

THE HISTORICAL APPROACH TO WATER LAW --  
Its Value and Its Problems

Ira G. Clark<sup>1/</sup>

History adds a new dimension to the technological, sociological, and legal approaches to the study of the administration of our water resources. Had these resources been developed according to some broad preconceived plan, many present-day problems might well have been avoided. But this is not the way it did develop. The law governing water in the western states was born in conflict because there simply was not enough of that precious commodity to go around. It evolved through a multitude of adjustments growing out of specific situations which required immediate answers. The solutions were not arrived at philosophically nor did the lawmakers usually anticipate the effect of their action beyond the issue at hand. As a result, they frequently created as many or more difficulties than they resolved. Present-day water problems cannot be separated from their origins and development because that background remains a part of the problem. Today I would like to consider some of these relationships, concentrating particularly on the formative years. In a brief period, it is impossible to do more than sketch the general outline, omitting much which is properly a part of the story.

Any discussion of western water law must begin with federal lands, which have had a profound and continuing influence. With few exceptions, early controversies arose as the result of the occupation of the public domain; furthermore, much of the area of the sub humid states is still owned by the government and from these lands a preponderance of the surface water originates.

For all practical purposes, public land law beyond the one hundredth meridian (the eastern boundary of the Texas Panhandle) was water law, because the value of the land was almost wholly dependent upon its accessibility to water. Forty-niners who fought their way across the continent to get rich panning gold were not too concerned with legal niceties such as their right to occupy claims or to divert public streams in order to carry on their placer-mining operations. Since most of their activity was on the public domain, they were in point of fact illegally squatting, and their water diversions a violation of the common-law principle which guaranteed to each riparian owner an undiminished and unpolluted flow of water from above. In order to secure a shadow of legality, the miners turned to a frequently-used frontier device which went back to the extralegal landing of the Mayflower's passengers at Plymouth: that of establishing a body politic to regulate and govern itself. The Californians then set up their own rules for determining the validity of mining claims; more important, from our standpoint, they recognized the right of the first appropriator of water to divert it elsewhere irrespective of downstream riparian settlers.

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<sup>1/</sup> Professor of History, New Mexico State University

Seventeen years later Congress belatedly took up the matter, and in the mining law of July 26, 1866, recognized local mining custom and, incidentally, the accompanying water rights doctrine. This simple, direct solution, the work of a body of legislators who had not the foggiest notion of conditions in California, supplied an answer which inherently raised problems which have never been resolved. Was it the intent of Congress to surrender jurisdiction over non-navigable waters of the public domain, to sever water rights from land rights in those regions in which the value of the land was wholly dependent upon water, and to recognize preferential use -- California's favoring of mining or New Mexico's protection of agriculture -- as limiting the operation of the doctrine, "first in time, first in right?"

In 1862, four years before it legalized local mining custom, Congress enacted the famous Homestead Law. By this time the frontier had passed beyond the region with which the vast majority of the nation's lawmakers were familiar. It was poised on the border of subhumid lands upon which it was impossible to survive on the traditional quarter-section but which, nonetheless, was designated as the size of a homestead. Paraphrasing Walter Prescott Webb, Congress innocently set up a system in which the United States bet 160 acres of land against an entry fee that the homesteader would starve before proving up -- and the government usually won. The timber-culture and desert-land acts were attempts to remedy some of the inadequacies, but the overall result was simply to encourage illegal land entries, usually for the purpose of securing water rights. Almost from the beginning these laws were under attack from their administrators, and this assault continued until they were repealed or drastically modified. The modifications themselves, however, opened loopholes which had not existed previously.

It was during this period, and while there was still a very considerable amount of unappropriated water, that Major John Wesley Powell presented a broad plan for future development of the arid public lands. It included a system of land classification, a dedication of the waters and the lands of each catchment basin to an organization of land-users within that basin, and a revamping of the Homestead Act in recognition of the completely different mode of land tenure necessary for the successful occupation of the dry region. Powell also advocated the storage of flood waters so that they would be available when needed. His plan never became operative because a combination of forces successfully resisted his crusade. Powerful western interests were hostile because Powell was critical of promotional schemes which would result in disastrous consequences by inviting settlement far in excess of the water resources. To follow his design would mean a slower and more limited growth than promoters were willing to accept. Many easterners, unacquainted with western conditions, were equally hostile to changing the traditional methods for occupying lands. The only other comprehensive scheme was that of Elwood Mead, the eminent state engineer of Wyoming and irrigation adviser in the Department of Agriculture, which, had it been adopted in its entirety, came too late to avert major conflicts which had already arisen.

