WESTERN WATER LAW: HOW IT EVOLVED AND WHERE IT IS GOING WITH IMPLICATIONS FOR NEW MEXICO

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I take the words in the title to mean that my assignment is to offer some background for non-lawyers and lawyers.

This introduction is divided into three uneven sections on: geography, history and technology (referring here to the handmaiden of the sciences that continues to shape the law, particularly in relation to ground water and water quality).

GEOGRAPHY

Western water law is essentially state property law with very important federal dimensions. It is generally defined to include court decisions, legislation and administrative procedures in the 17 states beginning with the tier from North Dakota south through Texas. Climate and rainfall in this region encouraged irrigation or made it necessary, except in certain mountain and coastal areas. You may add Alaska and Hawaii in this grouping although each has a different water law system I will not discuss.

The water law evolving in the West until about 50 years ago applied almost exclusively to surface waters, which include visible sources, streams and other water bodies. Ground water law emerged more recently. New Mexico, a pioneer in ground water legislation, passed its first statute in 1927. Increasing withdrawals in the Roswell area produced that law, reenacted in 1931, and laws in other states in recent years, as we shall see in comments on technology.

As to surface waters, however, some form of appropriation law, that is, the pioneer first in time, first in right principle, applies in all western states even where common law riparian rights were recognized, as in the six states traversed by the 98th meridian and the three along the Pacific Coast. But in the eight mountain states, which are the tier from

Idaho and Montana south through Arizona and New Mexico, prior appropriation law applies exclusively to surface waters with statutory modifications that relate mainly to management.

The two groups of states are known as "California" or "Colorado" doctrine states. The difference is of little importance with respect to ground water legislation, which varies greatly in the West as we shall see in a moment.

The geography of the western states heavily influenced water law origins and later development. Unique water dependencies in the Colorado River Basin produced the Compact of 1922, and geography and history shaped allocations of the Rio Grande above Fort Quitman, Texas. All of us here know of the demands on the Arkansas, Platte and the Pecos rivers that have been litigated for years, and we realize that interstate mining of the Ogallala Formation by six states cannot go on indefinitely without an interstate institution of some kind.

But as a minimum, we have now identified the physical area in which western water law evolved and was a major factor influencing national legislation, such as the Reclamation Law. To a large extent water law continues to determine development in the West.

HISTORY

The history of water law in the western states is as colorful as the geography and terrain. Although the origin of Prior Appropriation Doctrine--the first in time, first in right principle applied to water use--is quite clear, some closely related U.S. history is not clear. Moreover, the vacillating attitudes of Congress, some courts and several administrations toward the public lands, the U.S. Constitution and the meaning of federalism, have complicated the whole field of resource law, including water law. These complications are part of the reality of our constitutional system and still promote confusion, as I will try to demonstrate with a question at the end of this discussion.

Obviously water rights questions begin with the aboriginal people, the Indians, who have been living for centuries along the Rio Grande, the

Colorado, and other streams, and at Acoma, Jemez, Zuni and the Hopi second mesa. There were others before them, like the Anasazi and the Hohokam of Arizona.

All of these people had water and land use practices of some kind. However, we know little about them except as similar practices continue today, or as can be inferred from the ruins of canals and abandoned communities like Chaco Canyon or Bandelier.

This early period is emphasized to explain that prior appropriation, as it was developed in the West, was not derived from Indian law or customs although similarities can be inferred as they have been from the evidence of ancient irrigation practices along the great rivers of Egypt, Mesopotamia, India and China, among the so called hydraulic civilizations. However, pioneer water law--the prior in time, prior in right idea--as adopted in the West, did not originate with the Indians. Like the ancients of the Middle East, they were less individualistic than our pioneers, but we can assume that the law of necessity also shaped many of their customs, as it has ours.

