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THE PRIOR APPROPRIATION SYSTEM
IN WESTERN WATER LAW:
THE LAW VIEWED THROUGH THE EXAMPLE
OF THE RIO GRANDE BASIN

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Western Water Law in Transition

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I. INTRODUCTION

With few exceptions, states in the American West rejected completely the common law riparian approach to the allocation of water as unsuitable to the arid conditions that prevailed in the region. Instead, they adopted the appropriation system of "first in time, first in right." In recent years, increasing demands on essentially fixed water supplies have forced legislatures and courts to examine closely some of the time-honored rules of the appropriation doctrine. Changes have been made to encourage increased efficiency, permit conjunctive use of ground and surface waters, preserve diminishing groundwater aquifers, accommodate recreational and environmental concerns, provide water to federal enclaves, and honor Indian water rights, to list some of the more obvious examples. This process of evolution in western water law will doubtless continue as contemporary needs change.

The Rio Grande Basin, embracing portions of Colorado, New Mexico, Texas, and Mexico, provides an unusually striking illustration of the historical development of many of the principles of water law in the West. The purpose of this presentation is to examine these principles through the lens of the Rio Grande Basin.

II. RESEARCH SOURCES

W. Hutchins, Water Rights Laws in the Nineteen Western States (U.S.D.A. 1984) (three volume treatise; comprehensive and detailed treatment of western water law)

R. Clark, Waters and Water Rights (Allen Smith Co. 1967, with pocket parts) (seven-volume treatise; comprehensive

NOTE: We appreciate the research assistance of Ann Kaufman, a 1985 law graduate of the University of Colorado.

treatment of state and federal issues)

- C. Meyers & D. Tarlock, Water Resource Management (Foundation Press, 1980) (casebook)
- F. Trelease, Water Law (West Publishing Co., 3d ed. 1979) (casebook)
- D. Getches, Water Law in a Nutshell (West Publishing Co., 1984) (overview of water law in the nutshell format)
- R. Dunbar, Forging New Rights in Western Waters (U. Neb. Press, 1983) (historical treatment of western water law)
- F. Cohen, Handbook of Federal Indian Law (Michie Bobbs-Merrill, 2d ed. 1982) (updated edition of the classic work in the field; Chapter 10 treats Indian water rights)

III. DESCRIPTION OF THE BASIN

The Rio Grande River rises in the glaciated San Juan Mountains near Creede in southwestern Colorado. Flanked to the west by the San Juan Mountains and to the east by the Sangre de Cristos, it runs in a southeasterly direction, entering Colorado's San Luis Valley at Del Norte, then flowing through Monte Vista and Alamosa to the Colorado-New Mexico state line. From there proceeding southward through canyons and valleys, traveling over 400 miles through New Mexico, it passes Santa Fe, Albuquerque, Las Cruces and Elephant Butte. Turning southeast from El Paso, Texas and Juarez, Mexico, the river forms the boundary between Texas and Mexico for approximately 1250 miles, finally draining into the Gulf of Mexico near Brownsville, Texas. Its total length of 1800 miles makes the Rio Grande the second

longest river in the United States. Geographers have divided the Rio Grande watershed into two basins with Fort Quitman, Texas as the division point. The major tributaries in the upper basin are the Conejos River, and Alamosa and La Jara Creek in Colorado, and the Rio Chama and Rio Santa Cruz in New Mexico. The average annual production of the upper Rio Grande is 3,064,000 acre feet. See generally R. Dunbar, FORGING NEW RIGHTS IN WESTERN WATERS (1983); J. Mueller, RESTLESS RIVER (1981), Colorado Water Conservation Board, San Luis Valley Project (1939).

IV. HISTORICAL USES

Water helped ancient man learn those first difficult lessons about the rights of others and responsibility to a larger society It is not surprising that a substance so basic to all sources of life should have permeated philosophical, scientific, and religious thought. It became part of the moral and mental legacy parents passed onto their children. M. Meyer, WATER IN THE HISPANIC SOUTHWEST ix (1984).

