Water Law Review

Volume 15 | Issue 2 Article 24

1-1-2012

The Public Trust Doctrine

Chelsea Huffman

The Public Trust Doctrine

were properly notified, they were on notice that the requantification applied ditch-wide. Combining the fact that Burlington offered FRICO a fair settlement and that the ditch had was never requantified, despite years of protest against FRICO, Sims believes that the villainization of Aurora Water was misplaced.

Jonathan Culwell

THE PUBLIC TRUST DOCTRINE

Doug Kemper, Executive Director of the Colorado Water Congress, spoke on the Public Trust Doctrine as it relates to water law and two topical ballot initiatives currently pending in Colorado. The Public Trust Doctrine, hereinafter the "Doctrine," is an ancient doctrine that balances the public and private interests with respect to public goods, such as water. The basic premise is that governments should ensure equal access to water and adequate water supplies for all.

A Brief History of the Public Trust Doctrine

The Doctrine dates back to the Justinian Code - at that time, the Doctrine was mostly concerned with public access to beaches. The Doctrine was later incorporated into the Magna Carta. During that time, nobles built private piers and access structures to waterways, impeding the King's navigable waters, and such private structures were soon forced to comply with the Doctrine and made subject to the benefit of the public. Despite this longstanding European tradition, the Doctrine did not make its way over to the United States until a little over a century ago, in the State of Illinois.

As a result of infrastructure development necessitated by the Industrial Revolution, the City of Chicago granted the Illinois Railroad a significant part of the Chicago harbor for its operations. Decades later, concern arose that Chicago had given too much of the land to the Railroads. Eventually, the Illinois Supreme Court had to step in, and determined that the Railroad could not alienate a public resource by conveying that resource to private entities.

The Doctrine continued to evolve in relation to the allocation of public resources, and most notably arose during the now infamous disputes over Mono Lake, which sits on the border of California and Nevada. In 1913, the Los Angeles Department of Water and Power ("LA DWP") diverted water from the Owens River through the Los Angeles Aqueduct to the City. In 1941, the LA DWP extended the Aqueduct to reach into the Mono Lake Basin in order to further develop water supplies for the fast-growing population of Los Angeles.

Though the LA DWP knew that withdrawing water from the lake to supply Los Angeles would lead to receding water levels in the lake, it relied on existing statutes that granted preference to domestic use over other uses, and in this case, the withdraws from Mono Lake constituted a domestic use. Litigation over the City's excessive withdraws began in the

1980s, and ultimately the Supreme Court of California determined that because the lake was an outstanding national public resource, the LA DWP would be required to modify its patterns of diversion to account for the changing level of the lake water. Decades of negotiation and litigation later, the LA DWP agreed to bring the lake back to a specified level, to the fullest extent possible, and also restore the related fisheries and streams.

This was essentially the first recognition of the Doctrine in the western United States. The pivotal California case asserted that the public has rights that are co-equal to diversion rights for hunting, fishing, recreation, domestic use, and aesthetic enjoyment.

The Public Trust Doctrine in Colorado

This brief history leads us to the political and legal issues surrounding the Doctrine in Colorado today. Colorado has never recognized the Doctrine in its constitution or water code and continues to operate under a pure prior appropriation system whereby water is allocated solely on theories of availability and non-injury. In 1944, two individuals sought to bring the Doctrine to Colorado and periodically introduced ballot initiatives, none of which were successful. Most recently, several proponents of the Doctrine introduced two new ballot initiatives - Initiatives 3 and 45 (discussed in more detail below). Kemper argued that, if enacted, the initiatives would create a broad and undefined concept of the Doctrine that will lead to (i) a radical change to the traditional method of appropriation of water; and (ii) major effects on vested property rights in water.

Initiative 3

Section V of the Colorado Constitution states, "the water of every natural stream is hereby declared property of the public and same dedicated to the use of the people, *subject to appropriation*" (emphasis added). According to Kemper, nearly all Colorado statutes governing water development hang on that phrase. Essentially, it means all water remaining in a natural stream *after* private parties have appropriated their water rights is the property of the public. Initiative 3, while still recognizing these appropriative water rights, specifies that such uses will now be subject to the "public trust," which will overlay and supersede the historic priorities of those rights. Therefore, all water rights would be subject to modification, curtailment, or elimination in entirety if found to be not in the public's best interest.

At present, Colorado has issued approximately 150,000 water rights decrees. If passed, Initiative 3 would affect virtually all of these decrees. According to Kemper, it would not matter what water right one has owned and for how long - that right would be subject to requantifiaction or elimination based on the public's interest. Such a change would inevitably inject a great deal of uncertainty into water markets and affect the security of existing property rights in water.