When the first Europeans arrived in our region--Coronado spent the winter of 1541-42 on the banks of the Rio Grande near Bernalillo, and Juan de Onate established his settlement in 1598 near Espanola--they brought the law and customs of Spain with them. Similar developments by the Spaniards occurred in Sonora, Arizona, and California 150 years later. These early Spaniards generally encountered two types of Indians in the Southwest: the nomadic tribes with a hunting culture who ranged over large areas and often followed the buffalo, and land based tribes like the pueblo people who cultivated maize and had an agricultural economy. (Other tribes were dependent on the fish of certain rivers and lakes and settled near them, such as the Pyramid Lake Indians in Nevada.)

We should not forget that Indians hold to an attitude different from ours toward the land, the mountains, the streams. One poet said Mother Earth is our home, our granary and our graveyard. (We could suggest that the Indian has maintained a more sophisticated view of land tenure than the white man, but that would require a 15-week seminar to explore.)

In any case, we know that the early Spaniards in the Rio Grande Valley confirmed Indian rights in tribal lands and water supplies. If you are following the Aamodt case you know that four pueblos near Santa Fe currently claim water rights antedating claims of the earliest Spanish settlers. These Indians do no rely on the prior appropriation doctrine, but on paramount rights against the claims of the descendants of the early colonists making gringos like us mere bystanders in the struggle.

If valuable records had not been destroyed in the Pueblo Rebellion of 1680, perhaps the resolution of this controversy would be easier. Nevertheless, we know that the Spaniards arrived with their own system of law and military force.

We know also that Spanish law contrasted sharply with the Indian's attitude toward man's brief tenure on this planet. As it later developed, English land law conflicted with Spanish law and with Indian custom and practice as well.

Spain's land law derived in part from Roman law and preserved an important and a more formal distinction between possession and ownership. Nowhere was this more confused and misunderstood than in the nineteenth century struggle over the private land grants that comprised more than 40 percent of the state of New Mexico and contributed to the unique land situation in Texas before and after it entered the Union.

Spanish law held that the minerals beneath the surface and flowing streams were the patrimony of the Crown, the central government; grants of land did not include the minerals and flowing waters unless expressly included in the grant. Many of the large grants were of surface rights only. Stream flows were limited to riparian uses for culinary purposes and stock watering.

In general, rights to withdrawals from wells and springs remained the same all over Europe and England for centuries, though modern technology is changing ground water law there also.

England was emerging from feudalism and ending the absolute powers of kings in the seventeenth and eighteenth centuries of our colonial period and shaping the beginnings of constitutional government. Meanwhile, English land lawyers were perfecting the notion of the fee simple

absolute. A line in a poem by William Empson called Legal Fiction describes the landowner's rights as follows: "Your rights extend under and above your claim Without bound; you own land in Heaven and Hell."

The English landowner's property rights extending "under and above your claim without bound . . ." included riparian rights. In a humid climate with abundant water, the riparian right made sense. Water was plentiful in streams bordering landed estates and because irrigation was not practiced, there was enough water for all contiguous owners without diminishing the hydraulic head needed for mills on the stream. This was the essence of the riparian doctrine the English settlers contributed and is still basic law east of the Missouri where not modified by statute.

Prior appropriation never applied in England or in the eastern states during this formative period.

West of the 98th meridian, however, and along the wavering 20-inch rainfall line, the many uncertainties connected with riparian rights became as obvious to the early settlers as they had centuries earlier when Roman colonists settled in semiarid southern Spain. They, and the later Arabs (for 800 years), practiced irrigation and adopted allocation rules still followed before La Tribunal de las Aguas that meets regularly before the great doors of the Valencia Cathedral. Allocation rules, and institutions such as the community ditch, or acequia madre, the mayor domo, or zanjero, the ditch boss, were brought to the New World. Their origins go back 1,000 years; indeed la acequia is an Arabic word, as is the other Spanish word for canal, la zanja.

In this history there are similarities, or parallels, with ancient irrigation principles, but despite misleading statements by a few of our courts, it is clear that the appropriation doctrine, as we know and apply it, did not come from Spanish law.

