with private ownership of waters. The focus in this discussion is on state revocation of water permits. Clearly, the state can condemn appropriated water rights by means of an eminent domain proceeding.[138] The issue of the revocation of permits for unused water rights presented a difficult problem for many years ignored by the legislative assembly.

The procedure for issuing water permits involves a review and investigation of every permit application as to the quantity of water available for appropriation. A problem faced by the State Engineer is that of determining the amount of water actually used on a given stream as opposed to the amount authorized for use by permit. Since water permits are issued for an indefinite duration, and since there is no requirement that the State be informed when a use ceases or decreases, it would be possible for a stream or other body of water to be fully appropriated on paper, but under appropriated in actual use. Thus a need exists for a procedure to cancel permitted but unused water rights.[139]

The 1963 Legislative Assembly responded to the need by enacting a statute providing for the forfeiture of water rights on the basis of nonuse.[140] This statute specified that if an appropriated right was not used for three successive years, provided that water was available and that the nonuse was not due to "a justifiable inability to complete the works, or other good and sufficient cause," it ceased to exist. The statute further provided that the State Engineer could, after notice and hearing, declare such water permit or right "forfeited and cancelled." The State Engineer's authority to clear the record extended to water rights that had never been used as well as to those that had ceased to be used. In 1965 the law was amended

137. N.D. CENT. CODE § 61-02-22 (1960).
138. *Id.*
139. 13 BIENNIAL REPORT OF N.D. WATER CONSERVATION COMM. 135 (1962).
140. N.D. Sess. Laws ch. 419 §§ 3-6 (1963); N.D. CENT. CODE §§ 61-04-23 to -26 (Supp. 1973).

so that the right did not automatically cease after three successive years nonuse; it would require affirmative action by the State Engineer.[141] In 1969 the law was again amended to exclude from the State Engineer's power to declare forfeited the water rights of state agencies, departments, boards, commissions, or institutions.[142] These now can be declared forfeited only by the legislative assembly.[143]

The statute appears to give the State Engineer substantial discretion in determining what is sufficient cause for nonforfeiture.[144] One question that arises is whether a three-year successive period of nonuse, followed by a continuous period of use could leave the water right subject to forfeiture, since there appears to be no statute of limitations, and since the forfeiture is no longer automatic. Other water permittees from the same supply, or applicants for water rights therein, and "interested parties" may request the State Engineer to begin forfeiture proceedings,[145] and if he refuses they may appeal his decision to the district court.

As an overall policy, it is desirable to have a procedure whereby unused water rights can be cancelled. This facilitates maximum use of the waters within the state, especially when water is in short supply. Furthermore, it is difficult to plan water programs without knowing the total amount of unused water on any given stream or in any particular body of water. If a system of charges could be set up on the basis of amount used and a metering system introduced, it might encourage less consumption and better data collection.

Since the Commission is a public corporation, it has authority to acquire and sell water rights in irrigation projects as well as to assert possession over the corpus of the waters of irrigation projects that it controls.[146] At the same time the Commission has authority to control use of any unappropriated waters in the state.[147] A unique aspect of the Commission is that it may acquire water rights merely by filing a declaration of intention,[148] as well as by complying with the regular permit requirements. The specific Code reference is to an intention "to store, divert, or control the unappropriated waters of a particular body, stream, basin, or source"[149] together with some specified details as to proposd use. There is no provision that the use has to be made within any specified time; it vests

141. N.D. Sess. Laws ch. 447 §§ 11-12 (1965).
142. N.D. Sess. Laws ch. 544 (1969).
143. N.D. CENT. CODE § 61-04-23 (Supp. 1973).
144. N.D. CENT. CODE §§ 61-04-23 through -26 (Supp. 1973).
145. N.D. CENT. CODE § 61-04-24 (Supp. 1973).
146. N.D. CENT. CODE § 61-02-28 (Supp. 1973).
147. N.D. CENT. CODE § 61-02-29 (1960).
148. N.D. CENT. CODE § 61-02-30 (Supp. 1973).
149. *Id.*

when the declaration is filed and has priority from that date.[150] Thereafter the State Engineer can approve water rights therein only with the consent of the Commission.[151] The Commission can thereby, in effect, withdraw waters from private appropriation and reserve them for a public purpose.

It has been pointed out previously that the State Engineer can deny a water permit that he considers not in the public interest.[152] For example ,North Dakota will soon find itself in a position where almost all of its once free-flowing streams will be either dammed or channelized. When a permit request comes to the State Engineer seeking to dam or channelize one of the last remaining such streams, he might well deny the permit on the basis that it is not in the public interest to dam further even though water is available and even though the water dammed would be put to beneficial use.

Thus, between the Commission and the State Engineer they are to manage, conserve, and develop the public waters of the state for the public good subject to appropriation of the waters for beneficial use. What if they fail to do so? Are they subject to action by the public for violating a public trust? This is an important question that is raised but not discussed in this article. The public trust doctrine has been explored extensively in other jurisdictions.[153]

In passing it has been noted that other state agencies are entitled to obtain water permits and thereby priorities to water use for public purposes. Thus the North Dakota State Game and Fish Department has obtained numerous permits for wildlife and recreational purposes.[154] The Code specifically recognizes "fish, wildlife, and other outdoor recreational uses"[155] as beneficial uses, and with the increased understanding of the interdependence of all living things, the necessity for fish and wildlife uses may be more broadly understood than ever before.[156] However, the Code specifies these uses as the lowest in a four category level classification.[157] In this classification system seemingly all industrial uses are placed ahead of any fish, wildlife, or recreational use. Such a classification system does not seem desirable particularly in view of the increase in environmental understanding. A strong argument can be made that there are areas of North Dakota where fish and wildlife, for example, should have a high or the highest classification level. In the Devils

150. *Id.*
151. *Id.*
152. See discussions at notes 72 and 131, *supra.*
153. For a comprehensive general discussion see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970).
154. *See, e.g.*, Permit Nos. 1399, 1470, 1493, and 1562 for the 1966-1968 period.
155. N.D. CENT. CODE § 61-01-01.1(4) (Supp. 1973).
156. *See* Beck, *A Survey of North Dakota Environmental Law*, 49 N.D. L. REV. 1 (1972).
157. Category one is domestic use; category two is livestock use; and category three is irrigation and industry. N.D. CENT. CODE § 61-01-01.1 (Supp. 1973).

Lake country, for example, North Dakota has one of the few areas in the United States uniquely suited to raising a variety of waterfowl.[158] Arguably, North Dakota should recognize its uniqueness in this respect and give it a higher priority than it does at the present time.

To what extent do the public have rights to use the surface of the waters in North Dakota? While the Code provides for water permits for wildlife and recreational purposes, it is clear that the focus of these permits is for erection of works or diversions for this purpose or for maintaining the water necessary for these purposes. It does not follow that a permit is needed, for example, to boat on public waters. There may, of course, be certain public waters that have been collected by an expensive structure for which it is feasible to collect boating fees to help pay for part of the structure. However, this has not been a general approach.

In the absence of any controlling North Dakota authority on this question, the key should be a recent pronouncement of the Wyoming Supreme Court:

> Irrespective of the ownership of the bed or channel of waters, and irrespective of their navigability, the public has the right to use public waters of this state for floating usable craft and that use may not be interfered with or curtailed by the landowner. It is also the right of the public while so lawfully floating in the state's waters to lawfully hunt or fish or do any and all other things which are not otherwise made unlawful.[159]

Clearly this should apply to navigable waters for navigation purposes and all uses such as hunting, fishing, boating, canoeing, water skiing, swimming, scuba diving, and any other similar type use that may exist. But as the Wyoming Court points out if the waters are public, and they are in North Dakota, then the result ought to follow on that fact alone. And particularly on navigable streams, the public should be protected in the use of the banks, bed, and foreshore as well on the theory that such use is incidental to the use of the waters.

Thus, the public would have common rights in the surface of the waters. While there may be still some riparian control over use of waters in this state, it is undoubtedly minimal, so there is no effort in this article to discuss the relative rights of riparian owners to control the surface use of waters.[160]

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158. *See* North Dakota State Water Commission, North Dakota Interim State Water Resources Development Plan, Appendix E, The North Dakota Wetlands Problem (1968).

159. Day v. Armstrong, 362 P.2d 137, 147 (Wyo. 1961).

fication Act and the Need for a Comprehensive Weather Modification Program, 45 N.D.L. (1960).

Because these waters are public and because the public may have a common right to use of the surface, it does not mean that the public will always have access thereto.[161] Such public rights do not entitle members of the public to trespass over private land in order to exercise such rights.

Two other areas of public use relative to waters of the state should be noted. For many years it has been a more or less common assumption that there was a public right to pollute the waters of this and other states.[162] Numerous municipalities and industrial concerns as well as many private individuals would dispose of raw sewage and other refuse into public waters, particularly streams. This disposition was true in North Dakota,[163] as well as elsewhere. Now with the advent of comprehensive state and federal water pollution control laws[164] much of that process has been stopped, and it can no longer be viewed as a public right if it ever was. However, it is still permissible to use public waters as a waste disposal system if one first obtains a permit to do so from the appropriate agency.[165] At the present time, that is the Federal Environmental Protection Agency, although this function will soon be turned over to the North Dakota State Health Department. Perhaps refuse disposal permits should have been examined in the private rights section of this article. Regardless, this is one use of public water that is not regulated directly either by the State Water Commission or the State Engineer.[166]

Also, the North Dakota Legislative Assembly has declared: "The state of North Dakota claims its sovereign right to use the moisture contained in the clouds and atmosphere within the sovereign state boundaries."[167] Despite the direct relationship between weather modification programs and water, administration of such programs is vested in the State Aeronautics Commission rather than the State Water Commission.[168] While it is understandable that the Aeronau-

161. Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Water*, in 1 WATERS AND WATER RIGHTS 177, 221-22 (R. Clark ed. 1967).

