Water Law Review

Volume 20 | Issue 2 Article 18

1-1-2017

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own protections in place. For instance, California's state Clean Water Act requires appropriation similar to the federal statute. Similar to the court-supported federal ESA, California courts have also held that state agencies have the authority to protect instream water for public services. As a response to the *Winters* Doctrine, both the California Constitution and its Water Code operate under a reasonable use law. Under this scheme, unreasonable methods of diversion are unlawful, which protects instream flows from improper diversion. Where biological opinions may not be available, the California Fish and Game Code requires dam operators to release enough water to maintain downstream fishers. Even better, this provision applies to federal dams within the state. Finally, Section 401 of the CWA requires the federal government to obtain water quality certification from the states for certain activities. While the state is considering the effect of a project on its waters, it may impose instream requirements on those water quality certifications to protect them.

Connor Pace

UNIVERSITY OF DENVER WATER LAW REVIEW ANNUAL SYMPOSIUM 2017: AT THE CONFLUENCE: THE PAST, PRESENT, AND FUTURE OF WATER LAW

Denver, Colorado April 7, 2017

EVOLVING WATER LAW AND MANAGEMENT IN THE UNITED STATES: DELAWARE, KANSAS, MONTANA, AND INTERSTATE LITIGATION

Professor John Peck of the University of Kansas School of Law introduced the second panel of the 2017 Water Law Review Symposium entitled "Evolving Water Law and Management in the United States: Delaware, Kansas, Montana, and Interstate Litigation." Professor Peck chose these states because they represent a cross-section of the United States. He highlighted the major differences in rainfall between the states and explained that these states differ in the way they use groundwater and the rights applied to it.

Professor James May of the Widener University Delaware School of Law presented first regarding Delaware, which was the first state in the country to have water law. Delaware applies riparian water rights, which is mostly derived from the state's common law.

Water use greatly affects the abundant wildlife in Delaware's waters. The Delaware Bay Estuary is habitat for many water-dependent species, including migratory birds, marine turtles, horseshoe crabs, and twenty threatened or endangered species. Delaware has a high extinction rate—second only to Hawaii.

Furthermore, since the Swedes landed in Delaware in 1658 and first established water laws, water rights have been an important part of industrial development. Water law established through common law focused primarily on mill owners' rights until the late Nineteenth Century.

Administrative agencies also manage Delaware's water resources. The Department of Natural Resources and Environmental Control (the "DNREC") is responsible for regulating water in Delaware and enforcing the Delaware Coastal Zone Act. The legislature passed the Act in 1971 to prohibit new heavy industry, bulk transfer facilities, and other non-conforming uses.

A compact between Delaware, New Jersey, Pennsylvania, New York, and the United States created the Delaware River Basin Commission (the "DRBC") in 1961 to address and regulate a variety of water quality and quantity issues affecting the Delaware River Basin, such as permitting, water conservation issues, drought management, flood loss reduction, and recreation. The DRBC covers land under the Delaware River down to the low water mark in Delaware and New Jersey. New Jersey has been trying to get ownership of the land under the river back to the 1700's and 1800's, and as recently as 2008, but Delaware has always won those lawsuits.

Professor Peck began his discussion of water issues in Kansas with a general description of water in the state. Northeastern Kansas receives a great deal more rainfall than the southwest, but the west has most of the groundwater. There are several large aquifers in western Kansas, including the Ogallala, Great Bend Prairie, and the Equus Beds, as well as federal reservoirs. Kansas has two major river basins—the Kansas-Missouri River Basin in the north and the Arkansas River Basin, which starts in Colorado and flows down through Wichita and Tulsa, and eventually converges with the Mississippi River.

Professor Peck discussed the evolution and sources of water law in Kansas. The courts established most water law from the time Kansas got its statehood in 1861 until 1945, but there were very few cases. The state adopted common law at formation, including riparian water rights for surface water and absolute ownership for groundwater.

From 1945 to 1967, a mix of legislative and judicial actions managed water law. The legislature passed the Kansas Water Appropriation Act in 1945, which changed water rights from the common law doctrines of riparian and absolute ownership to prior appropriation. People using water in 1945 could get vested water rights, but people who were not using water in 1945 lost any rights the day the Act went into effect. Kansas citizens who lost their water rights brought claims alleging the Act was unconstitutional because it was a taking for which compensation should be paid, but the Kansas Supreme Court upheld the constitutionality of the Act by a six-to-one decision.

From 1967 to the present, administrative, legislative, and judicial processes have governed Kansas water law. By the 1960's, users were depleting groundwater aquifers so, in 1972, the legislature passed the Kansas Groundwater Management Act, which permitted groundwater management districts to be set up for local control.

In 1978, the legislature made it a crime to divert water without a permit, except for domestic use, and created new districts for Intensive Groundwater Use Control Areas ("IGUCAs"). These IGUCAs gave the Chief Engineer extraordinary power, including the ability to change priority dates. The Chief Engineer established nine IGUCAs, including Walnut Creek, which includes the Cheyenne Bottoms wetlands at its eastern edge. The Fish and Game Commission ("FGC") applied for a permit covering Walnut Creek to help preserve wetlands.