A quotation, in a recent Supreme Court decision, from a reclamation engineer's report says, "That afternoon, July 23, 1847, was the true date of modern irrigation . . . ." when the first Mormon pioneers diverted water from a creek near the site of the present Mormon Temple and flooded five acres to plant potatoes. This is not a claim that the Mormons were the originators of prior appropriation law. While crossing the plains

they had seen irrigation practices, including the community ditches of the Pueblo Indians and the Spanish colonists.

Now you are ready to ask, "Where did prior appropriation come from?" The answer is simple: It grew out of the customs and rules devised by the gold miners on the public domain after the discovery of gold in California in 1848. Thousands of 49ers were trespassers as they diverted streams in their search for gold. A handful of soldiers could not keep them off government property, and little was done to remove them until President Lincoln got an ejectment decree.

In the meantime, crucial American history had occurred in the turmoil over slavery; the admission in 1845 of Texas to the Union, the compromises of 1840 and 1850, the Mexican War in 1846 and the acquisition of the Southwest and California.

The treaty of Guadalupe-Hidalgo in 1848 and the Gadsden Purchase in 1853 specified protection for land owners or occupiers, under the laws of Spain and Mexico. In many cases the main problem was to determine the nature of their rights. Many rights were lost, relinquished for a pittance, or the grantees were defrauded. In other cases, the land claims were enlarged beyond all reasonable interpretation and there were delays in the courts of 30 years or longer. Valuable water rights on the public domain were involved in many private land grant claims as shown in the reports of the Court of Private Land Claims.

However, by the turn of the century prior appropriation was well established in the western states and territories. The early California miners had formed mining districts (some writers think the idea came with immigrant miners from northern Europe where such districts existed), and the idea spread to Oregon, Nevada and other states. Rules were useful in resolving disputes between trespassers, but these rules were not the law. However, later prospectors were prevented from going upstream to divert water from an earlier prior user's gold washing sluice boxes. As some miners became disenchanted, they turned to farming and irrigated fields and orchards under the principle of first in time, first in right. The custom, without the sanction of law, was effective; it prevented and reduced friction and it spread rapidly.

But it was not until after the Civil War in 1866 that Congress passed the first mining law, actually the first water law applicable to the public lands, in which the custom of prior appropriation was recognized by the U.S. government:

> Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing and other purposes have vested and accrued, and the same are recognized and acknowledged by local customs, laws and decisions of the courts . . . .

Thus, water rights claimed by trespassers on the public domain became valid against the United States and a legal property interest. The Mining Law revisions of 1870 and 1872 which are the laws today, and the Desert Land Act of 1877 also recognized that patents of land and homesteads granted by the United States were "subject to vested and accrued water rights." Needless to say, disputes arose and water law controversies multiplied in the courts.

At the same time a belief was encouraged, which a later decision of the U.S. Supreme Court seemed to support, that the U.S. government had parted with rights in waters on the public domain in the states and territories. This notion had previously run into conflict with the rights of Indians who had been put on reservations. Here you recognize the allusion to the Winters case that in 1908 confirmed the existence of reserved water rights. But even before the Winters decision, the supreme Court had said ". . . in the absence of specific authority from Congress, a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least as may be necessary for the beneficial uses of government property . . . ." This 1899 decision, which made possible the building of Elephant Butte Dam, refers to the federal responsibility for the public lands, namely the plenary power of Congress under Article IV of the U.S. Constitution. That responsibility was not removed by the recent New Mexico decision in which the U.S. Supreme Court held 5-4 that water was reserved on public lands for growing timber but not for the wildlife inhabiting public lands, or livestock permitted to be there.

These decisions remind us that although water law is primarily state law, there are large federal implications under the U.S. Constitution with respect to the Indians, in treaties, interstate compacts, Supreme Court decisions and decrees, and Congressional allocations such as Arizona v. California and later Colorado River legislation.