162. Occasionally there would be a common law nuisance action or one based on riparian rights challenging alleged pollution, such as Messer v. City of Dickinson, 71 N.D. 568, 3 N.W.2d 241 (1942), and Kinnischtyke v. City of Glen Ullin, 79 N.D. 495, 57 N.W.2d 588 (1953).

163. As late as January 1, 1970, the cities of Kenmare, Stanton, and Washburn were listed by the North Dakota State Health Department as having no municipal waste treatment, and the same publication contained a full page listing of treatment needs in North Dakota. North Dakota State Department of Health, Water Quality Standards and Plan for Implementation and Enforcement of the Standards (1970).

164. *See, e.g.*, Water Pollution Control Act, 62 Stat. 1155 (1948) *as amended*, 33 U.S.C. § 1151 (1970), 33 U.S.C. § 1251 (Supp. II 1972); N.D. CENT. CODE ch. 61-28 (Supp. 1973).

165. Title IV of the 1972 amendments to the federal law sets up this system. Federal Water Pollution Control Act Amendments of 1972, 86 Stat. (1972).

166. Water pollution is within the jurisdiction of the Commission, N.D. CENT. CODE §§ 61-02-01; 61-02-14(1)(f); 61-02-14(2)(c) (1960), but the Code provides that the Health Department is not to be deprived of authority thereby. N.D. CENT. CODE § 61-02-15 (1960).

167. N.D. CENT. CODE § 2-07-01 (Supp. 1973).

168. N.D. CENT. CODE ch. 2-07 (Supp. 1973). See Note, *The North Dakota Weather Modification Act and the Need for a Comprehensive Weather Modification Program*, 45 N.D.L. REV. 407 (1969).

tics Commission should have a role to play, it is difficult to justify its primary responsibility and the exclusion of the State Water Commission.

IV. FEDERAL RIGHTS

In considering the question of federal ownership and control over waters within the State of North Dakota, it is necessary to consider three different relationships: (1) the federal government as landowner; (2) the federal government as possessor of certain constitutional regulatory powers; and (3) the federal government as water permit owner. Before beginning this analysis, however, certain basic points should be made in relation to some important questions about the water flowing in the Missouri River or stored behind the various Missouri dams. Does the federal government own the water in the Missouri River? In only three aspects may it have any ownership rights: (1) as permit holder from the state, it might like other permit holders have a property interest in the water—an ownership interest in a sense but even this is unlikely; (2) as trustee for certain Indian tribes to the extent of their interest in the Missouri River waters; and (3) as landowner to whatever extent riparian rights remain. Does the federal government have *the power* to allocate the waters of the Missouri River among the several abutting states, even contra to the wishes of these states? The answer is: Probably yes. Has the federal government (through Congress) exercised that power? The answer is: Probably no. That the appropriate answers have been given to the foregoing questions should appear from the following discussion.

In the most recent treatise on water and water rights,[169] the author of the chapter on Federal-State rights in discussing the case of *Arizona v. California* observes:

> In other words, the power of the United States *over navigable streams,* is so complete that in reality, if not in legal contemplation, the United States can deal with such streams as though it 'owned' them. It can take over the entire streamflow, dam it and distribute it interstate and intrastate under its own allocation scheme and in disregard of state law.[170]

This appears to be what the United States *can* do, but the question remains: *Has* it done so? Has the United States dealt with the Missouri River so as to "take over the entire streamflow, dam it and distribute it interstate and intrastate under its own allocation

169. WATERS & WATER RIGHTS (R. Clark ed. 1967).
170. E. Morreale, *Federal-State Rights and Relations*, in 2 WATERS & WATER RIGHTS 1, 69 (R. Clark ed. 1967) (emphasis added).

scheme"? This difference between the existence of power and its exercise is fundamental and was stated clearly by the United States Supreme Court in one of the early cases on state versus federal water rights:

> It is true there have been frequent decisions recognizing the power of the State, in the absence of Congressional legislation, to assume control of even navigable waters within its limits to the extent of creating dams, booms, bridges and other matters which operate as obstructions to navigability. The power of the State to thus legislate for the interests of its own citizens is conceded, and until in some way Congress asserts its superior power, and the necessity of preserving the general interests of the people of all states, it is assumed that state action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge.[171]

In answering the question whether the federal government has exercised its full authority over the Missouri, the key is found in *Arizona v. California*,[172] decided by the United States Supreme Court in 1963, where the Court found just such an exercise of power by the United States over that portion of the waters of the Colorado River allocated to the lower Colorado basin states. It is, therefore most useful to begin with an extensive analysis of that case. However, even in that case three justices thought that the United States had not exercised its power.[173] The majority found:

> The legislative history, the language of the Act, and the scheme established by the Act for the storage and delivery of water convince us *also* that Congress intended to provide its own method for *a complete apportionment* of the mainstream water among Arizona, California, and Nevada.[174]

Thus the majority focused on three elements to reach its final conclusion. An examination of the legislative history of federal legislation relating to the Missouri River is beyond the scope of this study. With respect to the language of the Act, the Majority observed:

> These several provisions, even without legislative history, are persuasive that Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get waters.[175]

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171. United States v. Rio Grande Irr. Co., 174 U.S. 690, 703 (1899).
172. 373 U.S. 546 (1963), *decree entered* 376 U.S. 340 (1964).
173. Mr. Justices Douglas, Harlan, and Stewart.
174. 373 U.S. at 575 (emphasis added).
175. *Id.* at 580 (emphasis added).

What then were "These provisions"? The Court discussed them as follows:

> In the first section of the Act, the Secretary was authorized to 'construct, operate, and maintain a dam and incidental works . . . adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water . . . ' for the stated purpose of 'controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses . . . ,' and generating electrical power. The whole point of the Act was to replace the erratic, undependable, often destructive natural flow of the Colorado with the regular, dependable release of waters conserved and stored by the project. Having undertaken this beneficial project, Congress, in several provisions of the Act, made it clear that no one should use mainstream waters save in strict compliance with the scheme set up by the Act. Section 5 authorized the Secretary 'under such general regulations as he may prescribe to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river . . . as may be agree upon, for irrigation and domestic uses . . . .' To emphasize that water could be obtained from the Secretary alone, § 5 further declared, 'No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.' The supremacy given the Secretary's contracts was made clear in § 8(b) of the Act, which provided that, while the Lower Basin States were free to negotiate a compact dividing the waters, such a compact if made and approved after January 1, 1929, was to be 'subject to all contracts, if any, made by the Secretary of the Interior under section 5' before Congress approved the compact.[176]

The three dissenting justices argued that these provisions did not show such a complete exercise of federal power in view of § 18 of the Project Act:

> Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders . . . .[177]

The majority replied that section 18 merely allows the States to do things not inconsistent with the federal project such as regulating use of tributary waters and protecting present perfected rights.

176. *Id.* at 579-80.

177. Boulder Canyon Project Act, 45 Stat. 1057 (1928).

As to the third point, "the scheme established" by the federal legislation, the majority stated:

> Before the Project Act was passed, the waters of the Colorado River, though numbered by the millions of acre-feet, flowed too haltingly or too freely, resulting in droughts and floods. The problems caused by these conditions proved too immense and the solutions too costly for any one State or all the States together. *In addition, the States, despite repeated efforts at a settlement, were unable to agree on how much water each State should get. With the health and growth of the Lower Basin at stake,* Congress responded to the pleas of the States to come to their aid. The result was the Project Act and the harnessing of the bountiful waters of the Colorado to sustain growing cities, to support expanding industries, and to transform dry and barren deserts into lands that are livable and productive.
>
> In undertaking this ambitious and expensive project for the welfare of the people of the Lower Basin States and of the Nation, the United States assumed the responsibility for the construction, operation, and supervision of Boulder Dam and a great complex of other dams and works. Behind the dam were stored virtually all the waters of the main river, thus impounding not only the natural flow but also the great quantities of water previously allowed to run waste or to wreak destruction. The impounding of these waters, along with their regulated and systematic release to those with contracts, has promoted the spectacular development of the Lower Basin. Today, the United States operates a whole network of useful projects up and down the river, including the Hoover Dam, Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Dam, Imperial Dam, Laguna Dam, Morelos Dam, and the All-American Canal System, and many lesser works. It was only natural that the United States, which was to make the benefits available and which had accepted the responsibility for the project's operation, would want to make certain that the waters were effectively used. All this vast, interlocking machinery—a dozen major works delivering water according to congressionally fixed priorities for home, agricultural, and industrial uses to people spread over thousands of square miles—could function efficiently only under unitary management, able to formulate and supervise a coordinated plan that could take account of the diverse, *often conflicting interests* of the people and communities of the Lower Basin States. Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the § 5 contract power, to direct, manage, and coordinate their operation. Subjecting the Secretary to the varying, *possibly inconsistent,* commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended

