

FEDERAL LEGAL TRENDS

George William Sherk
Trial Attorney, U.S. Department of Justice
Land and Natural Resources Division

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If there is any single area of American law in which there will be substantial development during the next 50 years, it is water law. As demands increase, and the supplies of quality water decrease, the resulting conflicts will require the continued development of laws and regulations governing the use of water.

Many of these laws and regulations will develop at the state level throughout the 50 states. The practice of water law will no longer be limited primarily to those states lying west of the hundredth meridian. For example, 16 of the 26 historically riparian states lying east of the Mississippi River now have water laws of some kind. The need for revision of state laws and regulations governing water use is being studied (or has been studied within the past five years) in all of the 26 eastern states.¹

Substantial activity also will continue at the federal level. These comments address likely developments in federal water law during the next 50 years in three areas: (1) resolving water conflicts, (2) types of federal water rights, and (3) water conservation. After these areas have been reviewed, a number of additional areas in which there will also be federal water law development will be mentioned.

Resolving Water Conflicts

Traditionally, disputes over water have been resolved through litigation, legislation or the development of interstate compacts. Though each of these dispute resolution mechanisms will continue to be used, each has certain limitations that inhibit its effectiveness.

Litigation concerning federal water rights can occur in state courts (under the McCarran Amendment),² in U.S. District courts (if there

exists a federal question or diversity of citizenship) or in the U.S. Supreme Court (if a case is appealed or if one state sues another). Regardless of the forum in which it occurs, litigation is both expensive and time-consuming.

In addition, the U.S. Supreme Court established a burden of proof requirement in the Vermejo decisions³ which will eliminate equitable apportionment litigation as a mechanism by which interstate water conflicts will be resolved. In Vermejo, the Supreme Court ruled that a state bringing an equitable apportionment action must be able to prove by clear and convincing evidence (i.e., to a high probability) that it has suffered real or substantial injury or harm. No state will be able to allow an interstate water conflict to continue to the point that the state can meet this burden of proof requirement.

Litigation, however, will continue. States will return to the Supreme Court, but under different theories. South Dakota recently asked the Supreme Court to be allowed to file a complaint concerning the use of Missouri River waters. In its complaint, which the court has yet to accept, South Dakota argues that Congress intended to allocate the waters of the Missouri River when it enacted the Flood Control Act of 1944. South Dakota wants the Supreme Court to enjoin the states of Nebraska, Iowa and Missouri from interfering with the exercise of South Dakota's water rights.⁴ It is interesting to note that South Dakota is specifically arguing that this action is not an equitable apportionment action, probably because South Dakota cannot meet the burden of proof requirements that the Supreme Court established in Vermejo.

Resolving interstate water conflicts through legislation also will continue, though there are many problems with this approach. Legislative solutions are also time-consuming and may be motivated by purely political reasoning. Unfortunately, many legislative solutions result in litigation when they are implemented.

Legislation has been introduced that would restrict the diversion of water resources which are shared by a number of states unless all of the states sharing the resource consent to the diversion.⁵ Coal slurry

pipeline legislation contained numerous provisions regarding the use of water in the interstate shipment of coal.⁶ The legislative approach to resolving interstate water conflicts is certain to continue.

Development of new interstate compacts is also time-consuming and also requires congressional consent. Compacts frequently fail to address specific contingencies and may contain errors or ambiguities that emerge over time. (Regarding errors in compacts, the Colorado River Compact is an excellent example.)

Regardless of the difficulties in resolving water conflicts through compacts, development of new compacts will continue. Montana recently entered into a compact with the tribes of the Ft. Peck Indian Reservation (the Assiniboine and the Sioux tribes) regarding Indian water rights. North Carolina and Virginia are considering the development of a compact to resolve water use conflicts in the Tidewater area.

The difficulties of using any of these three methods to resolve water conflicts will result in the emergence of a fourth method focusing on mediation and arbitration. This mechanism will be established by an Act of Congress and will be fashioned after the Federal Mediation and Conciliation Service. Congressional willingness to encourage the use of mediation to resolve conflicts can be seen in the Dispute Resolution Act of 1980.⁷

In essence, the mediation mechanism will be a sitting special master, a "neutral corner" in which water conflicts may be resolved. This approach to resolving conflicts will be comprehensive, quick, relatively inexpensive and informal. When it enacts legislation establishing the mediation mechanism, Congress will also limit access to the courts by requiring an attempt at mediation before litigation may commence. Within the next 50 years, many (if not most) water conflicts will be resolved through mediation or arbitration.