The range-cattle industry dominated much of the arid country during the quarter-century following the Civil War, after which promoters became aware of the possibilities of irrigation. There was a flurry of activity in developing privately-financed projects in the late eighties and early nineties, but both the profits and the results were disappointingly meager. It was quite evident that private enterprise would be unwilling and unable to undertake the costly construction which would be necessary for extensive future development. Since the impetus would have to come from a public source, the question became one of how it could best be carried out. Many solutions were advanced: donating the arid lands to the state and territories in which they were located; ceding limited quantities of irrigable lands to state and territories which would guarantee their irrigation; and placing the responsibility on the federal government itself for reclaiming its arid domain. The Carey Act of 1894, granting up to one million acres of irrigable land in each of the western states which would assure its reclamation, enjoyed only limited success. The Newlands Act, or Reclamation Act, took its place alongside the Carey Act in 1902. It provided for the dedication of the proceeds from public land sales in sixteen western states and territories to a reclamation fund which would be used for building irrigation works for storing and diverting waters. Irrigable public lands within each approved project were open to homestead entry only, and on the condition that over a period of time the settler on each tract would pay his proportionate share of the estimated cost of construction. Once water rights had been paid on the majority of the acreage, the operation, management, and future financing would be turned over to local water-users' associations, but with title to, and operation and protection of the reservoir works and major canals remaining in the federal government. Although in theory the Newlands Act applied to the public domain, much of the land was already patented; therefore, provision had to be made for supplying water to bona fide landowners residing within the districts.

As was true of most public land legislation, the Newlands Act was controversial. Was it either feasible or just for the government to undertake the opening of new lands to compete with established eastern agriculture when there were agricultural surpluses? To what degree would the proposed reservoirs interfere with the flow and the navigability of interstate streams? Was the central government exceeding its delegated authority and, if not, was it nonetheless intruding into an area more properly reserved to the states? These were hardy perennials which were to surface time after time in the future. In actual operation, federal reclamation initially proved disappointing. Actual costs of construction ran far above estimates, the settlement of the land was usually much slower than had been anticipated, and entrymen were chronically in default in their payments. Engineering features were emphasized to the exclusion of educating newcomers in the art of irrigation farming, and scant attention was given to screening entrymen. There was much disillusionment, and the Reclamation Act required many amendments to remedy some of its obvious weaknesses.

The federal government was also struggling with other water problems. The desire to protect water sources resulted in legislation of 1891 providing for the creation of forest reserves, the primary purpose of which was to regulate water flow. There was general agreement in principle with this

action; the problems arose when it came down to the specifics of what land should be reserved, whether it would be closed to future development, and what effect the withdrawals would have on those already enjoying the benefits of its use. Another issue which was becoming acute was that of dividing the waters of interstate and international waters as upstream diversions increased.

While this was going on in Washington, New Mexico's own water law was evolving. During the nineteenth century it was dominated by custom, inherited from Spain through Mexico, designed for simple direct diversion from streams through individual, partnership, or community ditches. This period was marked by an amazingly small amount of water litigation, due in part to the relatively static nature of a system with which the populace was acquainted and in part to the substantial body of law turned out by the territorial assembly for solving local problems.

New Mexico shared with other western states and territories the general evasion of the public land laws during the wild heyday of the range-cattle industry. At an earlier water conference, Robert Emmett Clark described this as the period in which water rights were often determined at the end of a gun barrel. The interest in irrigation, largely generated by droughts and the spectacular collapse of this phase of livestock growing, had a profound effect on the territory. New Mexico was particularly in need of some answers because most of the water of the Rio Grande Valley had been appropriated, and the idea of storing flood waters was appealing. Underdeveloped streams, particularly the Pecos, were beginning to attract outside capital, especially after the territorial assembly's action in 1887 providing for the incorporation of irrigation and colonization companies. As a matter of fact, the activities on the Pecos entered prominently into a debate at the nation's capital in 1890 over the restoration to entry of lands which had been temporarily withdrawn two years earlier. Proponents of the measure used the Pecos project to illustrate the beneficent effects of privately-financed companies; opponents, to demonstrate the potential dangers attending them. New Mexico's delegates to Congress consistently supported private projects and worked to liberalize those laws which limited the investment of capital in the territories. As the prospect for federal action brightened, however, the territorial assembly memorialized Congress in favor of that program. With the passage of the Newlands Act, the assembly responded immediately to the requirements of that measure which provided for the organizing of water-users' associations to assume responsibility for the administration of the irrigation districts.

New Mexico was also prominently involved in controversies attending the use of the waters from interstate and international streams. When the touring Senate Select Committee on Irrigation and Reclamation arrived in the El Paso-Las Cruces area in the summer of 1890, they saw a bone-dry river-bed and the resulting tragic loss of trees, vines, and crops in the valley. The cause of the severe shortages was a matter of dispute. Serious droughts were not unknown, but this time it was compounded by the enormous increase in diversions from the river in the Colorado's San Luis Valley. Mexico was demanding protection for the centuries-old appropriative rights enjoyed by Juarez residents. This particular problem was solved eventually by the building of the

dam at Elephant Butte after a complicated chain of events beyond the scope of this paper. The dividing of such waters, however, has been a continuing source of friction only partially answered through interstate compacts and the cooperative effort of interstate stream commissions. Considering the delicacy of the situation both within and between the states, this is hardly surprising. I am reminded of something which I saw written on a blackboard in the Office of the State Engineer a couple of years ago. It went something like this: "Our problem for today: the water of the Rio Grande, Colorado has it; Texas is trying to get it. Where does that leave us?"