> this national project to bestow. We are satisfied that the Secretary's power must be construed to permit him, within the boundaries set down in the Act, to allocate and distribute the waters of the mainstream of the Colorado River.[178]

A complete comparative review of the legislative history, the law itself, and the federal scheme for the Missouri River Basin with —those of the Boulder Canyon Project is a mammoth undertaking and well beyond the scope of this study.[179] However, that is what must be done to best understand whether Congress has exercised the federal power as completely over the Missouri River as it did over the Colorado, since nowhere in the Missouri River legislation does Congress clearly state that allocations of water among and within the several states are to be made by some department of the federal government. However, several points are clear without such an extensive analysis. First, the Boulder Canyon Project Act was clearly intended to be an apportionment Act; section 4 thereof in its entirety deals with "the Colorado River compact" and the question of how to make a basic apportionment of waters among certain of the states.[180] Thus the issue to which all of the quoted material relates as indicated in the first excerpt is whether Congress intended *a complete apportionment* scheme when it was clearly dealing with a partial apportionment scheme in section 4. The answer the majority gave was "yes" based on the foregoing analysis. Nowhere in the Missouri River Basin legislation is there such a clear partial apportionment scheme which by later general language could be expanded into a "complete" scheme.[181] Second, four of the justices involved in *Arizona v. California* are still on the bench,[182] two of whom thought the federal power had been exercised, two of whom did not. If recent trends in other areas are any indication,[183] the present court requires a clear indication of federal pre-emption and on an ambiguous fact situation, the better position is against pre-emption. Third, nowhere in the Missouri River legislation is there a provision as strong as section 5 of the Boulder Canyon Project Act.[184] In fact in the 1965 Act dealing with the Garrison diversion unit, the

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178. 373 U.S. at 588-90 (emphasis added).

179. GARRISON DIVERSION UNIT, H.R. DOC. No. 325, 86th Cong., 2d Sess. (1960), alone is 230 pages in length.

180. Boulder Canyon Project Act, 45 Stat. 1057 § 4 (1928).

181. "The Garrison diversion unit as proposed in the report is a modification of the Missouri-Souris unit which was authorized by the Flood Control Act of 1944 for construction as an initial unit of the Missouri River Basin Project." GARRISON DIVERSION UNIT, H.R. Doc. No. 325, 86th Cong., 2d Sess. iii (1960).

182. Mr. Justices Brennan, Douglas, Stewart, and White.

183. *See, e.g.*, Askew v. American Waterways/Operators, Inc., 411 U.S. 325 (1973). For a recent review of pre-emption law, see Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515. *Cf.* Minnesota v. Northern States Power Co., 405 U.S. 1035 (1972) (Douglas & Stewart, JJ, dissenting); Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

184. Boulder Canyon Project Act, 45 Stat. 1060 (1928).

Congress found it necessary to specifically legislate: "the Secretary is authorized . . . (iii) to allocate water and reservoir capacity to recreation or fish and wildlife use. . . ."[185]

Furthermore, in the Missouri River legislation there exists a provision frequently referred to as the Milliken-O'Mahoney amendment. That section provides as follows:

> The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.[186]

Apparently Congress has subordinated navigation and the federal government's otherwise superior navigation easement to the listed uses. However, this provision is silent as to recreation and wildlife uses[187] and power generation use.[188] The only difficult provision in terms of seeming to endorse expansive federal powers reads as follows:

> SEC. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses *for surplus water* that may be available at any reservoir under the control of the War Department: PROVIDED, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.[189]

What does "surplus water" mean in this context? One argument is that it refers to "flood waters" that are accumulated behind the respective dams.[190] The Act after all was a flood control act,[191] how-

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185. 79 Stat. 433 (1965).
186. 58 Stat. 889 (1944). *See* GARRISON DIVERSION UNIT 47, H.R. Doc. No. 325, 86th Cong., 2d Sess. (1960).
187. For contrast see text accompanying note 185, *supra*.
188. Power generation is mentioned as an aspect of the Garrison Diversion Project, particularly as a basis for recouping some of the costs. *See* GARRISON DIVERSION UNIT 83, H.R. Doc. No. 325, 86th Cong., 2d Sess. (1960).
189. 58 Stat. 890 (1944).
190. *See* 1944 U.S. CODE CONG. SERV. 1354: "and, where practicable, of conserving the flood waters for beneficial uses." See also 2 U.S. C.C. & A.N. 1488 (1952): "The Corps of Engineers has no title to the surplus water which may be impounded by these dams."
191. *See* 58 Stat. 887 (1944), where in the preamble it is asserted: "It is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control . . . ."

ever, not only designed to reduce flooding, but also to allow those waters that would otherwise be wasted through flooding to be put to beneficial use. Since the federal government was going to save these flood waters through its construction efforts, it appears only reasonable that it would be given some control over those waters. It certainly was not intended that this provision would authorize the Secretary of War to dispose of any and all water not necessary for some other federal purpose.[192] If these waters are all eventually released downstream, then, of course, there is no surplus at all to dispose of.

Another interpretation is that surplus refers to all water not necessary for the primary purpose of the reservoir such as irrigation.[193]

But whichever meaning is assigned to "surplus," the section does not state that the Secretary of War may disregard State wishes as to the use of the water. It merely gives him the authority to set (1) prices and (2) terms and nothing more. "Terms" in all probability relates to the terms under which the price is to be paid and does not establish any control as to usage. Since the Corps of Engineers has constructed the facility and must to some extent manage it, it seems reasonable for them to recoup some of the costs through withdrawal charges.

Fourth, the history and conditions of the Missouri River Basin are not like those of the Colorado River Basin. There have been no long-standing controversies among the Missouri Basin States over allocation of the waters in the Missouri with repeated attempts at solution that have failed, and while the States have requested federal assistance for numerous projects, and continue to do so,[194] these projects, while arguably giving an economic lift to the Basin, have not been essential to the continued economic viability of the region. Furthermore, independent state action in no way threatens the viability of the federal projects. So vast differences do indeed exist. To argue that Congress stepped in to divide the waters of the Missouri at a time when the States had not even made an attempt to

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192. For that would have appropriated to the United States for allocation the water not only in the Missouri River but many other streams that the Flood Control Act of 1944 dealt with.

193. The Federal Power Commission has used the following definition of "Surplus waters":

> Where there is available stored water not to be used in irrigation, which represents storage over and above that needed for irrigation, and which would otherwise flow unused down the main channel of the stream, that water is 'surplus water', ...

Chemehuevi Tribe v. FPC, 489 F.2d 1207, 1235 (D.C. Cir. 1973).

194. See the interesting "history of water resource development" in North Dakota State Water Commission, North Dakota Interim State Water Resources Development Plan 16-21 (1968). Recent efforts in North Dakota have been directed toward getting assistance for bank stabilization. *See, e.g.*, Grand Forks Herald, Jan. 30, 1974, at 29, col. 8: "Bank erosion control sought," discussing the prospects for demonstration projects to stabilize the Missouri River banks.

do so and under circumstances when it was not essential to the viability of the federal project simply does not comport with *Arizona v. California.*

The United States Supreme Court has made it clear in the past that the federal government does not assume ownership over water merely through the construction of a federal project. In *Nebraska v. Wyoming* it observed:

> The property right in the water right is separate and distinct from the property right in the reservoirs, ditches, or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use.[195]

The Court found it unnecessary, however, to determine the federal claim to unappropriated water since the government had followed the Reclamation Law of 1902 and applied to the states for water permits.

That Congress has not exercised the complete federal power over the waters in the Missouri River does not mean that it has not exercised any power. Quite the contrary, it has exercised a substantial power,[196] the true nature and extent of which can be determined only by an exhaustive analysis of the complete legislative history and legislative documents pertaining to the River.

Before proceeding any further with the traditional analysis of federal power, it seems appropriate to deal with a nontraditional issue. When North Dakota formulated its constitution for admission to statehood, it included therein the provision mentioned earlier in the discussion of private and public rights: "All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes."[197]

When Congress admitted North Dakota into the Union did it enter into a "binding compact" with North Dakota that ceded to North Dakota any proprietary rights the federal government had in the waters thereof?[198] How could the language be more clear than "shall forever remain the property of the state"? Only Wyoming among the other states had a similar provision in its constitution

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195. 325 U.S. 589, 614 (1945).

196. *See, e.g.*, GARRISON DIVERSION UNIT, H.R. Doc. No. 325, 86th Cong., 2d Sess. (1960); 79 Stat. 433 (1965). Thus, we have three federal agencies directly involved: The Corps of Engineers as builder and manager of basic structures, the Bureau of Reclamation as irrigation overseer, and the Federal Power Commission as power development licensor.

197. N.D. CONST. art. 17, § 210. *See* discussion accompanying note 21, *supra.*

198. For a general discussion of this binding compact theory as it relates to water rights, see E. Morreale, *Federal-State Rights and Relations*, in 2 WATERS & WATER RIGHTS 71-76 (R. Clark ed. 1967).

upon admission.[199] While the United States Supreme Court has from time to time referred to a "compact" between the newly admitted state and the federal government,[200] it has never come close to a holding on the question here involved.[201] The most substantial problem with the compact theory is the language of the constitutional provision. In the North Dakota Constitution the reference is to "the property of the state," but was that meant to contrast with private riparian ownership or to contrast with federal ownership? The Wyoming Supreme Court has found such a compact to exist, and in their view it is "unalterable and obligatory."[202]

One area in which the federal government has exercised exclusive control on navigable waters is for licensing of power projects. In *First Iowa Coop. v. FPC*,[203] the United States Supreme Court found that the federal government had exercised its primary jurisdiction and that Iowa could not interfere by requiring an Iowa license or permit as well. The Court stated that the Federal Power Act involved the exercise of three different constitutional powers: (1) that to regulate interstate and foreign commerce, (2) that to administer the public lands and reservations, and (3) that to exercise authority under the treaties of the United States. The Court believed that the saving clause in Section 27 of the Federal Power Act supported its conclusion:

> Sec. 27. That nothing hereincontained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.[204]

Thus, the federal government now controls power licensing pursuant to the Federal Power Act whereas "irrigation or for municipal or other [similar] uses" are left to the State jurisdiction.