Types of Federal Water Rights

Historically, the federal government has held two types of water rights. The first, appropriative water rights, are those rights that have been acquired pursuant to state water laws. Many federal agencies

are required to obtain state water rights when water is needed for a federal purpose.⁸ In granting a water right, a state may impose whatever terms and conditions it chooses so long as the terms and conditions are not inconsistent with express congressional directives.⁹

The second, reserved water rights, are those water rights that the federal government has acquired by implication when land is withdrawn from the public domain for a specific purpose. The quantity of water reserved is the minimum quantity needed to fulfill the primary purpose of the reservation. Reserved water rights are limited to the quantity of water that was unappropriated at the time of the reservation.¹⁰

The federal government will continue to hold both appropriative and reserved water rights. In addition, over the next 50 years, a third type of federal water right will emerge: A preemptive water right.

What will happen if water is needed for a federal purpose and it can be acquired neither pursuant to state law nor through the exercise of a reserved water right? If it is the express intent of Congress, then state laws restricting the availability of water for the federal purpose will be preempted. Such a preemption is based on Article VI, section 2 of the U.S. Constitution (the Supremacy Clause). For example, in Missouri v. Holland, 252 U.S. 416 (1920), state laws asserting title to migratory birds, which were protected under federal law, were preempted. A similar result would have occurred if the state laws had restricted the availability of water for such waterfowl. When water is needed for a congressionally mandated purpose, state laws restricting availability will be preempted.¹¹

Water Conservation

The states will continue to have primary responsibility over water conservation. Many states will follow the examples of California and Arizona in establishing stringent water conservation requirements.¹² Despite the ongoing role of the states, there will emerge numerous federal laws and regulations focusing on water conservation.

Future federal policies will reflect the approaches that were taken toward energy during the energy crisis of the early 1970s.

Specifically, federal policies will address both a reduction in demand for water and development of alternative supplies of water. It is certain, for example, that federal tax incentives will be offered for investments in water conservation just as such incentives have been offered for investments in energy conservation.

Water from federal projects flows primarily into irrigation. Much of this water is used inefficiently due to outdated distribution facilities and conveyance systems. An Interagency Task Force on Irrigation Efficiency determined in 1978 that water conservation in irrigated agriculture could save as much as 24 million acre-feet of water per year.¹³

In terms of reducing demand for water from federal projects, operational criteria for existing projects will be changed to improve project efficiency. Future federal projects, if any, will be designed for maximum water use efficiency. For example, it is certain that existing contracting entities receiving water from federal projects will be required to demonstrate an ongoing water conservation program as a condition precedent to contract renewal. Such water conservation program requirements will become a standard provision in all new contracts for federal project water.

Federal cost-sharing requirements will also result in improved water use efficiency, basically because the water resource will cost too much to waste. As subsidies in all forms are eliminated, and as water consumers are required to pay the true costs of their water supplies, it will be in their best interests to minimize their demands on those supplies.

In terms of increasing water supplies, future federal policies will focus on mandatory water reuse and on federal weather modification programs. Where feasible, water will be delivered from federal projects only to those contracting entities that have ongoing water reuse programs. This may result in litigation regarding existing federal projects because of the likelihood that downstream water users are relying on existing waste as a source of supply. Future federal

projects, however, will require reuse whenever feasible. These requirements will be imposed on contracting entities immediately upon construction of the project before downstream water users can come to rely on the waste of federal project water as a supply source.

Within the next 50 years, operational federal weather modification programs will be implemented in numerous watersheds throughout the western United States. These programs will focus on the wintertime seeding of orographic clouds to increase the efficiency of such weather systems. The increased efficiency will result in increased precipitation, snowpack and runoff. The proposed CREST (Colorado River Enhanced Snowpak Test) Program of the Bureau of Reclamation is an example of such a federal initiative.

One aspect of any federal weather modification program is a certainty. If weather modification programs are federally funded, then the increased water supplies produced by such programs will be claimed by the federal government irrespective of state ownership claims. Water produced by federal weather modification programs is water that would not have naturally occurred in a stream system. As such, it will be seen as the property of the developer, that is the federal government.