Now we can summarize the crucial differences between prior appropriation law and riparian rights:

1. The nature of the riparian right

   The concept assumes a humid climate and virtually unlimited supply.

   The right is inherent in land contiguous to a water body.

   The right exists without being exercised.

   The right is part and parcel of the realty and cannot be lost by nonuse.

   The right passes with title to the land absent statutory or deed changes.

   Most troublesome of all, the right is unquanitifed, or open-ended.

The courts have said there are no riparian rights in New Mexico.

2. The nature of the appropriative right

   The right is separate or may be separated from ownership of land, though it may be appurtenant.

   The right is always conditional on there being a supply of water.

   The right is conditioned by the legal priority, first, second, etc.

   The right is conditional on beneficial use.

   The right may be lost or forfeited for nonuse, or nonbeneficial use.

   The right is quantified either in a decree, or administrative determination and is always limited to the duty of water for a beneficial purpose, or agricultural practice specified by law.

Before we turn to technology, remember that the discussion thus far has been primarily of surface water rights and doctrines.

TECHNOLOGY

New technology has greatly influenced ground water law development. The old hand pump and the windmill had limits in the level of lifts and withdrawal capacity, and not many artesian aquifers continue to provide free-flowing water supplies.

In New Mexico, economics and geology in the Roswell Basin shaped ground water law in the 1920s with the help of science and technology. As more reliable data and cheap power became available, artesian flows decreased with the drilling of more wells. The 1927 statute resulted. In a few other states the courts and legislatures responded to similar events but most of the legislation was inadequate, or too late, as in Arizona in 1980. The background of different rules, as well as ignorance and political pressure, contributed to the delay.

The early legislation was concerned primarily with the acquisition and protection of ground water rights; later statutes embodied management systems and, more recently, included measures to prevent contamination. Obviously there is great need for rational ground water management and for re-examination of the several ground water doctrines applied in the western states that can be summarized:

1. The English common law rule of unlimited withdrawals, a carry-over from the absolute notions regarding real property mentioned earlier, allows pumping from one's land even to the detriment of a neighbor. This is the general rule in Texas.
2. The so-called American rule of "reasonable use" is a variation of the common law rule, which means that withdrawals can be limited if they are unreasonable, a conclusion rarely reached as Arizona has demonstrated.
3. California's "correlative rights" concept is a variety of reasonable use, which relates the amounts pumped to the proportion of overlying surface ownership.
4. New Mexico, Nevada, Utah and other states purport to follow prior appropriation law but recognize that a ground water right

is not like a high priority on a dependable stream when the ground water source is being mined as, for example, in the Lea County basin where calculated depletion is taking place under a long term plan that includes well spacing. In the Roswell Basin, the management controls involve the artesian aquifer, the shallow valley fill above it, and flows from the Pecos River.

5. Another category could be added here to include legislation passed to correct or manage overdraft problems. Colorado passed such legislation, and the 1980 Arizona statute recognizes a severe overdraft that has existed for a generation. The law replaces, in part, an unworkable "reasonable use" doctrine and anticipates planned withdrawals through the year 2025, when it is hoped that balance in recharge and withdrawals will be achieved.

Technology improved conservation practices and made many changes in surface water irrigation: for example, lined canals, closed flumes, and drip, sprinkler and center pivot irrigation. With respect to ground water, new drilling techniques and deep well pumps have not only made changes in the law necessary, they also have revolutionized agriculture on the High Plains, for example, and make interstate cooperation necessary.

An important dimension of water law can only be alluded to in passing: water quality. The subject will be more and more at the center of water law changes.

Advanced technology has increased the dangers from contamination of surface and ground water sources; that fact is recognized in federal legislation, though still insufficiently as to ground water. The same legislation mandates a reversal of the pollution process and has large implications for New Mexico and the Southwest. We can hope that the planned document on a Strategy for Groundwater Protection by the Office of Safe Drinking Water will be available soon. The last such proposal appeared in 1980 and was never followed up.