In *Federal Power Commission v. Oregon*[205] this exclusive power licensing function was extended to federal "reservations." The *First Iowa* case did not control in *Oregon* since the Deschutes River in Oregon was a nonnavigable river. The Court found the regulation here to be within the scope of the property clause of the United States Constitution and applied the exclusivity feature of *First Iowa*. The argument that the Desert Land Act required Oregon's consent

199. *Id.* at 71.
200. *Id.* at 81.
201. *Id.*
202. Merrill v. Bishop, 287 P.2d 620, 625 (Wyo. 1955).
203. 328 U.S. 152 (1946) (Frankfurter, J., dissenting).
204. Federal Water Power Act of 1920, 41 Stat. 1077, 16 U.S.C. § 821 (1970).
205. 349 U.S. 435 (1955) (Douglas, J., dissenting).

was dismissed with the observations (1) that it applied only to "public lands" whereas the lands here involved were "reservations," and (2) that general statutes regarding disposal of lands did not apply to lands not available for disposal.[206] Justice Douglas in dissent foresaw an unhappy future. He believed that presidential withdrawals could not deal with water rights, otherwise:

> In the West, the United States owns a vast amount of land—in some states, over 50 per cent of all the land. If by mere Executive action the federal lands may be reserved and all the water rights appurtenant to them returned to the United States, vast dislocations in the economies of the Western States may follow.[207]

A recent federal appeals court decision[208] does raise a serious question about the role of the Federal Power Commission in controling use of Garrison Reservoir waters. The Federal Power Commission has contended that it does not have authority under the Federal Power Act to license thermal-electric generating plants, but in the case, the District of Columbia Circuit held that the FPC "does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants."[209]

What then is the general law with reference to federal rights assuming no pre-emption under the *Arizona v. California* or FPC doctrines? Of fundamental importance is *California-Oregon Power Co. v. Beaver*[210] decided by the United States Supreme Court in 1935. The petitioner in the case had an 1885 patent under the Homestead Act. He sought to enjoin the defendant from lessening the flow over his lands on the nonnavigable Rogue River. The petitioner had never applied any of the waters to beneficial use while the defendant had a permit from the state engineer pursuant to the state's appropriation laws. The petitioner claimed riparian rights. The Court found the Desert Land Act of 1877 to be controlling even though the petitioner's patent was issued under the Homestead Act. Following the Desert Land Act a patent to public lands in a desert-land state or territory, including Dakota, carried no water right. The grantee would take only such water rights "as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location."[211] What in effect the Desert

206. *Id.* at 448.
207. *Id.* at 457.
208. Chemehuevi Tribe v. FPC, 489 F.2d 1207 (D.C. Cir. 1973). At this writing an appeal is pending to the United States Supreme Court.
209. *Id.* at 1242. The court relied on the Federal Power Act, 16 U.S.C. § 797(e) (1970): "To issue licenses . . . for the purpose of utilizing the surplus water or water power from any Government dam . . . ."
210. 295 U.S. 142 (1935).
211. *Id.* at 162.

Land Act had done was to sever from the land "the waters of all lakes, rivers and other sources of water upon the public lands and not navigable"[212] and not previously appropriated to remain "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes."[213] This policy of general state control was continued in the Reclamation Act of 1902 and amendments thereto in 1906 and 1909.[214]

Prior to 1877 apparently riparian rights did attach to conveyances of public lands, and such rights were entitled to some constitutional protection.[215]

Having dealt with several aspects of the immediate issue of the status of the Missouri River, which has introduced questions concerning the power of the federal government over its property and the scope of its commerce power, including control over navigable waters and non-navigable waters as they affect navigable waters, it is appropriate to turn to a discussion of each of the three categories referred to at the beginning of this Part.

In the course of the major water law treatise chapter of federal-state relations,[216] the following sources of federal power are explored: the commerce clause and the navigation powers;[217] the property clause;[218] the spending power;[219] the war power;[220] and the treaty power.[221]

(1) *Landowner*

Prior to the admission of North Dakota to statehood in 1889, the federal government was the largest landowner in the area west of the Mississippi River. The question arose as the federal government's right to waters flowing on or by the land it owned. The United States Supreme Court ruled in 1899 that even though the states were free to adopt the appropriation system of water rights,

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212. *Id.* at 158.
213. *Id.*
214. Reclamation Act of 1902, 32 Stat. 390 § 8, 43 U.S.C. § 373 (1970); *as amended*, 33 U.S.C. § 759 (1970); 25 U.S.C. § 320 (1970).
215. *E.g.*, Sturr v. Beck, 133 U.S. 541 (1890) (discussed at notes 17-20, *supra*).
216. E. Morreale, *Federal-State Rights and Relations*, in 2 WATERS & WATER RIGHTS (R. Clark ed. 1967).
217. U.S. CONST. art. I, § 8: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .
218. U.S. CONST. art. IV, § 3, cl. 2:
> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

219. U.S. CONST. art. I, § 8: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the . . . general welfare of the United States . . ."
220. *Id.*: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense . . . of the United States."
221. U.S. CONST. art. II, § 2: "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . ."

no state could impose limitations on rights of the federal government as proprietor of public lands.[222] The Court concluded that the doctrine of appropriation could not act to divest the federal government of riparian rights. This limitation on state power existed even though the federal government had acquiesced to appropriation of water on land it owned and to the application of the doctrine of prior appropriation as a means of settling water disputes on federal lands.

Three early federal statutes form the basis for the federal recognition and protection of the Western appropriation concept. The earliest of these was the 1866 statute that granted rights-of-way to ditch and canal over public lands to further mineral development on public lands.[223] That statute contained an express provision protecting prior possessory water uses that had vested and accrued according to local customs, laws and court decisions.[224] The second federal statute was enacted in 1870 and amended the 1866 law by making "all patents granted, or pre-emption or homesteads allowed" subject to the vested and accrued water rights mentioned in the previous act.[225] Finally, the 1877 Desert Land Act provided that the titles to land and non-navigable waters on the public land subject to federal grants would be separated and rights in the water would be determined by the appropriate territorial or state law in effect at the time the land was transferred.[226]

The Supreme Court has interpreted the intention of certain of these acts to be the separation of titles to land and non-navigable waters riparian thereto so that future patents to land would convey only those water rights that had been acquired in accordance with state law.[227] This rationale has been regarded as a complete surrender

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222. United States v. Rio Grande Dam & Irr. Co., 174 U.S. 690, 703 (1899).

223. 14 Stat. 251, 43 U.S.C. § 661 (1970).

224. *Id.* § 9. "Sec. 9. *And be it further enacted,* That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however,* That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." *Id.* at 253.

225. 16 Stat. 218, 43 U.S.C. § 661: "Sec. 17. *And be it further enacted,* that none of the rights conferred by sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory."

226. 19 Stat. 377, 43 U.S.C. § 321. In California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935), the United States Supreme Court held that the Act was applicable to grants made under the homestead and pre-emption acts as well as to desert-land entries.

227. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162, 164 (1935).

of federal control over rights to non-navigable waters located on lands conveyed by the federal government.[228]

A contrary argument by the federal government contends that the acts that separated water rights from federally conveyed lands did not, however, have the effect of surrendering these rights to the states. Under this view the government retained power to reserve waters for its own use, the only stipulation being noninterference with state created rights. This argument has been relevant in determining the status of water rights on lands reserved for reclamation and power projects, particularly in the period from 1910 to 1915. In *Federal Power Commission v. Oregon*[229] the United States Supreme Court agreed that the federal government had reserved water rights necessary for such projects. The result of this decision was to deny compensation to water right holders who had acquired their rights pursuant to state law, but after the creation of the "reserved" lands, and whose rights would be affected adversely by the federal project development.

This case raises the question as to the scope of water rights that the federal government has retained for its own lands. The federal government still retains ownership of considerable acreage that it owned at the time the western states were admitted to the Union.[230] Would such reserved water rights apply to development of federal severed mineral interests?[231]

The Supreme Court indicated that waters on these reserved lands are not subject to appropriation or other diversion in a manner that would reduce their usefulness to federal governmental projects.[232] This argument was applied to reserved lands set aside for reclamation and power projects during the period from 1910 to 1915. The reasoning is that in reserving the land for a particular purpose, the government also, by implication, reserved sufficient waters on the land to supply that purpose.

Since North Dakota began as a common law riparian state,

228. Larson, *supra* note 4, at 252. In Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842), the United States Supreme Court had declared the basic law as to ownership of navigable waters. The court stated that the original colonies owned the waters of navigable streams and the beds beneath them, and as each subsequent state was admitted to the Union, it acquired rights comparable to those of the original colonial states subject only to the right of the federal government to regulate use thereof under the commerce clause and other constitutional powers.

