

1-1-2017

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Rioux Jordan, Conference Report, Separation of Powers: A Comparison of Administrative, Legislative, and Judicial Water Regimes, 20 U. Denv. Water L. Rev. 429 (2017).

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Separation of Powers: A Comparison of Administrative, Legislative, and Judicial Water Regimes

than the current system. Mr. Dick Wolfe responded that there are problems with high transaction costs in water courts and that water judges were working to solve those issues. However, Mr. Wolfe was not entirely sure that a mediation-based model would work much more effectively than the current system, pointing to required non-binding arbitrations in the Republican River Compact that have led to little actual progress. Alternatively, Mr. Wolfe also said that mediation has worked well in the Platte River Compact because it is more focused on species conservation.

The final question was about how to ensure courts are using the best science. The panelists responded to this by saying that water decrees have made things more complicated and that scientific tools are used on a case-by-case basis, so it is hard to know exactly what the “best” science is in an individual situation because each is so vastly different. But, they also said that the legislature can help make sure that scientists have the best tools and data that they need to present the “best” science in the courtroom through enacting legislation that enables science to continue to move forward and make more discoveries.

Gracen Short

**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

**SEPARATION OF POWERS: A COMPARISON OF ADMINISTRATIVE,
LEGISLATIVE, AND JUDICIAL WATER REGIMES**

This panel brought in three experts to discuss the benefits and drawbacks of water law regimes that are administrative, legislative or judicial in nature. Sturm College of Law Professor Tom Romero moderated the panel.

David Barfield, the Kansas Chief Engineer, spoke first and discussed the administrative regime. He explained the background of Kansas water law and the historical development of its administrative regime. The population of Kansas mostly resides in the wetter southeast, while most irrigation occurs in the west. This, combined with occasionally unavailable surface water, has led western irrigators to rely upon the groundwater of the Ogallala-High Plains aquifers. These aquifers do not interact with the surface stream and receive essentially no recharge.

To deal with these issues, Kansas has used several different water regimes. Before 1945, Barfield explained that Kansas used a judicial regime with few water laws. The state instead relied on the common law of riparian rights. The courts also interjected some elements of prior appropriation, creating a confusing mix of doctrines. In 1944, the Kansas Supreme Court decided this system no longer worked. The legislature responded, passing the 1945 Kansas Water Appropriation Act. Barfield said this legislative regime lasted from 1945 to about 1978. During this period, the legislature entered interstate compacts, partnered with the federal government to improve water storage, created an office dedicated to water planning, and much more. In 1978, the legislature made

major amendments to its water law, shifting Kansas into an administrative regime. This put the chief engineer in charge of administering the state's water system. The chief engineer's duties include managing permitting, all prior vested rights, all prior appropriation rights, any changes of water rights, and any other issues that may come up. While this system effectively manages the state's water, it has not fully addressed groundwater overdevelopment.

To deal with the overdevelopment problem, the Kansas legislature passed the Groundwater Management District Act, which created five groundwater management districts. In each district, the locals adopt management programs for groundwater use, subject to chief engineer approval. However, Barfield said, these plans have at best slowed down aquifer depletion. He said solving this problem requires solving hundreds of smaller problems. One of the problems he identified is the worry that conserving water will result in losing water rights. To address this, Barfield has eliminated "use it or lose it" within closed management districts. The irrigators' water rights will no longer lose their water right by non-use. Barfield said since this elimination irrigators have reduced their use of the aquifers. While the issues persist, Barfield explained that Kansas' administrative regime has been working towards solutions.

Rich Gordon, a former member of the California State Assembly spoke next to discuss the legislative regime. He discussed California's blend of prior appropriation and riparianism. California's prior appropriation roots date back to the 1849 Gold Rush. The miner's used first-in-time, first-in-right to determine water rights. In 1850, California adopted riparian rights in its constitution, but by 1851 California recognized prior appropriative rights as equals with riparian rights. In 1914, California established a permit system for its appropriative rights. This led to a system with three types of rights: pre-1914 appropriative, post-1914 appropriative, and riparian. On their own, riparian rights are difficult to quantify without stream-wide adjudication. But only a few streams have received these. Groundwater poses similar issues because its only regulations have been court imposed. In addition, the majority of California's water is in the north, while most of its need for water is in the south. With this variety of rights, difficulty of quantification, limited control of groundwater, and geographic disparity, California's water rights system has become difficult to navigate.

With these difficulties as a baseline, Gordon explained that California's legislature only gets involved to respond to crises or to headlines. California's recent drought provided both. Gordon noted the significance of the legislature passing the Sustainable Groundwater Management Act (SGMA). SGMA aimed to address the subsidence issue resulting from groundwater over-pumping. Originally, the act would have fully regulated groundwater basins. However, because it resulted from compromise (as legislation tends to do), SGMA instead requires local governments to establish groundwater sustainability agencies to manage wells. Though later questioned about the actual adoption of these agencies, Gordon said he believes that people will prefer local control over a state imposed system.