The Division of Water Resources issued several hundred permits in the alluvial of Walnut Creek after 1950, and by the mid-1980's the creek began to dry up. After the FGC asked for assistance, the Chief Engineer set up hearings and issued an order, which found the total annual quantity allowed under the

existing permits was well beyond the long-term sustainable yield, and the reasonable amount needed for irrigation was 12-14" per year. The order divided the prior appropriation rights into two groups. Those who had their rights before October 1965 had senior water rights, but those who acquired their rights after that date had junior rights. The order reduced senior rights from 18" per year to 12-14", and junior rights from 18" to 6 ¼ - 5 ¼".

Looking towards the future, former Governor Sam Brownback created a new program called the "50 Year Vision," which addresses construction of the Missouri River Aqueduct, climate change, global warming, and interstate conflicts. The biggest question the program seeks to address are whether the state will mandate further water restrictions and if those restrictions will be constitutional. Professor Peck believes water issues affecting Kansas may require a change from cattle production since it requires so much water to produce a pound of beef.

Next, Professor Irma Russell of the University of Missouri Law School spoke about Montana's water management. The eastern part of Montana may be dry, but there is a lot of rain and flowing rivers west of Missoula. Professor Russell analogized water users to a family and described additional water needs like another child joining the family. She believes Montana is a great example of water law in the western states because Montana demonstrates how water law relates to something larger than law as a controversy. In 1865, two decades before Montana became a state, the territory's legislature passed an irrigation law. When the state's Constitutional Convention met in Montana in 1972, the delegates agreed to include the right to a clean and healthful environment in their state constitution.

In terms of future challenges, Professor Russell believes it is necessary to find a unifying theme between different voices that have different interests to be able to see water law in an atmosphere of service and solicitude to the need to exist and to thrive. Senior and junior water rights holders' reasonable interests weigh against these concerns. People are always looking to what they have, how things are shared, and who has a right to it. That is the call of defending rights and figuring out how to live together and thrive together in the future.

Professor Burke Griggs, a visiting professor at the Washburn University School of Law, spoke last about the history of interstate water litigation. The Classical Period from 1900 to 1949 consisted of equitable apportionment and reticence; compact resolutions; and Congressional apportionments like the Rio Grande. Groundwater extraction and compliance with compact rules has dominated interstate water issues during the last fifty years. This phase of interstate water litigation has also dealt with groundwater modeling fights. Overall, cases have been more successful when the litigants used shared modeling.

Professor Griggs discussed a few examples of recent interstate litigation. In Mississippi vs. Tennessee, the Special Master found the Doctrine of Equitable Apportionment applies, so Tennessee did not trespass or convert water when it pumped groundwater out of the Mississippi Embayment Regional Aquifer System. In Florida vs. Georgia, the Special Master found that Georgia was probably harming Florida by over-pumping groundwater and starving Georgia's oysterbeds, but since the U.S. Army Corps of Engineers was not a part of the lawsuit, the Court could not help.

Looking forward, Professor Griggs posed several issues likely to come up in the future of interstate water, such as how states will respond over the next fifty years as water in the Ogallala decreases and if there will we be compact litigation over water quality?

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SCIENCE AND THE COURTROOM: HOW MODELING IS CHANGING THE GAME

Meg Frantz, an engineer at Brown & Caldwell, moderated this panel discussion on science, data, and math modeling in water law. The panel featured: Dick Wolfe, State Engineer & Director of the Colorado Division of Water Resources; Chris Sanchez, a Hydrogeologist at Bishop-Brogden & Associates, Inc.; and Burke W. Griggs, visiting professor at Washburn University School of Law.

Chris Sanchez, who has testified in the Division 1 Water Court providing expert testimony about water, oil, and gas rules, offered a view from the perspective of an engineer and spoke about the difficulties related to communication especially with the more technical aspects of hydrology and water law. Sanchez also spoke about the varying accuracy models have in accounting for the interaction between groundwater and surface water. He indicated that current models can account for surface water fairly easy, but using models to make predictions about groundwater is much more difficult because there are still many unknowns and missing information in the field of groundwater modeling. Complicating this issue is that groundwater moves slowly and that some aquifers are buried and can be shallower, deeper, or more connected than others.

Moreover, Mr. Sanchez said that the impacts of groundwater wells on these aquifers and streams is also hard to predict because of all the variables and inputs involved, including the fact that aquifer depletion continues after the pumping stops. Mr. Sanchez's said that the ground-surface water interaction is determined by the attributes of that individual, which are not always easily to isolate for the purposes of modeling. Next, Mr. Sanchez explored some of the different models used in many courtrooms—such as Modflow and others based on Glover inputs—before discussing communication and cultural issues in the world of water law. From the perspective of an engineer, Mr. Sanchez expressed that it is not always easy to communicate the technical work he does even to skilled attorneys and consultants. He continued on this theme and said that it was even more difficult to defend the models and work that water engineers do in court. He elaborated on the difference in the kind of testimony required when he appears in front of a water court judge or in front of a jury.

Dick Wolfe also offered an engineer's perspective. Mr. Wolfe has been Colorado's State Engineer for the Division of Water Resources for the last ten