

Water Quantity Issues

USDA-CSREES National Water Conference
January 31, 2007
J. Michael Jess

Water Resources Policy Underpinnings in the United States

Market culture & belief in man's domination of nature

Experience & customs

Unlike soil or minerals, air & water are public resources

Colonial Period to California “Gold Rush”

Eastern seaboard climatically similar to United Kingdom

Forms of taxation & rule by sovereign monarchy rejected by Colonists & early Americans, but many principals of governance and jurisprudence were borrowed extensively from English customs & institutions

Riparian Water Rights

Emerged from American common law, not deliberate action by Legislative bodies or Executive branch officials

Individuals must own real property adjacent to stream or lake (implicit rights/appurtenances – not severable)

Right to divert & use water is perpetual

Provided changed flow, volume & quality do not result from diversions, riparian landowners entitled to as much as they reasonably need

“Mill privilege” entitles some riparian landowners to dam streams & effectively acquire a monopoly

Courts resolve disputes on case by case basis

Westward Expansion (1850s – World War I)

Great Plains and far west more arid and otherwise dissimilar to portions of the U.S. lying east of the Missouri River

In California gold fields, Spanish influences and meager stream flows prompted allocation only to owners of earliest mining claims

Location of some mines not adjacent to streams

Doctrine of Prior Appropriation

A form of prior appropriation exists in practically every state located west of the Missouri River

Adopted by deliberate action of Legislative bodies (earliest examples: Colorado, Wyoming & Nebraska)

In application many similarities to settlers' experience with provisions of 1862 Homestead Act

Prior Appropriations

Rights not assumed; diversions allowed only by those holding officially recognized rights

Individual users need not own real property adjacent to streams or lakes (water appropriations are an explicit property right – severable & subject to sale, lease, change in location, etc.)

Individual diversions limited by rate, volumetric amount & time specifications

First physical diversion (alternatively, initial filing date) establishes priority date

During times of shortage, earliest priority appropriations entitled to full supply – “junior” users are curtailed or enjoined

Right to divert/use water may be lost - “Use it or lose it”

State Engineer is frequently chief regulatory official charged with enforcement responsibilities & delegated authority to resolve disputes

Equitable Apportionments, Congressional Actions & International Treaties (20th Century)

Equitable apportionment lawsuits *U.S. Const. Art. III, Sec. 2*

A dozen lawsuits since 1776 (Ex's: North Platte, Laramie, Vermejo, Arkansas, Colorado, Republican, Pecos)

Congressional enactments *U.S. Const. Art. 1, Sec. 8*

Only two examples:

a) Boulder Canyon Project Act

b) certain Pyramid Lake Paiute Tribal requirements inserted when approving California-Nevada Interstate Compact for Truckee-Carson Rivers & Lake Tahoe

International Treaties *U.S. Const. Art. II, Sec. 2*

One example:

Minute 242, Developed by U.S.-Mexico Boundary & Water Commission for the Colorado River

Interstate Agreements (20th Century)

Negotiated allocation Compacts

U.S. Const. Art. I, Sec. 10

Nearly 30 Compacts (Ex's: South Platte, Bear, Belle Fourche, Yellowstone, Alabama-Coosa-Tallapoosa, Colorado)

Interstate Allocation Compacts



Contemporary and Emerging Issues

CHANGED CIRCUMSTANCES - - - Re-allocation of previously committed and/or dwindling supplies

- a) Population growth & changes in migration patterns
- b) Shifting societal values
- c) Improved understandings – Ex: hydraulic linkage between ground water & surface water supplies
- d) Competition among states
- e) Federal requirements

Clean Water Act

Endangered Species Act (especially)

Coalition building & collaborations

Markets

Wildcards (can be played anytime)

Winters v U.S., 207 U.S. 564 (1908)

Native American rights

Hinderlider v LaPlata Co., 304 U.S. 92 (1938)

Without legislative-branch enactment, St. Engineer devises interstate compliance scheme

State ex rel. Cary v Cochran, 138 Neb. 163, 292 N.W. 239 (1940)

“Futile call”

References

Getches, David, H., *Water Law in a Nutshell*, 3rd ed., St. Paul, MN: West Information Publishing Group, 1997.

Locke, John, *Second Treatise of Government*, circa. 1662, in *Two Treatises of Government*, 2nd ed., edited by Laslett, Peter, Cambridge, U.K., Cambridge University Press, 2003.

Tarlock, A. Daniel, *Law of Water Rights and Resources* (Environ. Law Series), New York: Clark Boardman Callaghan, 1988 (w/annual supplements – 1989-2002).

J. Michael Jess

School of Natural Resources

503 Hardin Hall

University of Nebraska-Lincoln

Lincoln, Nebraska 68583-0995

Phone (402) 472-7570

Fax (402) 472-2946

mjess3@unl.edu