Western Water Law
Legal Basics of Water Allocation and Use

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Overview

• Basic principles of Western water law
• Water administration – surface/ground
• Adjudication
• New Appropriations
• Transfers
• Key differences among the states
What is Water Law?

Water Law is a set of rules re water resource allocation & use

Primarily, it’s state law, however, there is significant federal involvement

• Interstate Compacts
• Indian water rights
• Federal projects & federal law
Prior appropriation fundamentals

Prior appropriation doctrine governs surface water use in West

Water rights arise by actions of appropriator

• ‘first in time, first in right’ – earliest rights are best
• diversion of water from its natural course
• application of water to a ‘beneficial use’
Beneficial Use is the basis, measure and limit of a water right

• Quantity of water is that needed for beneficial use
• “Waste” is not beneficial use
• Examples: where most of water evaporates
• Reasonably efficient means of diversion required
Getting a water right

Originally, users could establish a right just by putting water to beneficial use.

Starting with Wyoming in 1890, most western states began requiring a state permit for new water uses.

Permitting decisions are made by state agencies based primarily on water availability.
Water right administration in the West

State officials are responsible for shutting off junior users as needed to get water to seniors

When senior users ask for such regulation, that’s referred to as a call – ‘putting a call on the river’

Typically NO regulation in unadjudicated basins
Compacts are binding agreements regarding the allocation (or other aspects) of interstate waters:

- Must be ratified by each signatory state
- Must also be approved by Congress
• Compact may allocate waters by requiring delivery of a fixed quantity at the state line, or otherwise

• Often set up a “compact commission” to administer

• Compacts require state officials to regulate water rights in order to ensure compact compliance
Compacts

- Many interstate compacts ignored issues that are of concern today:
  - Indian water rights
  - Ecological concerns

Utton Center – Model Water Compact
Reserved water rights intro

Doctrine began with *Winters v. U.S.*, Supreme Court, 1908

Originally applied to Indian reservations, on theory that water was needed to fulfill their purposes

- Rights created even though treaty silent re: water

*Arizona v. California*, 1963, extended doctrine to federal lands designated for a specific purpose, e.g. parks, forests
Basic features of reserved water rights:

- Created by operation of federal, not state, law
- Priority usually is date of reservation/designation
- PIA is measure for Indian lands
- For non-Indian reserved rights, the quantity of water is the amount minimally needed to fulfill primary purpose(s) of reservation
A typical reserved rights scenario

c. 1870: Indian Reservation established by treaty along the banks of the X River

c. 1910: US Bureau of Reclamation builds project to store & divert X River water for irrigation

c. 1975: Start of X River water rights adjudication
Today: adjudication continues, tribal claims are largely still unresolved, and there is no change in pre-existing water uses. Thus, senior tribal water claims remain unfulfilled. Indian Water Rights Settlements include federal funds for water development.
Protection for instream water uses

Traditional appropriation obstacles to instream use:

- Diversion requirement

- Instream uses not historically deemed “beneficial”
Statutes allow instream flow protection in most states:

• by agency action to bar new uses on some streams
• or, by allowing new water rights for instream uses
• most flow protections are to protect fish habitat
Big challenges for western water law

Explosive population growth in western cities along with projected changes in long-term supply

Land use approvals and water availability considerations

Administration of shortages without full adjudication of water rights
Addressing environmental impacts of water uses

• Endangered Species Act, Clean Water Act are key

• These laws don’t create or destroy water rights, BUT they may restrict the use of water rights

• Managing effects of climate change on water supply
Similarities and differences among the States: Prior Appropriation in most Western States

- Colorado
- New Mexico
- Idaho
- Montana
- Nevada
- Utah
- Wyoming
- Arizona
Other States

• California – dual system
  – riparian rights along streams
  – Appropriative rights – putting water to beneficial use
  – Pueblo rights

• Oregon – prior appropriation, with remnants of riparian water rights
Adjudications

“Adjudications” are huge court cases that determine all pre-permit water rights in a river system.

