Is It Time for a Missouri River Compact?

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By John H. Davidson

Whether one chooses to blame it on global warming, climate variability or population growth, one thing seems certain—we are confronting an era of broad-based regional water shortages, particularly in and around the American West. Current patterns of water use and the vast infrastructure built to support them are based on climate patterns as we have experienced them, but climatologists now agree that future water patterns will not simply mimic the past. This is particularly true of the American West, which is getting drier while supporting an ever-increasing human population.

The most recently published modeling results indicate warming in the West will occur well beyond the worldwide average, and the Western Governors Association is predicting temperature increases from 4–13 degrees Fahrenheit. Any such increases will result in smaller snowpacks, earlier snowmelt, accelerated flood-control releases, more extreme flood events, receding glaciers, more evaporation and less groundwater. Most models foretell water shortages, lack of storage capacity to meet seasonally changing river flows, and transfer of water from agriculture and industry to municipal use. Over the last half of the 20th century, the West’s mountains received less winter snow and more rain, with snow melting earlier, causing rivers to flow more strongly in the summer. Simply put, the West provides our first good example of a problem that has the potential to become commonplace.

It is inevitable that water-short regions such as the West will look elsewhere for additional supplies, and the Missouri River may be the nearest opportunity. The six massive reservoirs constructed on the Missouri’s main channel include three of the five largest man-made lakes in the United States, with a combined storage capacity of 74 million acre-feet, the largest system of reservoirs in the United States. Oahe and Garrison dams together store in excess of 55 million acre-feet.

The idea of transbasin diversions from the Missouri River Basin is not new. In the 1980s, the State of South Dakota advanced a complex scheme to sell Oahe reservoir water in order to slurry Powder River coal to Arkansas. Other proposals for diversions surface from time to time. But the issue was highlighted recently when North Dakota granted a water permit for 15,000 acre-feet per year in order to allow the Garrison Diversion Conservancy District to serve a federally funded Northwest Area Water Supply
Project. This project will divert water from Garrison Dam and transfer it eastward, where return flows will leave the Missouri River basin, draining into the Red River and thence northward into Canadian waters.

The State of Missouri responded to the North Dakota action by filing suit in federal court, asserting that “any significant out-of-basin transfer of water ... will significantly affect the human environment and will cause actual and imminent harm to Missouri citizens.” More specifically, it argues that the out-of-basin transfers will reduce the amount of flows released for downstream uses in the State of Missouri, such as domestic water supply and navigation. Clearly, Missouri's concern is with the decision of one basin state, North Dakota, to permit a transbasin diversion over the objection of another basin state, and that even a relatively small diversion will establish an unacceptable precedent. But Missouri stands alone in its opposition; generally, the Missouri Basin states have displayed no collective interest in the threat.

In contrast to the inaction of the Missouri basin states, the states in the Great Lakes basin have tackled the threat of transbasin diversions directly. Confronted with persistent proposals to divert Great Lakes water for such purposes as recharging the Ogallala Aquifer and augmenting Mississippi River flows in support of navigation, the states, provinces and tribes signed a Great Lakes Charter that committed the governors and premiers to monitor existing and future diversions of all kinds, regulate diversions in excess of a minimum gallonage, and notify all other states and provinces of any new or increased diversions over five million gallons per day. This early "hand-shake" agreement has evolved through a series of more specific versions, and at the heart of each is the question whether transbasin diversions will be formally prohibited by law. In 1986, Congress authorized any governor to veto a proposed out-of-state diversion. Finally, a formal Great Lakes-St. Lawrence River Basin Compact was adopted by the states and approved by Congress, making it a federal law. Most importantly, the compact prohibits "all new or increased diversions," defining "diversions" as "transfers from the basin into another watershed." The Great Lakes states have thus cooperated to implement a comprehensive water management regime, which wrests major decisions from both the federal Corps of Engineers on one hand, and individual states on the other, and prohibits diversion from the Great Lakes watershed.

In the Missouri River basin, two rounds of litigation have occurred during the 1980s and 1990s, the net result of which is to make clear that under the Flood Control Act of 1944, the Corps of Engineers enjoys sweeping discretion to operate the river. This discretion includes the power to "make contracts with States, municipalities, private concerns or individuals, at such prices and on such terms as [it] may deem reasonable, for domestic and individual uses for surplus waters that may be available at any reservoir..." It follows that the Corps can choose the places to which surplus waters may be sent and the persons who are to use the waters.

Thus the Missouri basin states and tribes are faced with choices critical to the future of the river. First, they can choose to acquiesce in the status quo, which is that the Corps runs the river and has discretion to authorize exports from the basin. Second, they can ask Congress to rewrite the authorizing legislation, a political process that the Corps itself will be in a position to influence directly. Third, the states can follow the example of the Great Lakes states and negotiate a compact that prohibits out-of-basin diversions, and submit it to Congress for approval The stakes are high—will the River be finally converted into a mere commodity, marketed across the west and south much like electricity? Or will it be the great natural resource that defines the character of the basin?

The Missouri basin states and tribes have a legendary history of near total inability to cooperate on river issues, but the stakes in the game are increasing daily, and it is time for them to begin negotiating the future of the river.

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