Despite the predictions contained in the previous section, if there ever is another successful equitable apportionment action in the Supreme Court, the outcome may turn on the success of state water conservation programs. The Supreme Court made it very clear in the Vermejo decisions that a state's efforts to conserve a shared water resource would be a major factor to be considered in any equitable apportionment action.¹⁵

Additional Trends

Future litigation in federal courts will establish that Indian water rights must be treated the same as all other water rights existing within a state water rights system. In quantifying Indian reserved water rights, the same beneficial use requirements and waste restrictions that apply to other water right holders will be applied to Indian claims. To do otherwise will be seen as an impermissible racial classification. For example, if a state requires water efficient irrigation systems in an

effort to conserve state water supplies, Indian water rights will not be quantified on the basis on preexisting inefficient irrigation systems.¹⁶ It must be remembered that all reserved water rights are for the minimum quantity of water needed for the primary purpose of the reservation.

Numerous developments will affect the use of water from federal projects. Restrictions on use to specific service areas will be eliminated once water augmentation plans are developed. These plans will provide for a supply of water to service areas so that existing service area supplies may be used for other purposes. As federal projects are paid-out by project sponsors, the restrictions on use to specific service areas will be eliminated.

Also to be eliminated as federal projects are paid-out will be any further involvement of the federal government in the operation and maintenance of a project. The sponsoring entities will be expected to assume full responsibility. Unless there is an ongoing national purpose to be served, continued federal involvement following pay-out will be seen as an unacceptable subsidy. Once project sponsors have assumed responsibility for specific projects, they will be subject to federal health and safety regulations. This will become the maximum extent of federal involvement.

Future litigation will clarify the second subsentence of the McCarran Amendment.¹⁷ The first subsentence has been subject to substantial judicial scrutiny.¹⁸ The rulings have been clear: State courts have jurisdiction over federal water claims in general adjudications. When presented with the issue in future litigation, the courts will rule that the second subsentence of the McCarran Amendment subjects the federal government to state administrative requirements once a general adjudication has occurred. Administration of water rights decrees will become exclusively the responsibility of the states.

Perhaps the most important development that is likely to emerge during the next 50 years may be the decline of both federal and state governments as having responsibility over water resources planning and

management. New institutions will emerge that will manage water resources on the basis of hydrologic reality, not on the basis of historic but irrelevant political subdivisions. The new management districts will transcend political boundaries, both interstate and international.

These new management districts will be areawide or basinwide. They will allocate and manage both surface water and groundwater based on a principle of multiple use maximization. Such maximization will become feasible as hydrologic and geologic information expands and as computer systems develop to make use of the information. Specific area or basin models will be developed. Telemetry and remote sensing systems will feed enormous amounts of data into these models on a real-time basis.

Maximum multiple use efficiency will be possible because all of the impacts of all water uses or requirements can be determined. Water uses will be allowed when and where such uses can be of maximum benefit. Existing water rights holders will receive the same benefits of water use that they are now receiving, but based on a complete understanding of how their water uses relate to all other water uses in the area or basin, not on the antediluvian concept of temporal priority.¹⁹

Conclusions

Chief Justice Warren Berger, in his Annual Report to the American Bar Association on February 12, 1984, spoke of the need for innovation in the legal system.

The story of justice, like the story of freedom, is a story that never ends. What seems unrealistic, visionary and unreachable today must be the target even if we cannot reach it soon or even in our time. If we ever begin to think we have achieved our goals, that will mean our sights were set too low or that we had lost concern for our profession or the public interest.

What will occur within the next 50 years? How many of the projections which were made 50 years ago were accurate?

The accuracy of a projection is relatively unimportant. What is important is the commitment to resolving issues before they become crises, rather than reacting to crises with ill-conceived laws and policies. The future will occur. The only real question is whether it will be by accident or by intent.

END NOTES

1 Sherk, "Water Rights: Eastern Water Law," 1 Natural Resources and Environment _____ (1985) (forthcoming).

2 The McCarran Amendment provides, in part, that:

Consent is hereby 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 amendable 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.

43 U.S.C. 666 (1984).

3 New Mexico v. Colorado, 459 U.S. 176 (1982) (Vermejo I) and _____ U.S. _____, 104 S. Ct. 2433 (1984) (Vermejo II) rehearing denied _____ U.S. _____, 105 S. Ct. 19 (1984).