229. Federal Power Comm'n. v. Oregon, 349 U.S. 435 (1954). *See also* Winters v. United States, 207 U.S. 564 (1908), where the Court held that Indian lands had been "reserved."

230. PUBLIC LAND LAW REV. COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION 19 (1970), indicates 700 million acres. The report shows five percent of the land area of North Dakota to be federally owned, although it does not indicate the source of federal ownership. *Id.* at 23.

231. Recent unpublished federal statistics show a federal claim to ownership of 5,406,683 subsurface acres in the 28 western North Dakota coal counties or 20.3 percent of the total area. The statistics were compiled for the Great Plains Resources Program.

232. Federal Power Comm'n v. Oregon, 349 U.S. 435 (1954).

the argument could be made that the federal government still possesses the common law riparian rights to waters on lands that it owns and over which it has never relinquished control whether reserved or not. Several cases bear on this argument.[233]

In order to fully assess the relevance of possible federal water rights in North Dakota, it is necessary to determine whether or not the federal government has designated any lands as "reserved" lands as distinguished from "public lands." Of course, the possibility also remains for the government to designate previously undesignated lands as "reserved" lands and, thus, cut off future water rights. This would only apply to original public domain lands, however. There is some question as to whether any of these federal rights may be asserted by grantees of the federal government.[234]

It is now clear that state courts may adjudicate the nature and scope of federal reserved water rights. This matter was in direct issue before the Supreme Court of the United States in *United States v. District Court for Eagle County*:[235] "The United States moved to be dismissed as a party [from a Colorado adjudication proceeding], asserting that 43 U.S.C. § 666[236] does not constitute consent to have adjudicated in a state court the reserved water rights of the United States." A unanimous Supreme Court affirmed the Colorado Court in its refusal to dismiss the United States. North Dakota has adjudication procedures available under its water law.[237] Montana adjudication questions have been raised recently in a suit filed in federal district court in Montana,[238] a partial purpose of which is to challenge federal claims to control over waters in the Missouri River.[239] Perhaps the filing of the Montana law suit spurred

233. Arizona v. California, 373 U.S. 546 (1963); Federal Power Comm'n v. Oregon, 349 U.S. 435 (1954); First Iowa Hydro-Electric Coop. v. F.P.C., 328 U.S. 152 (1946); California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935); United States v. Rio Grande Dam & Irr. Co., 174 U.S. 690 (1899).

234. Broder v. Water Co., 101 U.S. 274 (1879). *See also* 14 Stat. 251, 253; 43 U.S.C. § 661 (1970).

235. 401 U.S. 520, 522 (1971).

236. 66 Stat. 560, 43 U.S.C.§ 666(a) (1970), provides:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2)) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

Id.

237. N.D. CENT. CODE §§ 61-03-16 to -19 (1960).

238. Environmental Defense Fund v. Morton, as per the complaint available in the office of Professor Beck at the University of North Dakota School of Law.

239. *Id.* at 39-40.

the federal government into seeking a unified position on the matter of ownership and control over Missouri River waters.[240] If the concerned parties do not reach a settlement then either Congress or the courts may have to make a determination.

With reference to acquired lands, the federal government would have only such water rights as were attached to and transferred with the land at the time of acquisition and in this capacity would be like any private party.

There is factual data to support the argument that the federal government divested itself of all water rights in favor of the states. This data forms the basis for the second source of federal water rights in North Dakota, that is, water permits in favor of the federal government which have been issued by the State Engineer after application for a water permit had been made by a federal agency.[241]

(2) *Permit Holder*

At present the federal government is probably the largest single water user in North Dakota. The records of the State Water Commission are replete with water permits in favor of the federal government. There are 284 W.P.A. permits alone. In addition to these, there are many additional recorded water permits in favor of federal agencies.[242]

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240. "Unified Federal Position on Water Marketing First Goal of Special Committee," MRBC, Basin Bulletin 1 (Dec. 20, 1973).

241. It is assumed here that the federal agency would be required to file for a water permit under North Dakota law. In the past, however, the federal government has been exempted from the formal filing requirements and has merely had to notify the office of the state engineer of an intention to appropriate waters in order for those waters to be removed from the scope of public use for appropriation. N.D. LAWS, 1905, ch. 34, § 36, *repealed* N.D. LAWS, 1943, ch. 229, § 1:

> Whenever the proper officers of the United States, authorized by law to construct works for the utilization of waters within the state, shall notify the state engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated at the date of such notice, shall not be subject to further appropriation under the laws of this state for a period of three years from the date of said notice, at which time the proper officers of the United States shall file plans for the proposed work in the office of the state engineer for his information, and no adverse claim to the use of the waters required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of this state, except as to such amount of the water described in such notice as may be formally released in writing by an officer of the United States, thereunto duly authorized; provided, that in case of failure to file plans of the proposed work within three years, as herein required, the waters specified in the notice given by the United States to the state engineer shall become public waters, subject to general appropriations.

Id. See also N.D. LAWS 1935, ch. 228, § 17, *repealed* N.D. LAWS 1957, ch. 383, § 46. In 1934 the Secretary of Agriculture had communicated the federal government's intent to utilize unappropriated waters described as: "The Mouse River, also known as th Souris River, and all of its tributaries; the Des Lacs River, also known as the Des Lacs Lakes, and all of their tributaries; the James River, including its tributary the Pipestem River, and all tributaries of both such rivers in North Dakota; the Bois de Sioux River, the Sheyenne River, the Forest River, and all other tributaries of the Red River in North Dakota; all tributaries of the Missouri River in North Dakota. North Dakota State Water Commission, North Dakota Interim State Water Resources Developmen Plan 17 (1968).

242. *See, e.g.*, S.W.P. 250, 434, 435, 466 (U.S. Bureau of Reclamaion); 926, 1058, 1243,

Is the federal government legally required to file for permits under state law? Or have these agencies merely chosen to do so as a matter of grace in aiding the state's regulation of water use? Clearly the federal government is required to file for permits in conformity with applicable state law under the Reclamation Act of 1902.[243] Similar provisions exist in other federal statutes.[244] These statutes taken together might imply that Congress did not intend to reserve paramount water rights for the federal government. As a practical matter, since arguments are strong on both sides of this issue, it seems logical to consider the public policy aspects of defeating private investment interests by the exercise of claims that have long been dormant.[245]

The final aspect of federal water rights in North Dakota to be treated here is control over waters that results from the exercise by the federal government of specific regulatory powers delegated to it by the United States Constitution.

(3) *Regulatory Powers*

Among the relevant federal regulations are the commerce power, the treaty-making power, and the spending power. The total result of these powers is to remove from state control a significant amount of authority over bodies of water that lie within North Dakota or on its borders.

If it is determined that particular waters are navigable, it has been the rule that the state owns the bed and the waters subject to the right of the federal government to regulate use in order to promote and maintain the flow of commerce.[246] The commerce clause gives the federal government the opportunity to extend its control over waters within a state to an immense degree. The Supreme Court has declared[247] that to the extent that private rights are impaired by navigation improvements there is under some circumstances no right to redress by the injured party. The Court has also held[248] that flood protection, watershed development and so forth, through the generation and use of electric power were all parts of commerce control. In a special context the Court has approved[249] the exclusive jurisdiction of the federal government over navigable streams.

1259P, 1260P, 1261, 1262, 1263, 1273P, 1274P, 1339, 1361, 1362, 1481 (U.S. Fish & Wildlife Service); 1107, 1133, 1134, 1135, 1136, 1137, 1138, 1234, 1554 (U.S. Forest Service); and 1191 through 1198 (National Park Service).

243. 32 Stat. 390, § 8; 43 U.S.C. § 372 (1958).

244. *See* Rights of Way Act of 1891, 26 Stat. 1101, 43 U.S.C. § 946 (1958); Federal Power Act, 41 Stat. 1063, 16 U.S.C. § 1821 (1958).

245. *See* Larson, *supra* note 4, at 253.

246. Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

247. United States v. Willow River Power Co., 324 U.S. 499 (1945).

248. Oklahoma v. Atkinson, 313 U.S. 508 (1940).

249. First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946).

Under the commerce power the federal government has authority to control waterways to the extent necessary to promote navigation.[250] This control extends to tributaries of navigable waters which are in themselves not navigable to the extent necessary to protect navigation.[251] In theory then, federal control could extend to the tiniest stream. The question thus presents itself as to how far and to what extent the federal government could assert control over nonnavigable waters on the ground that there is some effect on navigable waters. If a small nonnavigable stream empties into a navigable river and the nonnavigable stream is drained or dammed by the state or by an appropriator, could it not be argued that under some circumstances the lessening of the flow to the navigable stream produced a detrimental effect on the flow of commerce? Therefore, federal control could be exerted over the uses for which the nonnavigable waters are applied on the grounds that there is an ultimate effect produced on the navigable waterways. In light of past Supreme Court decisions, this conclusion is a distinct possibility. This provides the federal government with a great deal of power in North Dakota as regards the Missouri River and its tributaries. While the issue of navigability for commerce purposes is a federal question, the North Dakota courts have recognized the Mouse River at Minot to be nonnavigable,[252] the Missouri River to be navigable,[253] Sweetwater Lake to be navigable,[254] and Devils Lake to be navigable.[255]

It is well settled that the riparian right of access to the navigable part of a river is property.[256] The question then arises whether the impairment or destruction of a riparian owner's access to a navigable body of water, when the impairment is caused by construction incident to making improvements in navigation, is taking without compensation. The courts hold that a riparian owner is entitled to no compensation for the cutting off of his access to the navigable portion of the stream by work done by the government for the improvement of navigation.[257] The reasons for this result which seems initially to violate the constitution do not seem clear, and the courts are not in agreement as to any general postulates. One theory is to declare that the constitution forbids "taking" for public use without compensation and in these cases the injury is merely consequential and thus not a taking.[258] Other cases have

250. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
251. United States v. Rio Grande Dam & Irr. Co., 174 U.S. 690 (1899).
252. Bissell v. Olson, 26 N.D. 60, 143 N.W. 340 (1913).
253. Hogue v. Bourgois, 71 N.W.2d 47, 52 (N.D. 1955).
254. Roberts v. Taylor, 47 N.D. 146, 181 N.W. 622 (1921).
255. Rutten v State, 93 N.W.2d 796 (N.D. 1958).
256. Park Comm'rs v. Taylor, 133 Ia. 453, 108 N.W. 927 (1906); Reeves v. Backus Brooks Co., 83 Minn. 339, 86 N.W. 337 (1901).
257. Annot., 21 A.L.R. 206, 215 (1922).
258. *Id.* at 216.

stated the reason to be that since Congress has constitutional power over commerce it may improve the navigability of water without making compensation for the access destroyed in so doing.[259] Some of the cases have stated that the private right of access to the water is not valid as against the superior right of the government to make improvements beneficial to navigation.[260] There are some cases that have gone so far as to allow the water to be completely removed from the channel thus totally destroying the watercourse as far as the riparian owner was concerned.[261] The federal government may accomplish improvement of navigation by placing structures in the bed of the stream. The cases hold that as long as the structures improve navigation, the riparian owner will have little or no redress.[262]

Since the federal regulatory interest is not proprietary,[263] it does not in theory contradict state ownership of water and state power to allocate water rights, but does operate to prevent the assertion of any ownership or allocation rights that would hinder navigation. And since the federal interest is an "overriding servitude," injury to private rights resulting from exercise of navigation power does not require compensation.[264]

Most of the federal activity regarding water has been justified on the basis of the navigation power.[265] It was not until 1936 that the spending power[266] received separate status generally[267] and in 1950 this power was cited to justify the Central Valley Reclamation Project in California.[268] The power offers a vast potential for federal involvement and it appears to be up to Congress whether any project authorized thereunder must comply with state laws.[269]

The war power[270] appears to provide the federal government with vast potential as well, although it has been little used to date.[271] It did surface as a basis for justifying the Tennessee Valley Authority Project.[272] It might surface again in the energy production context since water is an important element in most forms of energy produc-

259. Henderson v. Hines, 48 N.D. 152, 183 N.W. 531 (1921).
260. Home for Aged Women v. Com., 202 Mass. 422, 89 N.E. 124 (1909).
261. Black River Improv. Co. v. LaCrosse Boom & Transp. Co., 54 Wis. 659, 11 N.W. 443 (1882).
262. Hawkins Point Lighthouse Case, 39 F. 77 (1889).
263. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).
264. United States v. Willow River Power Co., 324 U.S. 499 (1945); *See* Larson, *supra* note 4, at 257.
265. *See generally* E. Morreale, *Federal-State Rights and Relations*, in 2 WATERS & WATER RIGHTS 1, 83-84 (R. Clark ed. 1967).
266. U.S. CONST. art. I, § 8.
267. United States v. Butler, 297 U.S. 1 (1936).
268. United States v. Gerlach Livestock Co., 339 U.S. 725 (1960).
269. *See* Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275 (1958).
270. U.S. CONST. art. I, § 8.
271. *See generally* E. Morreale, *supra* note 265, at 85.
272. Ashwander v. TVA, 298 U.S. 288 (1936).

tion whether electrical power generation or coal gasification.[273]

The treaty power[274] will be discussed in Part VI of the article with International and Interstate matters.

V. INDIAN RIGHTS

Due to the silence of the treaties, legislation, or executive orders creating reservations as to the nature and scope of Indian water rights, it has been necessary for the courts to determine to what extent tribal water rights exist, and the nature of those rights.

Historically, Indian tribal claims to the use of water were confined to hunting and fishing rights, agricultural use, and domestic use. However, with rapidly advancing technology and a push for development within many Indian tribes, Indian claims to water are now made for other uses as well, such as hydroelectric power and industrial development.

Tribal claims to fishing rights are relatively unimportant in North Dakota[275] as compared to other states,[276] so only a brief treatment will be given. *United States v. Winans*[277] was one of the earliest cases involving tribal claims to the use of water. It involved the rights of the Yakima tribe in Washington to establish certain fishing sites on the Columbia River for the tribe. The Court construed the treaty liberally in favor of the Indians on the fishing rights issue.

Winans was followed in 1908 by a landmark case concerning Indian water rights, *Winters v. United States*.[278] The *Winters* case involved the interpretation of an 1888 agreement between the United States and the Fort Belknap Indians. This agreement reduced the area designated to be the permanent home of the tribe. The reduced area was bounded in part by the Milk River which had also been a part of the original reservation land. In 1889 Montana became a state. Since 1889 the Milk River had been diverted by the United States so as to supply the reservation with adequate water. Upstream from the reservation, Winters, a non-Indian, constructed dams that prevented the water from flowing down to the reservation. The Indians through the United States sought injunctive relief. The lower federal courts granted the injunctive relief injoining inter-

273. The recent activity in requests for water permits from the North Dakota State Water Commission for just such uses attest to this fact.

274. *See* U.S. CONST. art. II, § 2.

275. No North Dakota cases involving fishing rights have been uncovered. *See* 48 N.D.L. REV. 734-35 (1972).

276. Alaska, Oregon, and Washington have highly developed commercial fishing interests in which Indian tribes can and do participate. Minnesota also recognizes commercial fishing rights in Red Lake by the Red Lake Chippewa tribe.

277. 198 U.S. 311 (1905). For a general discussion of Indian water rights law see Clyde, *Indian Water Rights*, in 2 WATERS AND WATER RIGHTS 373 (R. Clark ed. 1967).

278. 207 U.S. 564 (1908).

ference with reservation "use of 5,000 inches of the waters of Milk River" in Montana.[279]

The Supreme Court held that under the circumstances there was an implied reservation of water rights by the Indians when they ceded the larger area of the reservation to the United States since to hold otherwise would have so greatly reduced the value of the land for any retained purpose that it would be highly unlikely that such a result could have been contemplated. The Court reasoned that in order to become a "pastoral and civilized" people, the Indians could not have intended to grant to others the water that is so necessary for agriculture in the arid western states. "[A]mbiguities occurring will be resolved from the standpoint of the Indians."[280]

Several circumstances of the case should be noted. First, the underlying theory is one of reservation of water rights by the Indians, not one of grant by the United States. How did the Indians come to have water rights to be reserved in the first place? Second, the Milk River is non-navigable. To what extent may Indian water rights exist in navigable bodies of water? Third, is any more than a prior existing use protected? Fourth, are the uses limited to hunting and fishing, domestic, and agricultural uses? Fifth, the Court noted that "there are springs and streams on the reservation flowing about 2,900 inches of water."[281] Is there any question about the Indian right to tap bodies of water confined wholly within the reservation? Sixth, this case involved the interpretation of an agreement establishing the reservation. Do the principles attach to reservations created by other means?

As to whether the admission of Montana as a state divested the Indian rights, the Court held that the federal government had the power to reserve the waters and exempt them from appropriation under state laws.[282]

In *Conrad Investment Co. v. United States*,[283] the Ninth Circuit Court of Appeals faced squarely the issue whether future tribal needs must be met in addition to needs existing at the creation of the reservation. The decision came shortly after the *Winters* decision:

> [T]he policy of the government to reserve whatever water . . . may be reasonably necessary, not only for present uses,

279. Winters v. United States, 143 F. 740, 148 F. 684 (9th Cir. 1906), *aff'd*, 207 U.S. 564 (1908).
280. 207 U.S. at 576.
281. *Id.*
282. The Court relied on United States v. Rio Grande Ditch & Irr. Co., 174 U.S. 690 (1899); United States v. Winans, 198 U.S. 371 (1905).
283. 161 F. 829 (9th Cir. 1908).

> but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the *Winters* case.[284]

In this case the plaintiffs sought to enjoin the defendants from obstructing the flow in the non-navigable Birch Creek in Montana so as not to interfere with Indian rights on the Blackfeet Indian Reservation. The district court allowed the Indians 1,666-2/3 inches or 33-1/3 second feet: But this, said the circuit court, is subject to modification "should the conditions on the reservation at any time require such modification."[285] The court in referring to uses said that the Tribe has "the paramount right" to use "to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic *and other useful purposes,*"[286] although the focus of this case clearly was agricultural.