Some highlights from the States:
New Mexico Adjudication

• State Engineer conducts hydrographic survey and files suit
• 13 on-going adjudications filed starting in 1956, up through 2001
• There are 64,875 claimants involved
• The stream system where the major population center is located is not being adjudicated (Middle Rio Grande)
Idaho Adjudication

- Court proceeding – IDWR files notice and claimants are required to file a claim
- Snake River Adjudication filed in 1987 involves 38 of the 44 counties in Idaho and accounts for about 87% of the state’s water rights
Montana adjudicaton

• 1979 bill enacted: comprehensive general adjudication of the entire state’s 85 drainage basins

• Supreme Court ordered all claimants to file by 1982

• DNRC is technical advisor to Water Court
Nevada adjudication

• Administrative hearings held by State Engineer, who determines the validity of claims

• Upon completion, an Order is submitted to the court where it goes through further hearings
Utah Adjudication

• Court ordered adjudication – started in the 1950s and 1970s

• Entire state is in adjudication except the Sevier and Weber Rivers which were adjudicated in the 1920s and 1930s
Wyoming Adjudication

• Application process results in an adjudicated right through administrative procedures on a right-by-right basis

• There are several general adjudications: Purpose is to determine and integrate tribal and federal water rights
Oregon Adjudication

• General adjudications are administrative, conducted by the Water Resources Department
• Claimants must file a claim
• After review and hearings, Department issues an order of determination
• Court reviews the order and affirms or modifies it
California Adjudication

- Conducted in either:
  - Court forum where State Water Board acts as a referee, or
  - Statutorily, upon petition to the State Water Board

- As of 2000, 16 Basins had been adjudicated
Arizona Adjudication

• General stream adjudications are filed in State Court and ADWR is the technical advisor and provides administrative assistance

• Two pending:
  – the Gila River, and
  – the Little Colorado
New Appropriations

Basic:

• Is there impairment?

• Is it contrary to water conservation?

• Is it contrary to the public interest?
Idaho

- New use will not damage existing rights
- Water supply is sufficient for the purpose of the new use
- *Application is made in good faith and is not speculative*
- *Applicant has sufficient resources to complete the project*
- New use does not conflict with the local public interest
- Project is consistent with conservation of water
Utah

- Is there unappropriated water?
- Will the proposed use impair existing rights or interfere with uses that are more beneficial?
- *Is the proposed plan feasible?*
- *Was the application filed in good faith and not for speculation or monopoly?*
- *Will it unreasonably affect recreation or the natural stream environment?*
- Will it be detrimental to the public welfare?
Nevada

- Is there unappropriated water?
- Will the proposed use impair existing rights?
- Is the proposed use detrimental to the public interest?
- *State Engineer explicitly can consider water quality issues.*
- Can place conditions to protect any interests.
Groundwater

1. Absolute Ownership (capture) – unlimited use by any overlying owner – some eastern states & TX

2. ‘American’ Reasonable Use – ‘reasonable’ use on overlying lands (AZ, many east/midwest states)
Groundwater

3. Correlative Rights (equitable sharing of water among overlying owners – mostly California)

4. Prior Appropriation: first in time, first in right, subject to limits (most western states)
Particular groundwater regulations: Montana

- Outside of Controlled Groundwater areas, no permit is needed to drill a well or develop a groundwater spring with an anticipated use of 35 gallons per minute or less, not to exceed 10 acre feet per year
Montana

- DNRC can designate a Controlled Groundwater area

- Where withdrawals are in excess of recharge, or are very likely to occur in the near future; there are significant disputes concerning priority or amounts being used; or water quality is deteriorating
Arizona

• Arizona groundwater management:
  – Control severe overdraft
  – Provide a means to allocate the state’s groundwater
  – Augment groundwater through water supply development
Active Management Areas

Councils develop water conservation strategies within the AMA. Required to achieve a “safe yield” where consumption = recharge.
Water right changes (transfers)

Water rights are normally ‘appurtenant’ to a parcel

But, water right terms may be changed, especially:

- Point of diversion
- Place of use
- Type of use
Water rights transfers

Prior state approval is needed for such changes:

- Is there a valid water right?
- What is the historic beneficial use of the right?
- Would the change cause injury to other water users?
Highlights from States: Water Rights Transfers

Idaho:

• Thriving water rights market

• Water Resources Board also operates a water bank to facilitate temporary transfers to provide a mechanism for entities (that have excess water) to lease it
Wyoming Water Transfers

- Water rights cannot be sold. They are attached to the land and cannot be sold separately from the land, but can be included in the sale of the land.
Oregon Water Transfers

• Water rights can be transferred, but a profit cannot be made. Only the expenses incurred regarding the operation and sale of the water right can be recovered

• May not be strictly enforced?
California Water Transfers

• Water rights can be transferred separately from land subject to approval of the State Water Board

• Must find that the transfer would not injure any other water rights and would not unreasonably affect fish, wildlife, or other instream beneficial uses
Future

- Water conservation – work towards reasonable beneficial use standard
- State will need to manage water to protect federal interests and interstate obligations
- Land use and water availability will be more closely linked
- Streamline adjudication – Montana reserved water rights commission approach?