4 State of South Dakota v. States of Nebraska, Iowa and Missouri, Motion for Leave to File Complaint (August 15, 1985). The Supreme Court applied a similar legislative intent history in Arizona v. California, 373 U.S. 546 (1963), regarding the Boulder Canyon Project Act and the appropriation of the lower Colorado River.

5 See, for example, H.R. 1749 which was introduced by Representative Badell on March 1, 1983. Section 2 of the bill provided that:

No state shall sell or otherwise transfer or permit the sale or transfer, for use outside of such State, water which is taken from any river or other body or surface water which is located in or which passes through more than one State or from any aquifer or other body of ground water underlies more than one State unless -

(1) there is in effect an interstate compact (A) among the States under which

such aquifer or other body of ground water lies, which governs such sale or transfer, and

(2) all the States which are parties to such compact consent to such sale or transfer.

The bill was not enacted.

- 6 See, for example, H.R. 1010 (the "Coal Pipeline Act of 1983") as reported by the House Committee on Interior and Insular Affairs on April 15, 1983. Section 207 of the bill as reported provided that:

Pursuant to the commerce clause in Article I, section 8 of the United States Constitution, the Congress hereby expressly delegates to the States the power to establish and exercise in State law, whether now in existence or hereafter enacted, terms or conditions (including terms or conditions denying or terminating use) for the reservation, appropriation, use, export, or diversion of or other claim to, or exercise of any right in, water for a coal pipeline, notwithstanding any otherwise impermissible burden which may thereby be imposed on interstate commerce.

Coal slurry pipeline legislation containing this language was defeated in the House of Representatives on September 27, 1983.

- 7 28 U.S.C. App. 1-10 (1982).

- 8 For example, section 8 of the Reclamation Act of 1902, codified at 43 U.S.C. 383 (1964), provides that:

Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the [sic] laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or any landowners, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

- 9 California v. United States, 438 U.S. 645 (1978) (the New Melones decision).
- 10 Winters v. United States, 207 U.S. 564 (1908). See also Cappaert v. United States, 426 U.S. 128 (1976) and United States v. New Mexico, 438 U.S. 696 (1978).
- 11 See also First Iowa Hydro-Electric Co-op. v. Federal Power Commission, 328 U.S. 152 (1946), and Federal Power Commission v. Oregon, 349 U.S. 435 (1955) (the Pelton Dam decision).
- 12 See Shupe, "Wasted Water: The Problems and Promise of Improving Efficiency under Western Water Law," paper presented at Colorado Water Issues and Options: The 90's and Beyond (Denver, Colorado, October 8-9, 1985).
- 13 Cited in Shupe, id. at 10.
- 14 The operational characteristics of an orographic weather modification program and the basis for claiming the water produced as "developed water" are discussed in Danielson, Sherk and Grant, "Legal System Requirements to Control and Facilitate Water Augmentation in the Western United States," 6 Denver Journal of International Law and Policy 511 (1976). Also appears at Water Needs for the Future 289 (1977) (V. Nanda, ed.)
- 15 In Vermejo II, for example, the Court disagreed with the Special Master over the issue of water conservation: "[W]e cannot agree that Colorado has met its burden of identifying, by clear and convincing evidence, conservation efforts that would preserve any of the Vermejo River water supply." Supra note 3, 104 S. Ct. at 2439.
- 16 In terms of future trends, a major decision was recently handed down by the Colorado Supreme Court. In Alamosa-LaJara Water Users Protection Association v. Gould, 674 P.2d 914 (Colo. 1984), the Court ruled that existing senior water rights holders who were receiving surface waters could be required to satisfy their rights through the pumping of groundwater. Not to do so would have precluded the development of substantial quantities of groundwater in the Rio Grande basin. In essence, historic water use practices are not protected merely by the seniority of the appropriation. Changes may be required in order for limited water supplies to be put to their maximum beneficial use.
- 17 The McCarran Amendment is quoted at footnote 2, supra.
- 18 Most recently, see Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

- 19 Studies of how such an approach might be applied to the South Platte River Basin in Colorado have been ongoing. See Grigg, "Voluntary Approaches to Basinwide Water Management," paper presented at Colorado Water Issues and Options: The 90's and Beyond (Denver, Colorado, October 8-9, 1985).