



The Missouri River: Whose Water Is It?

Special to Garrison Diversion

Stretching nearly 2,500 miles, the Missouri River is the longest river in the country. The drainage basin encompasses one-sixth of the continent, embraces 10 states, two Canadian provinces and the reservations of 25 Indian tribes. A series of six massive dams impede water flow on the main stem of the river, creating three of the largest man-made lakes in the United States. With a combined storage capacity of 74 million acre-feet, it is the largest system of reservoirs in the United States.

States exercise near-exclusive authority over waters within their boundaries, holding water “in trust” for their citizens’ benefit. Yet, when water crosses state lines, controversies frequently arise over who is entitled to use the water and dam the water and in what amounts. The Missouri River history is rife with controversy, and current claims for water indicate a feud over water rights between states is likely.

More than 80 years ago, lower Missouri basin states sought protection from catastrophic flooding. These southern states sought Congressional authorization for dams to be placed upstream, which would flood northern states’ farmland and Native American reservations. In return, pursuant to a political compromise, northern states were promised benefits from the water behind the dams, such as recreational opportunities and financial support to develop irrigation and statewide municipal, rural and industrial water supplies. The southern states

were successful in obtaining flood protection, yet North Dakota has been forced to resort to decades of lawsuits in the effort to get the federal government to provide the benefits promised. North Dakota spent over a decade in the 1970s in litigation to bring Missouri River water to communities in eastern North Dakota through Garrison Diversion facilities. Other litigation over the Northwest Area Water Supply (NAWS) plan to bring water to Minot and north central North Dakota has raged for the last 15 years, continuing today. Missouri objected to a federal plan 10 years ago to bring Missouri River water to the Red River Valley. In the last year, Missouri objected to a plan to bring Missouri River water to the Spiritwood area near Jamestown.



How Do States Resolve Water Rights Battles?

Traditionally, interstate water disputes get resolved through one of following three mechanisms. States may enter into an agreement between themselves, known as an interstate compact. Alternatively, an interstate water dispute may be resolved by an act of Congress, who has authority to apportion waters pursuant to the U.S. Constitution. Finally, where states have been otherwise unable to reach an agreement, litigation may ensue. The U.S. Supreme Court is able to hear conflicts between individual states and will apply the principles of “equitable apportionment” to determine what each state should receive.

1. Interstate Compacts

Parties retain the most control over the outcome by resolving disputes through an interstate compact. Once an agreement is reached, state legislatures enact identical legislation to put the compact into force.

Several major rivers are apportioned through interstate compacts, including the Yellowstone, Colorado, Arkansas and Delaware rivers. Some compacts simply allocate water between states and otherwise leave each state to manage water within its jurisdiction. Other compacts establish regional commissions or other interstate administrative bodies, which are given authority to manage water according to the terms of the compact. For example, the Delaware River Basin Compact formed the Delaware River Basin Commission. This Commission controls every important aspect of river management: water quality, water

allocation, hydroelectric power generation, recreational use, flood control and watershed preservation. Recently, there have been calls for the formation of a Missouri River Basin Commission, combining the advantages of state cooperation and federal oversight and participation.

2. Congressional Apportionment

Congress has the power under the U.S. Constitution to apportion interstate waters among states. This is the rarest of apportionment schemes, as Congress has only exercised this power twice. In one of those instances, it was the states that negotiated the terms of the agreement, and Congress simply adopted it.

3. Equitable Apportionment Lawsuit between States

Interstate water disputes frequently result in litigation, where the U.S. Supreme Court may apportion interstate waters between states. A typical equitable apportionment case arises when a downstream state seeks to stop a diversion or use by an upstream state. A downstream state must show that the diversion will cause “real and substantial injury.” In fact, the Supreme Court will apportion water only when the petitioning state can demonstrate that another state has appropriated more than its equitable share of the flow of shared water and that such an appropriation has caused serious injuries to the downstream state’s substantial interests.

If a downstream state meets its burden, the burden shifts to the upstream state to show that, based on the relevant equities, the diversion should be allowed.



In making its ruling, the Supreme Court will examine a number of factors, including geographical, economic and social considerations. For example, the Supreme Court could review and consider the actual financial impacts to irrigation and municipal water supply needs upstream versus the actual expected financial impacts downstream to navigation interests, fishing or municipalities.

So how does North Dakota obtain and maximize its rights to Missouri River water? The Supreme Court's equitable review does not automatically give credit for large permitted allocations that are issued but unused. The state needs to remain steadfast in its quest to put water to beneficial use across the state. The state must continue to develop the Southwest Pipeline, bringing water to the southwest, as well as the Western Area Water Supply Project, bringing water throughout the northwestern corridor and to the energy industry. As distasteful as litigation is, the state needs to continue its quest to bring water to the NAWS region, central North Dakota and Red River Valley, despite downstream objections. The state is to be applauded for its continued commitment to these important water projects.