In 1939 the Ninth Circuit again had occasion to consider Indian water rights. In *United States v. Walker River Irr. Dist.*,[287] an action was brought to enjoin defendants from interfering with the flow in the Walker River, a non-navigable stream in Nevada so as to preserve the flow to the Walker River Indian Reservation. Rather than having been established by treaty or agreement, this reservation was established by Executive action in November of 1859. The court found the absence of aboriginal rights insignificant: "It would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive."[288] In other words, the same line of reasoning would apply even though no treaty was involved. In response to the argument that establishment of water use rights should be based on first come, first served, the court noted that it was understood the Indians would make slow progress and would, therefore, be at a competitive disadvantage. What amount did the Indians obtain? It was "to the extent reasonably necessary to supply the needs of the Indians," and "the area of irrigable land . . . is not necessarily the criterion for measuring the amount."[289] Only "experience" could demonstrate the extent. The special master had determined that 26.25 second feet was demonstrated by seventy years experience. The Indians are awarded this amount "during the irrigation season of one hundred and eight days for the irrigation of two thousand one hundred acres . . . *and* the flow of water reasonably necessary for domestic and stock watering purposes and for power purposes

284. *Id.* at 832.
285. *Id.* at 835.
286. *Id.* at 831 (emphasis added).
287. 104 F.2d 334 (9th Cir. 1939).
288. *Id.* at 339.
289. *Id.* at 339-40.

to the extent now used by the government, during the nonirrigating season, with a priority of November 29, 1859."[290]

In 1939 in *United States v. Powers*,[291] the Supreme Court held that the 1868 treaty established water for equal benefit of all tribal members, so when land allotments were made, a water right passed appurtenant to the land. Such rights were owned then by the individual allottees and their successors in title rather than by the Tribe. Since North Dakota Reservations are checkboarded with privately owned land, individual Indian land, and tribally owned land, problems may arise in determining the amount of water needed.

More recently in 1956, in *United States v. Ahtanum Irrigation District*,[292] the Ninth Circuit Court of Appeals reaffirmed the need to adjust the quantum of water necessary for an Indian tribe. The Court said:

> [T]he quantum is not measured by the use being made at the time the treaty reservation was made. The reservation was not merely for present but for future use. Any other construction of the rule in the Winters case would be wholly unreasonable . . .[293]

It then went on to say that the waters were set aside for the Indians regardless of the quantity remaining for white settlers. These rights, having been reserved by treaty, are not subject to appropriation under state law. The case involved Ahtanum Creek, a nonnavigable stream, and the Yakima Tribe in Washington. The Treaty entered into in June of 1855 was similar to that involved in *Winters*. One difference was that the *Winters* treaty referred to the center of the Milk River while this treaty referred to the stream as the boundary. The Court found no significance in this. The focus again was on the agricultural use of the land. A question arose as to a 1908 agreement by the Secretary of the Interior to the effect that non-Indian users could have 75 per cent of the water while the Indians would retain 25 per cent. "[W]e can readily perceive that the Secretary of the Interior . . . improvidently bargained away extremely valuable rights belonging to the Indians,"[294] but it was not *ultra vires*. However, the 75 per cent is limited to the 1908 needs.

To that extent, then, *Conrad* and *Ahtanum* provide a basis for arguing that Indian usage of reserved waters is subject to change to meet future needs. An important aspect of this concerns the *na-*

290. *Id.* at 340.
291. 305 U.S. 527 (1938).
292. 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957).
293. 236 F.2d at 326.
294. *Id.* at 337.

ture of those needs. In the *Winters* case the main concern of the Court was with ensuring that the tribe was supplied with sufficient water to meet its agricultural needs. With the advances in industrial technology and decline in the number of persons engaged in agriculture since 1908 it is not inconceivable that an Indian tribe would consider applying its water resources to other than an agricultural use. Indian tribes are considering putting water to recreational, timbering, industrial and hydroelectric uses.[295] The possibility of the Indian tribes being able to enforce claims to water for such uses could have serious consequences for other appropriators who might find themselves faced with a loss of water.

The *Conrad* case addressed the issue of uses by the Indians. The court referred to Indian paramount rights in water as including such things as irrigation, stock raising, domestic use, "and other useful purposes."[296] The language here seems to indicate that irrigation was not the sole purpose for which reservation tribes could use water. It might even seem reasonable to argue, based on this language in *Conrad*, that changes in technology require the Indian tribes to use water for purposes other than agriculture in order to keep their economy in step with the times.

Are the Indian water rights absolute or merely usufructuary rights which, if not exercised by the Indian tribes, allow the water to be used by other appropriators? In *Ahtanum* the court said that an Indian water right was only a right to use the water, and if the right was not exercised, the water could be used by anyone else.[297]

In one sense the *Ahtanum* view clashes with the thrust of the earlier cases. If the Courts hold that unused water rights are abandoned or lose priority to other appropriators, then the Indian tribes would stand little or no chance of recovering any *Winters* doctrine rights that were reserved for their benefit. On the other hand, if the tribal claims are to be extended to unlimited usage with future needs to be fulfilled by withdrawing waters from other appropriators, an extremely unstable economic condition would exist. This condition would most likely result in lack of full development of water resources.

In North Dakota both the Fort Berthold Reservation and the Standing Rock Reservation border or encompass sections of the Missouri River. In the *Winters* case the issue of navigability of the water was not raised, although the stream there involved was

295. Memo C2-2, presented to a Special Meeting of the Yellowstone Compact Commission at Sheridan, Wyoming, May 6, 1971.
296. Conrad Inv. Co. v. United States, 161 F. 829, 831 (9th Cir. 1908).
297. United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957). See Memo, *supra* note 295.

non-navigable. Since the Missouri River is navigable, the question of a specific reservation of the waters becomes important. Generally, it may be argued, if navigable waters have not been reserved, a tribe would have only the right of use of the water in common with the citizens of the state.[298] Questions of intent and the circumstances surrounding the creation of the Reservations would be important in determining any claims by North Dakota Indian Tribes to have prior and superior rights to use of waters in the Missouri River.[299]

Thus, for numerous reasons an approach that determines finally the needs of the Indian tribes and the future availability of water resources to others is needed. *Arizona v. California*[300] may provide the answer. There the Court held that Indian water rights could be quantified by allowing the Indians enough water to take care of the acreage pratically irrigable on their reservation. This decision would settle the question once the acreage can be determined, if agricultural usage is the only use claimed for the water. Some attorneys contend that Indian rights to water extend to control as well as to use. If this contention is correct, it may have serious implications for industrial appropriators on the Missouri River. These same attorneys also contend that Indian water rights extend to industrial and hydroelectric purposes. If these contentions are correct also, quantification of water rights based on irrigable acreage might not only be irrelevant to the actual use made of the water, but might also be based on highly unrealistic appraisals of the quantity needed, resulting in prejudice to either the Tribe or other appropriators.

A statement by one of the field solicitors of the Yellowstone Compact Commission contends that since the reservations were originally created for agricultural purposes, the water rights should be limited to agriculture.[301] This argument overlooks the fact that many of the "agricultural" lands reserved to the Indians were hardly fit for agriculture. If the Indians can establish water rights in the Missouri River, this resource may be worth as much or more than the agricultural potential of reservation lands. It is a gross understatement to say that there is potential for much litigation in this area.

The cases to date establish an Indian priority date as of the establishment of the reservation.[302] They have not undertaken a thorough review of aboriginal claims.

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298. F. COHEN, FEDERAL INDIAN LAW 318 (1942).
299. Mr. Hart's interviews with B.I.A. engineers at New Town and Fort Yates indicate that data concerning use of the Missouri River by the tribes may not be very accurate.
300. 373 U.S. 546 (1963).
301. Memo, *supra* note 295.
302. Arizona v. California, 373 U.S. 546, 600 (1963); United States v. Hibner, 27 F.2d

The final aspect of Indian water rights to be discussed relates to the source of the Indian water supply. From the cases previously discussed or referred to, it seems clear that Indian use privileges extend to navigable and non-navigable waters, to streams flowing through or by the reservation and even to streams not touching the reservation. If more than one source is available and not all sources are necessary to satisfy the Indian need which source will it be. *United States v. Wrightman* denied to the Indians several small springs located on the corner of the reservation because "the use of these waters is in no just sense necessary to the objects for which the reservation was erected."[303]

That Indian usage can extend to groundwater seems obvious. The Solicitor of the Department of the Interior has ruled that since state law cannot be applied to Indians on reservations in the absence of specific congressional consent, in the absence of such consent state groundwater law cannot be applied even though the Department of the Interior and the Indian tribe consent.[304] However, there may be limits to drilling of wells on reservation lands within duly authorized irrigation project areas that also contain non-Indian lands.[305]

In North Dakota, wells are used extensively on all four Indian reservations.[306] The Turtle Mountain Reservation in particular contains large aquifers that provide a substantial water source for the reservation. Plans are underway to tap a large aquifer near Belcourt to provide for the needs of that town.

The North Dakota State Water Commission records show almost no information about the types of use, sources of water used, or the quantities used by North Dakota tribes. The BIA offices on all four reservations indicate that there is raw data available that could be studied to better determine the extent of water used on the reservations.[307] No statistics are available from that raw data now. The reservation wells are used mainly for domestic and stock-watering purposes. The Standing Rock and Fort Berthold BIA offices advise that there are diversions on the Missouri River for agricultural puposes, but that they have no idea as to the quantity diverted.[308] The present lack of communication and cooperation between the State Water Commission and the Indian tribes in North Dakota as to Indian water claims could lead to extensive litigation.

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909 (D. Idaho 1928) ; Skeem v. United States, 273 F. 93 (9th Cir. 1921).

303. 230 F. 277, 282 (D. Ariz. 1916).