Speaking of following up, I promised to leave you with a question.

QUESTION

The question stated here rhetorically with an outline for your analysis, has practical and constitutional implications, not limited to New Mexico.

You have heard that in 1982 the U.S. Supreme Court resolved a dispute over water uses in Nebraska and Colorado by applying the Commerce Clause and holding that water is an article of interstate commerce.

Recalling the geography (and demography) and history of the Southwest, and how it was acquired by the United States under our constitutional system, this is my question:

What is the present obligation of the United States under Article IV, Sec. 3, Cl. 2 with respect to conserving, managing (and protecting the quality of) ground water resources beneath the public lands, in this case BLM lands in New Mexico that El Paso hopes to mine for domestic purposes?

This question calls your attention to a fact, often passed over in discussions of the El Paso case, an important fact that makes the New Mexico case different from the Sporhase case: NO public lands of the United States were involved in that case.

Recall for a moment the history of Texas and how it was first a sovereign state, then joined the Union in 1845 before the Mexican War. Think of the territory that was involved. As an independent state, Texas entered the Union with no public lands belonging to the United States. The lands acquired from Mexico were previously held under the law of Mexico and Spain, which meant that subsurface minerals and other interests passed in 1836 to the Sovereign State of Texas under principles of continental law and the regalian concept.

Now think of the Treaty of Guadalupe-Hidalgo in 1848, and the Gadsden Purchase of 1853 after the Mexican War, when the United States acquired, as sovereign and proprietor, vast territory including and surrounding huge private land grants in New Mexico and other lands occupied by persons who had no more than surface tenure or possession. All property interests of the Republic of Mexico in the vast territory passed to the government of the United States subject to the conditions and terms of the treaty and purchase.

The United States knew that the regalian concept applied in Mexico. In part, the principle was recognized when, in disputes over land titles, the United States authorized the selection of nonmineral lands by claimants such as the heirs of Luis Maria Baca. But with most dispositions, the United States followed the fee simple concept, and patented, in fee, land to grantees on private grants, and to citizens of the United States. That is history now, as are the abuses under the Mining Law of 1872, which invites miners to go on the public domain and discover minerals and acquire "unpatented claims," claims which, if perfected according to law and upon receipt of a patent, become a fee simple absolute. That law of 1872 is still in effect today. The United States also transferred lands to the railroads and to homesteaders in nonmineral areas under the same general policy until just before World War I. In 1916 Congress passed the Stock Raising Homestead Act, which expressly reserved minerals. Not until 1920 did Congress pass the Mineral Leasing Act. However, the United States still holds, as sovereign and proprietor, public lands administered by the Forest Service and the Department of the Interior.

It is not my intention to go into the semantics of ownership. If the United States doesn't own the public lands, who does? Not the descendants of Mangas Coloradas or Geronimo, or the individual states. At the very least, the United States is "trustee" of the public lands for all of the people of the United States; public lands do not belong to New Mexico although New Mexico has certain regulatory powers over the withdrawal of ground water. The public lands remain subject to the plenary control of Congress under Article IV which reads:

> 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.

The United States has not disposed of these lands and, at least since the report of the Public Land Law Review Commission in 1970, U.S. policy is to retain public lands except in special circumstances shown to be in the public interest.

The Supreme Court held long ago that the states are entitled to establish water law systems. The court has also held that water is not a mineral for purposes of property designation. In the Sporhase case, the U.S. Supreme Court recognized that the states have an interest in controlling and protecting ground water for certain purposes. But nowhere has Congress or the Supreme Court said that all rights in ground waters have been disposed of by the United States.

Now the Supreme Court has held that water can be an article in interstate commerce. What does this mean as applied to the public lands? Do the states have to relinquish control of ground water when it is withdrawn from federal property for transfer across state lines? Does the Commerce Clause in these circumstances become superior to Article IV and the responsibility of the United States to all of the people for their resource stored under public lands?

Isn't this a matter for congressional attention?