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The Water Law Backdrop [outline]

James N. Corbridge

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THE WATER LAW BACKDROP

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**New Sources of Water for Energy
Development and Growth: Interbasin Transfers**

**a short course sponsored by the
Natural Resources Law Center
University of Colorado School of Law
June 7-10, 1982**

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I. Riparian Law

A. Basic Principles

1. Natural Flow Theory
2. Reasonable Use

B. Interbasin transfers: riparian limitations

1. Non-riparian uses
2. Uses outside watershed of origin

C. The Restatement analysis

1. Restatement of Torts
 - a. Unreasonableness: utility of use vs. gravity of harm
 - b. Sec. 855: the importance of classification as riparian or non-riparian
2. Restatement (Second) of Torts
 - a. Reasonableness and the factors to be considered: Restatement (Second) of Torts, Sec. 850A
 - b. Non-riparian uses
 - 1) Sec. 855: reasonableness not "controlled" by classification of a use as riparian or non-riparian
 - 2) Sec. 856: the privileged position of the riparian use
 - 3) Sec. 857: the burdens of non-riparian use

D. Case law

1. McCord v. Big Brothers Movement, 120 N.J.Eq. 446, 185 A. 480 (1936)
2. Kennebunk, Kennebunkport & Wells Water District v. Maine Turnpike Authority, 145 Me. 35, 71 A.2d 520 (1950)
3. Stratton v. Mt. Hermon Boys' School, 216 Mass. 83, 103 N.E. 87 (1913)

E. Statutory modifications to permit non-riparian use

II. Appropriation Doctrine

A. Basic principles

B. Instituting new uses

1. Prohibitions on interstate transfers
2. Area of origin protection statutes

C. Transfer of water rights: the protection of junior appropriators

1. Consumptive use and the integrity of the stream
2. Types of injury
 - a. Increases in consumption
 - b. Stream conveyance losses
 - c. Changes in time of diversion/use
 - d. Changes in pattern of use

Ref.: Gould, Conversion of Agricultural Water Rights To Industrial Use, 27 Rocky Mt. Min. L. Inst. 1791 (1982)

3. Colorado

- a. Change of water right: C.R.S. 1973, §37-92-103(5):

"Change of water right" means a change in the type, place, or time of use, a change in the point of diversion, a change from a fixed point of diversion to alternate or supplemental points of diversion, a change from alternate or supplemental points of diversion to a fixed point of diversion, a change in the means of diversion, a change in the place of storage, a change from direct application to storage and subsequent application, a change from storage and subsequent application to direct application, a change from a fixed place of storage to alternate places of storage, a change from alternate places of storage to a fixed place of storage, or any combination of such changes. The term "change of water right" includes changes of conditional water rights as well as changes of water rights.

- b. Method of protection -- reduction of decreed amounts; replacement water

- c. Case law: Green v. Chaffee Ditch Co.,
150 Colo. 91, 371 P.2d 775 (1962); Farmers
Highline Canal & Reservoir Co. v. City of
Golden, 129 Colo. 575, 272 P.2d 629 (1954)

4. Permit States

a. Public interest restrictions

b. Wyoming

1) Wyo. Stat. §41-3-104(a):

(a) When an owner of a water right wishes to change a water right from its present use to another use, or from the place of use under the existing right to a new place of use, he shall file a petition requesting permission to make such a change. The petition shall set forth all pertinent facts about the existing use and the proposed change in use, or, where a change in place of use is requested, all pertinent information about the existing place of use and the proposed place of use. The board may require that an advertised public hearing or hearings be held at the petitioner's expense. The petitioner shall provide a transcript of the public hearing to the board. The change in use, or change in place of use, may be allowed, provided that the quantity of water transferred by the granting of the petition shall not exceed the amount of water historically diverted under the existing use, nor exceed the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators. The board of control shall consider all facts it believes pertinent to the transfer which may include the following:

(i) The economic loss to the community and the state if the use from which the right is transferred is discontinued;

(ii) The extent to which such economic loss will be offset by the new use;

(iii) Whether other sources of water are available for the new use.

2) Basin Elec. Power Coop. v. State Bd. of Control, 578 P.2d 557 (Wyo. 1978)

III. Ground Water

A. Historical development

B. Legal doctrines

1. Absolute ownership

2. Reasonable use

3. Correlative rights

4. Appropriation

a. Arizona: 1980 Ground Water Management Act

b. Colorado

1) Types of ground water

a) Tributary ground water

b) Non-tributary water outside designated basins

c) Water in designated ground water basins

C. Problems of Interbasin Transfers

IV. Navigable waters