304. Applicability to Indian lands of Arizona Law Regulating Withdrawal of Ground Water, 61 Interior Dec. 209 (1953).

305. *See* Indian Irrigation Wells on San Carloe Project Lands, 61 Interior Dec. 312 (1954).

306. The conclusion is based on Mr. Hart's conversations with various B.I.A. and Indian representatives from the reservations during 1972-1973.

307. *Id.*

308. *Id.*

What then is required? As a first step an analysis must be made of all treaties, legislative acts, and executive pronouncements relating to Indian lands in North Dakota. Second, a detailed examination must be made of the nature and extent of historic water uses by Indians within North Dakota. Third, knowledge must be acquired of present uses of both surface and groundwaters on Indian lands. Fourth, projections must be made for future water needs on the reservations. If after this knowledge becomes available, difficulties arise in terms of lack of water, appropriate steps will have to be taken to settle the problems.

VI. INTERNATIONAL AND INTERSTATE RIGHTS

Many of North Dakota's important streams are either international or interstate in character or both. Thus more than one sovereignty may have claims thereto. There are several approaches to solving these claims that will have to be briefed. These include treaties, interstate compacts, federal legislation, and court apportionment.

A treaty between nations is the usual method for resolving a dispute as to the distribution and use of waters which traverse the lands of more than one country. Furthermore, disputes over the use of such resources should be resolved by applying international law, which includes generally accepted principles limiting national sovereignty, as well as the application of treaty provisions.[309]

The federal government has power to enter into treaties with foreign nations.[310] This same power is denied to the states.[311] The treaty power thus gives the federal government the power to regulate streams common to more than one nation. North Dakota's concern is with Canada. The 1909 Boundary Waters Treaty between the United States and Canada[312] is applicable to the Mouse, Pembina, and Red Rivers in North Dakota. Article II of this treaty states that each country shall have the "exclusive jurisdiction and control over the use and diversion, . . . of all waters on its own side of the line . . . which flow across the boundary or into boundary waters."[313] There is a restriction on this sovereignty, however, to the extent that "any interference with or diversion . . . of such waters . . . resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injuried parties to the same legal remedies

309. For a thorough discussion of the general principles here involved see A. Utton, *International Streams and Lakes*, in 2 WATERS AND WATER RIGHTS 401 (R. Clark ed. 1967), which includes a separate section on "Canadian International Waters" at 430-69.
310. U.S. CONST. art. II, § 2, cl. 2; art. VI, cl. 2.
311. U.S. CONST. art. I, § 10, cl. 1.
312. Treaty between the United States and Great Britain Relating to Boundary Waters between the United States and Canada, Jan. 11, 1909, 36 Stat. 2449 (1909).
313. *Id.*

as if such injury took place in the country where such diversion or interference occurs."[314] This stipulation does not guarantee a remedy, however. It only places the downstream user in the same position as one damaged at the point of diversion. Thus, if the doctrine of sovereign immunity would apply against a user in the country where the diversion took place, the downstream user in the foreign country would also be without remedy.[315]

In 1962 the International Joint Commission was asked by the governments of Canada and the United States to investigate and report on the water resources in Manitoba and North Dakota. This request concerned primarily the Pembina River, but resulted from a 1948 reference by the Joint Commission to study water uses in the Mouse and Red River basins.[316] However, data concerning the international aspects of the Souris and Red Rivers are scarce.[317]

This final portion of the article will discuss briefly interstate interests in water considering the use of interstate compacts, federal legislation, and the doctrine of equitable apportionment as methods to resolve interstate disputes over waters.[318]

The interstate compact is a device that was contemplated when the Constitution was drafted.[319] Its popularity has increased in the last thirty or forty years. The difficulty with an interstate compact is that it fixes the rights of the states irrevocably until changed by Congress or by mutual agreement of the states themselves, which in some cases might prove to be a difficult task. The State of North Dakota is involved in one interstate compact at present. This is the Yellowstone River Compact, the signatories of which are North Dakota, Wyoming, and Montana.[320] The interests granted to North Dakota under this compact are minimal, as there is little of the Yellowstone that actually flows in North Dakota. However, the compact does recognize that waters of tributary streams of the Yellowstone which have their origin in North Dakota and are situated entirely in North Dakota and which flow into the Yellowstone River below Intake, Montana, are to be alloted to North Dakota.[321] When disputes arise over these waters, the applicable provisions of the compact will govern.

In disputes over interstate waters where no interstate compact is in existence, two remedies may be applied by the federal govern-

314. *Id.*
315. A. Utton, *supra* note 309, at 441.
316. Waite, *International Law Affecting Water Rights in the Western States*, 4 LAND & WATER L. REV. 67, 79 n.50 (1969).
317. *Cf.* Souris-Red-Rainy River Basins Comprehensive Study (1972).
318. For a thorough discussion of the general concepts here involved see C. Corker, *Water Rights in Interstate Streams*, in 2 WATERS AND WATER RIGHTS 293 (R. Clark ed. 1967).
319. *Id.* at 297.
320. N.D. CENT. CODE ch. 61-23 (1960).
321. N.D. CENT. CODE § 61-23-01, art. v. (1960).

ment. The first remedy is by Congressional allocation of the waters. The second remedy is by decision of the United States Supreme Court.

Doubt as to the constitutionality of congressional apportionment legislation was not resolved by the United States Supreme Court until *Arizona v. California*[322] in 1963, so this remedy has been little used.

Resolution by decision of the United States Supreme Court through the equitable apportionment doctrine has been limited in use generally to cases of direct conflict between states.[323] However, in the justiciable cases between states the Court has made significant decisions that result in a "federal common law" doctrine of equitable apportionment. The doctrine attempts to divide the waters of interstate rivers in an equitable manner, depending in part upon the water law applicable in the states involved. With the exception of Minnesota, which is a riparian doctrine state, all of the states that border North Dakota are prior appropriation doctrine states. In this situation, the Court would give substantial weight to the underlying bases of prior appropriation doctrine. The principal case is *Nebraska v. Wyoming*[324] decided in 1945. There the Court explained its approach as follows:

> . . . [W]e are confronted with the problem of equitable apportionment. The Special Master recommended a decree based on that principle. That was indeed the principle adopted by the Court in *Wyoming v. Colorado* . . . . Since Colorado, Wyoming, and Nebraska are appropriation States, that principle would seem to be equally applicable here. That does not mean that there must be a literal application of the priority rule. . . . For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible these established uses should be protected. . . . Appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely illustrative, not an exhaustive catalogue.[325]

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322. 373 U.S. 546 (1963).

323. *See* Kansas v. Colorado, 206 U.S. 46, 117 (1907), where the Court found "perceptible injury to portions of the Arkansas Valley in Kansas . . . [but] yet to the great body of the Valley it [Colorado's appropriation] has worked little, if any, detriment," so Kansas was not entitled to a decree.

324. 325 U.S. 589 (1945).

325. *Id.* at 617-18.

Thus it is not certain that if North Dakota, for example, fails to use the water flowing in the Missouri River, downstream states that use it will obtain prior rights to continued flow and use. As can be seen from the foregoing summary by the Court, prior use is only one of many factors taken into account.

From the foregoing short summary in relation to international and interstate rights it can be seen that there is no easy settlement for apportionment difficulties that may arise, but that several forums are available. At the present time there is no clear delineation as to apportionment of any international or interstate body of water for North Dakota. To more fully understand the applicability and shortcomings of the various approaches available, a detailed study should be undertaken of each.

VII. SUMMARY ANALYSIS AND CONCLUSION

The preceding sections of this article cover the gamut of possible ownership and control interests in the water within North Dakota. At times no clear distinction is drawn between ownership and control. However, the article does set forth the relevant arguments. It shows that legal issues remain to be solved and that factual analyses remain to be made as to whether certain legal principles have any applicability.

The North Dakota Code provision which states that ownership of the water within North Dakota is in the public can only be interpreted as follows: The people of North Dakota own the water within the state of North Dakota; subject to existing riparian and prescriptive rights; subject to existing unsufructuary rights obtained pursuant to the state's prior appropriation law, some through permit, others through physical appropriation, and subject to the issuance of further such permits and further physical appropriation; subject to whatever ownership rights may exist in the federal government and Indian Tribes, and subject certainly to a great degree of control by the federal government over the use of water from federal structures and navigable waters; subject to whatever claims Canada may have to international streams; and subject to whatever claims other states may have to the interstate bodies of water. It will probably be a long time before some of the larger claims are settled. Some claims could be settled through use of the adjudicatory mechanism provided in the North Dakota Code.

The article has also pointed out problems within the scope of each of the claims analyzed. For example, many questions remain as to the nature of the appropriative use right obtained under the current North Dakota Code. Many of these questions could be answered through rule-making by the State Engineer or

the State Water Commission, and, if they fail to act, by the North Dakota Legislative Assembly. Some of the problems seem to have arisen because the North Dakota appropriation law had its beginnings in an Irrigation Code and it has now outgrown the limitation to irrigation without all of the necessary language changes having been made.

Hopefully, this article will spur clarification efforts.

VIII. BIBLIOGRAPHY

This bibliography has been selected to give North Dakota lawyers interested in water ownership and use problems easy access to the best readily available general and North Dakota materials on the subject. There are many other general sources; the North Dakota listing is intended to be exhaustive. The authors strongly recommend that any office doing significant work in water law obtain the new treatise on water law referred to in item A(1)(d) below.

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