After 1900 there was increasing awareness in New Mexico that the Territory must modernize its water law. The general immaturity and inadequacy of this type of legislation throughout the West had been the subject of pointed comment at the national level, with some question of whether those states and territories were, indeed, capable of providing effective and just administration for their water resources. In New Mexico, despite the report of a governor's committee in 1897 which assured the chief executive that the existing rules were working satisfactorily, it was generally recognized that they could not serve the need for large-scale development. Finally in 1905, the assembly adopted a water code which it elaborated considerably in 1907. It incorporated much which had been customary or had been established by case law, but it followed the example of Wyoming in creating for its administration the office of territorial engineer. At the same time, the increased use of ground water led to establishing the posts of artesian well inspectors to guard against waste in those counties which depended heavily on that source. As might have been expected, these changes resulted in a substantial increase in litigation in order to interpret the meaning of things which were new and different.

The lack of uniformity among western water codes was and is another source of difficulty. This has been particularly evident in conflicts over the use of waters of interstate streams, but it has complicated many other domestic problems. In one field in which New Mexico pioneered, that of developing a ground water code, problems of its internal administration have been rendered more complex because of the impact of the code along the borders of adjoining states.

Returning to the national scene, a crusade was under way in the early twentieth century which in time was to take the name "the conservation movement." The Newlands Act had introduced the revolutionary concept of direct federal intervention in reclaiming semiarid lands, but this was simply a first step towards a recognition of the nation's responsibility for protecting and developing its natural resources. Water was one of the key factors in popularizing the interrelationship of all land resources, such as the effect of lumbering, grazing, and agricultural practices on water supply, flooding, and siltation of waterways and reservoirs. New agencies came into existence to administer various parts of the program. The Army Engineers, traditional guardians of the rivers, and the General Land Office, long-time administrator of the public lands, had already been joined by the United States Geological Survey, and now were forced to share their rights and responsibilities with the Reclamation, Forest and Park services. There was an interlude between the two Roosevelt's after which conservation again became a major issue, this time broadened to include privately

as well as publicly-owned resources. In the case of dams, for example, they were no longer simply a means for creating storage for irrigation water but were multiple-purpose in nature. Conservation remained as controversial in the thirties as it had been earlier, with the arguments a rehash of those of the first decade of the century. Many new agencies came into existence, including such highly-publicized ones as the Civilian Conservation Corps, the Soil Conservation Service, the Grazing Service, and the National Resources Planning Board. Some were to disappear, others to merge, and yet others to expand. It was only natural that there would be conflict among them because inevitably there were overlapping functions, and each viewed its responsibilities as paramount to the others.

At the same time that conservation was becoming a great national concern, the competition for water was increasing. The number of traditional users was multiplying; they were joined by newcomers who were interested in using water for industrial and recreational purposes, or for producing hydroelectric power. Growing cities were demanding a greater share. As each was injected into the scene, it developed its entourage of advocates and lobbyists. Inherent in the situation was the necessity for making many difficult decisions. During World War II and immediately following, there was another interlude of relative quiet, followed by an awakening to the despoliation which was of critical importance to the entire nation. The greatest present national concern is one of trying to restore the environment, with attention being paid to dead bodies of water, and to streams incapable of sustaining animal life and dangerous for human or even economic use.

The history of water law is a story of controversy of battlegrounds on which were hammered out answers to specific issues. There was and is conflict over whether some programs are creeping socialism or prudent inventorying and husbanding of the natural resources; over the respective rights and duties of federal as opposed to state governments; over administrative control by specialists or by the legislative branch as directly representative of the people, with generous appeal to the judiciary based on due process. There are inter-agency and alternative-user rivalries, and sharp differences of opinion over the extent to which water should be developed to its full economic capability as balanced against the destruction of natural beauty and ecological balance. I would venture that there is in this room a wide variety of conflicting opinion on these subjects.

What can history contribute to the overall resolution of water problems? Its method is that of tracing the various strands of the story and showing their relationships. There is a common saying that history repeats itself; on the other hand history has been defined as the science of that which never happens twice. Quite obviously the first statement cannot be true because no situation is ever duplicated exactly; at the same time there are recurring situations which are similar to those in the past experience. The simplest answer would be to say that by studying the past we can correct the present, but that is not always easy or even possible. Quite possibly a greater value comes from studying the growth of water law -- its sources, its development, and the reasons why frictions and contradictions have crept in. It certainly shows that there are no perfect answers nor any which will satisfy everyone. Although it might not lead to a sympathetic understanding of an opposing point of view, it might establish the basis for a certain grudging respect for why that view persists.