Gordon also discussed the major issue resulting from California's premise that most of the state's water can be stored in snowpack. The state does not have the capacity to store water outside snow pack. Combine this with California's penchant for wet or dry years (rather than average years), and the state

cannot capture the benefit of the wet years to make up for the dry years because of its lack of storage. One of the solutions the legislature has put forth, has been allowing public entities to obtain water rights for captured storm water. Gordon concluded by describing the difficulty of working in the legislative role. Because legislation requires compromise, it is difficult to fully solve real problems.

Finally, Greg Hobbs, a retired Colorado Supreme Court Justice, spoke to discuss the judicial regime. He began by detailing the evolution of Colorado's water regime. Congress carved Colorado out to cover the head waters of five great rivers—the Platte, the Arkansas, the Colorado, the Republican, and the Rio Grande. After Colorado's gold rush in 1859, agriculture became a huge industry, because it was "rumored that the miners liked to eat." Colorado needed the prior appropriation system because it allowed moving water from rivers to farms. An early draft of the Colorado Constitution declared water to be the property of the state, left to the legislature to distribute, but the influence of farmers led to a different final wording. Instead the constitution embraces prior appropriation by declaring the water of the natural stream to be the property of the public, subject to appropriation. The early Colorado Supreme Court case, *Coffin v. Left Hand Ditch*, firmly rejected the existence of any riparian water rights.

The Colorado legislature later gave the district courts the responsibility to decree water rights. According to Hobbs, the legislature did not trust itself or an administrative apparatus to hand out water rights. He said the legislature did not want to require the people ask the government to use water. By putting the decision into the courts, the legislature instead trusted the people with their own water. In 1881, the legislature created the State Engineer to enforce those decrees and administer the system of water rights.

Unfortunately, these judges did not have a full view of the streams. The 1969 Act addressed this by creating seven water divisions, each based upon a major river basin. Each with a water judge, an alternate water judge, and a water referee. The referee works with the parties to investigate the water rights and attempt to obtain a consent decree. The act also explicitly recognized tributary groundwater within the priority system, because new wells had previously forced 1860s water rights to be curtailed.

When questioned about the cost of the court system limiting access, Hobbs noted that it still provides the best protections. In 1969, the Colorado legislature considered several options, including administrative and political regimes. These were all rejected in favor of the water court system and the water referee. This system provides extensive protection for everyone's water rights and, Hobbs asserted, without these protections Colorado would not have such an extensive water market.

Hobbs explained that by splitting the water regime into a system of checks and balances—water rights decreed by the court, administered by the executive branch, and problems solved by the legislature—Colorado avoids the pressures that could be applied on any one branch to not enforce the doctrines of prior appropriation in some circumstances. Hobbs expressed worry about the pressure faced by administrative agencies that both hand out water permits and enforce those permits.

With each panelist having discussed their regimes, Romero moved the

panel into question and answer. He asked the panelists how their regimes could benefit from a change or borrow from the other regimes to improve or address the challenges posed by social, political, and environmental issues. Gordon said that, while Californians never want to admit they can learn from others, their system is convoluted and would be better off with a more coordinated system that could better address groundwater. Barfield said that Kansas has already borrowed extensively from other states to create their system. He said, contrary to Hobbs' worries about an administrative regime, that chief engineers can certainly do it all. He does not foresee further changes to Kansas' system. Hobbs noted that the downstream states keep Colorado honest. Through compacts, Colorado has been forced to consider other states, and better administer its own waters. Similarly, Hobbs explained that other interests, including reserved water rights, and public lands continue to impact considerations of water rights within Colorado. The panelists then fielded questions from the audience until they ran out of time.

Each panelist discussed how the unique history of their state molded the regime it now uses. It is the unique challenges faced by each state that has created differing water systems that, mostly, work to create efficient use and administration of water.

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April 7, 2017

**ETHICAL AND PROFESSIONAL STANDARD FOR LAWYERS & ENGINEERING
EXPERTS IN WATER COURT LITIGATION AND DISPUTE RESOLUTION**

The final panel at the 2017 *University of Denver Water Law Review Annual Symposium* consisted of Stephen Leonhardt, a Partner at Burns, Figa & Will, PC, Kevin Rein, Deputy State Engineer of the Colorado Division of Water Resources, Ema Schultz, Assistant Attorney General with the Colorado Department of Law, and Janet Williams, Chairman at Leonard Rice Engineers, Inc.

Stephen Leonhardt opened the panel by giving a roadmap of the many rules governing lawyers in water court proceedings that include the Colorado Rules of Professional Conduct, Colorado Rules of Civil Procedure, Water Court Rules, Federal Rules of Evidence, and Colorado Rules of Evidence. Mr. Leonhardt noted the role lawyers play as zealous advocates, but said that lawyers must also follow the rules of professional conduct, act with candor, adhere to confidentiality requirements, and satisfy certain disclosure responsibilities. Mr. Leonhardt mentioned that the rules pertaining to disclosure have changed, and that the Federal Rules of Civil Procedure were amended in 2010 to narrow the disclosure requirements; the current rule requires disclosure of the facts or data considered by the witness in forming the expert's opinion. Mr. Leonhardt then explained that the Colorado Rules of Civil Procedure were amended similarly. Under the current rules, draft expert reports are generally protected from disclosure or discovery, except for those identifying facts, data, or assumptions that