Additionally, Kemper argued that Initiative 3 would affect the current law on stream access. Historically in Colorado, a property owner adjacent

to a stream owns to the centerline of the stream, which generally means that property owner can block public access to its portion of the stream bed. According to Kemper, if Initiative 3 passes, any person could technically have unrestricted access to those waters (and inevitably, to the private land underlying those waters), so long as one accesses the stream through a public causeway (such as a bridge). This would represent a fundamental change to water and real property law in Colorado.

Initiative 45

Section VI of the Colorado Constitution recognizes that the right to divert water for beneficial use from a natural stream will never be denied. Section VI generally provides that as long as there is water available and the diversion will not injure other water rights holders on a watercourse, a private party may appropriate water and put it to a beneficial use. However, Proposition 45 recognizes the "public control of waters" but does not make a distinction between waters of "a natural stream" and other, nontributary waters. Such recognition would be novel in Colorado. Historically under Colorado's water administration, nontributary water sources are wholly owned by the surface owner of the overlying property, and thereby not subject to administration within the prior appropriation system. Kemper argued that if Initiative 45 were to pass, anyone could withdraw nontributary groundwater so long as the withdrawal could be linked to the "public good," no matter how attenuated that link might be.

Kemper further argued that because the Doctrine provides that anyone who uses water must return that water back to the stream in a manner that does not affect the health or aesthetics of the stream, Initiative 45 would implicitly require water users (including municipalities) to remove any unnatural substances - from pharmaceuticals to personal care products - before returning the water to the stream; an extremely expensive and duplicative process considering existing water quality standards that already regulate this area.

In addition, at present in Colorado, one can divert water from another river basin, and reuse that water to extinction. Kemper argued Initiative 45 may disallow such activity, requiring that the user return the water to the same basin from which it was extracted. This would have meaningful impacts on dry areas of the State, preventing them from obtaining water from sources outside their basin.

The Colorado Supreme Court's Decisions on the Initiatives: The "Single Subject" Requirement

After Initiatives 3 and 45 were proposed, the Colorado Water Congress immediately appealed their validity to the Colorado Supreme Court on the issue of whether the Title Board properly determined that Initiatives 3 and 45 constituted a "single subject." The Title Board is responsible for examining proposed ballot initiatives to determine whether they address a "single subject" and are therefore legally allowed to make it onto the ballot.

Colorado law requires that "every constitutional amendment or law proposed by the initiative be limited to a single subject, which shall be expressed clearly in its title." A proposed initiative violates the rule if the subject has at least two distinct and separate purposes not dependent or connected with one another. Essentially, the proposed subsection must be necessarily and properly connected to the single subject of the initiative.

On April 16, 2012, the Colorado Supreme Court determined that indeed each initiative contained a single subject. The Court held that Initiative 3 was necessarily and properly connected with the subject of "the public's right in waters of natural streams" because the Initiative's language properly fell within the delineated purpose of protecting the public's interest in the water of natural streams. The Court further held, in a separate opinion, that the subsections in Initiative 45 are dependent upon and connected with one another under the title "the public control of waters."

Prior to the court's decisions, Kemper argued that a "single subject" finding would be incorrect because the initiatives deal with much more than one subject - the initiatives affect water quality statutes (statutes that are not the subject of one monolithic concept), diversion of water issues, and access rights. However, because the Title Board is entitled to significant deference in their findings, the Supreme Court declined to overturn the Board's decision. A fiery dissent from Justice Hobbs on each decision highlighted many of the same concerns Kemper identified in his presentation.

Chelsea Huffman

TRIBAL WATER LAW, TRIBAL SOVEREIGNTY, AND WATER DEVELOPMENT THROUGH COLLABORATION AND PARTNERSHIP

Celene Hawkins, Associate General Counsel for the Ute Mountain Ute Tribe ("UMUT"), discussed a cutting edge issue in Indian Water Law of multi-Tribal water organizations and Tribal/non-Tribal water organizations.

Because tribal water rights are governed by federal law and are not dependent upon state law or procedures (*Cappaert v. United States*), Hawkins began with brief overview of Federal water law. The seminal case *Winters v. United States* established the concept of implied federal reserved water rights for tribes. The *Winters* court held that Tribal water rights, now commonly referred to as *Winters* rights, are implied from the federal reservation of lands for Indian Tribes if the federal government's reason for reserving the land inherently requires access to water. The priority date for *Winters* rights are either the date of the creation of the Indian Reservation or time immemorial. *Winters* rights are not subject to abandonment or forfeiture under state law, and once *Winters* rights are quantified, Tribes are not required to put *Winters* rights to any particular use at any particular time.