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Water for Sale: Prior Appropriation or Free Market Trade

One major point illuminated throughout the panel discussion and the question and answer period is the adequacy of a permitting process that allowed the DAPL to move forward in the face of federal trust obligations to tribes. As previously mentioned, the permitting process for the DAPL requires certain mitigation activities under federal regulations to ensure proper treatment of sacred sites. While federal agencies may have completed the required steps to receive permits, the tribes argue that such steps lack substance and do not adequately and meaningfully consider tribal input. While the permitting process may be administratively sufficient, many question whether the process actually fulfills spirit of the federal trust obligations to substantively consult and include tribal input.

Lindsey Ratcliff

SIXTH ANNUAL CARVER COLLOQUIUM

WATER FOR SALE: PRIOR APPROPRIATION OR FREE MARKET TRADE?

Denver, Colorado September 29, 2016

The Rocky Mountain Land Use Institute hosted the sixth annual Carver Colloquium on September 29, 2016. Former Colorado Supreme Court Justice, Gregory Hobbs, and Professor Gary Libecap, of the University of California, Santa Barbara Bren School of Environmental Science and Management, compared the relative merits of the prior appropriation system and the free market system of water allocation. The debate over which system of water allocation is better suited for today's environmental realities quickly evolved into an in-depth discussion about the advantages and disadvantages of the doctrine of prior appropriation, as well as an insightful comparison between Colorado's use of prior appropriation and California's hybrid utilization of prior appropriation and riparianism. University of Denver Sturm College of Law professor Jan Laitos moderated the event, which consisted of a ten-minute opening comment by each speaker, followed by three discussion questions from Professor Laitos, and a thirty-minute session in which the speakers answered questions from the audience.

Justice Hobbs began by reciting a poem and providing a brief history of water law in Colorado. He discussed how the terrain of the American West requires the prior appropriation system of water allocations because the riparian system is not realistic in a place where the few sources of water are scattered across an arid landscape. Water rights, he said, are for the beneficial use of the people, and Colorado's historical use of the prior appropriation doctrine reflects that reality.

Professor Libecap followed Justice Hobbs' introduction with a brief explanation of California's current approach to water allocation. In California, the riparian doctrine is still used in conjunction with the prior appropriation system. The state owns the few large water projects that serve the main metropolitan areas, and contracts between water rights holders in the water-rich north and the water-scarce south tend to result in unfair distributions to the detriment of southern water users. This complicated situation has led to heavy reliance on groundwater supplies, which has caused severe shortages. Professor Libecap

noted that the doctrine of prior appropriation is not to blame for California's drought situation. Instead, Mr. Libecap pointed to the ill management of water supplies by state legislators and municipalities.

After the introductory remarks, Professor Laitos directed his first question to the two speakers: Could a "water markets" system or "water capitalism"—where water rights are bought and sold like a commodity—ever replace the prior appropriation system? Justice Hobbs began by stating that water rights are a type of property right and such rights cannot be bought and sold like a product or commodity. He said he did not believe a system in which water was bought and sold like a commodity could be successful, especially in Colorado because water rights are a public good determined by beneficial use, and although water rights can be owned, the use of such a right is dependent on use by all other owners. While prior appropriation is an adaptable system and could promote a "water market," water rights could never be traded like other commodities. Professor Libecap did not view the prior appropriation system as significantly different from a "water market." He noted that there have been many water contracts created in California, and said water acting as a commodity in a water market promotes a more versatile system, with more cooperation between water-rights owners. Legislators in California are considering the use of legislative mandates to control the current water shortage, but Mr. Libecap insisted that this kind of approach would be unmanageable and inflexible for responding to market and climate changes.

Professor Laitos then asked whether it is old fashioned that in 2016, when our society is more technologically advanced, the largest and most senior water rights holders are still ranchers and farmers as opposed to factories and production sites. Justice Hobbs argued that Colorado should remain true to its roots, saying that although Coloradans need to find a way to meet the growing water demands of booming urban areas, they should not do so at the detriment of older agricultural water rights holders. Professor Libecap claimed that the media is misinformed about the actual amount of water used by agricultural producers. Californian farmers are not opposed to trading or sharing water rights with the urban population; their main concern is that the state legislature will see them as old fashioned and outdated, and will proceed to forcefully take their rights away and reapportion them to others.

Professor Laitos' final question was whether the speakers believed that the prior appropriation system is equipped to accommodate the countervailing needs of the environment—keeping water in the stream to protect water quality and aquatic wildlife—and of making sure a senior appropriator has enough water, even if it means dewatering that stream? Justice Hobbs responded that prior appropriation is equipped to deal with environmental concerns but that it comes at a cost. He pointed out that federal legislation has created permitting regulations that overlay Colorado's prior appropriation system for any new major water projects, but those processes can take fourteen to eighteen years. Because of the increasing difficulty and uncertainty associated with getting those supplies through new transbasin or storage projects, Front Range municipalities are forced to turn to accelerated water-market acquisition, stoking the fears of buy and dry on the Eastern Plains. Professor Libecap agreed that prior appropriation is perfectly set up to deal with environmental flows. Nevertheless, he cautioned against states like California turning to solutions that involve issuing

mandates to protect stream flows, which he called a tax on senior rights holders and one that causes endangered species to become the enemy, thus creating a conflict between local and environmental objectives. Instead, he argued, if states really want to protect stream flows in the long term, they need to turn to market solutions like leases, option contracts, or outright sales to protect that water. That way the environment "owns" it and the farmers benefit financially, both of which prevent the type of conflicts mandates will have down the road.

In the final portion of the debate, the audience asked questions of the speakers. Justice Hobbs clarified that the prior appropriation doctrine used in Colorado does not create the "use it or lose it" problem because the key concept of the prior appropriation system is *beneficial use*. Applicants are only required to show actual use (historic consumption) and what is left over returns to the stream for the public; thus, nothing is lost. Then, Professor Libecap commented that the hybrid system currently used in California, when compared to the much more streamlined Colorado system, lacks the clear statutory structure and direction required to create an active and effective "water market." Professor Libecap also assuaged the general fear that recreational or aesthetic water use in times of drought are frivolous by noting that such uses are so minuscule that they do not have much impact on broader water issues. Finally, Justice Hobbs advised that the only problem with the prior appropriation system is management and enforcement of the system; he felt that the government sometimes gave in to pressure from private parties, which decreases the effectiveness of the system. Justice Hobbs proposed that more administrative control in the future should combat this governmental failing and make the prior appropriation system more successful.

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