A. Indians

The central role water plays in the Pueblo culture can be traced through legend and history to a 27-year drought in the thirteenth century, which forced Pueblo migration from a mountain habitat to the upper Rio Grande basin. There, since approximately 1400, Pueblo irrigation systems, including terraces and storage reservoirs have flourished. The Pueblos, who are subsistence farmers, have cultivated maize, squash, beans, wheat, melons, and chili and venerated their water deities through the mitote or rain dance. Pueblo water rights, in some ways comparable to Indian reserved rights, have a continuing existence in modern water law. See Cartwright v. Public Service Co., 66 N.M.

64, 343 P.2d 654 (1958). For a general treatment, see C. Dumars, M. O'Leary, A. Utton, PUEBLO INDIAN WATER RIGHTS (1984); M. Meyer, WATER IN THE HISPANIC SOUTHWEST (1984).

B. Hispanics

The Rio Grande River became an essential ingredient in the 16th century conquest and concurrent Christianization of the basin, as a great amount of water was needed for the sustenance and growth of mission settlements. The Spanish goal was to dominate and change their new arid habitat. Moreover, with the introduction of a new variety of crops, none of which could survive for long on desert rainfall, intensive irrigation and subsequent diversions became a necessity for a cash-based agricultural economy as well as for endeavors in mining and commerce. The Spaniards continued their centuries-long practice of using water as a source of power through privatization. Thus, the first Spanish settlers in the basin brought with them the seeds of an inevitable cultural clash with the Pueblos. Spanish land grants provide the original source of title for a significant amount of land in the Rio Grande Basin. See C. Dumars, M. O'Leary, A. Utton, PUEBLO INDIAN WATER RIGHTS (1984); M. Meyer, WATER IN THE HISPANIC SOUTHWEST (1984); R. Dunbar, FORGING NEW RIGHTS IN WESTERN WATERS (1983).

V. THE RISE OF STATE LAW

A. Colorado

In the seminal case of Coffin v. Lefthand Ditch Co., 6 Colo. 443 (1882), the Colorado Supreme Court rejected the applicability

of the riparian doctrine and said that the doctrine of prior appropriation has always existed in Colorado. Coffin involved the diversion of a stream from its natural channel. The Court went on to hold that "the first appropriator of water from a natural stream for a beneficial purpose has . . . a prior right thereto, to the extent of such appropriation." Coffin, 6 Colo. 447.

B. New Mexico

The doctrine of prior appropriation was judicially recognized by the New Mexico Supreme Court in 1898. In United States v. Rio Grande Dam & Irr. Co., 9 N. Mex. 292, 306-307, 51 P. 674 (1898), rev'd on other grounds, 174 U.S. 690 (1899), the court held that "The doctrine of prior appropriation has been the settled law of this territory by legislation, custom and judicial decision." A half a decade later, the court asserted that the prior appropriation doctrine had always been the rule under Spanish and Mexican dominion, and it continued to be the law after the United States acquired New Mexico. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N. Mex. 207, 217, 182 P.2d 421 (1945). See III W. Hutchins, WATER RIGHTS IN THE NINETEEN WESTERN STATES 390 (1974).

VI. ADOPTION OF STATE STATUTES GOVERNING SURFACE WATER APPROPRIATIONS

A. Adoption of the New Mexico Permit System

In 1891, the New Mexico Territorial Legislature established a formalized procedure for acquiring a water right. The law

required a recording within 90 days after commencement of construction, and completion of the work within five years. New Mexico Law 891 p. 130. New Mexico adopted the Bien Code in 1907. The code created water districts and a permit procedure, which required application to the State Engineer prior to appropriation. See generally I. W. Hutchins, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 283-435 (1971).

Today, a formalized permit procedure is in place, requiring application to the state engineer for a permit to appropriate as well as newspaper publication of the intended appropriation. N.M. Stat. Ann. § 75-5-1, 75-5-4 (1978). If a permit is granted, an appropriator has five years to complete construction and four additional years to apply the water to a beneficial use. N.M. Stat. Ann. § 75-5-6 (1978). A special feature of the New Mexico Statute allows an appropriator to get an early priority by filing a notice of intention to make a formal application for a permit. If the final application is approved, priority dates from the initial filing. N.M. Stat. Ann. § 75-5-1 (1978).

B. Adoption of the Colorado System

Colorado is the only prior appropriation state that does not have a permit system. The Colorado system, however, has been influential and many elements of it have been adopted in other jurisdictions.

1. Prior to 1969

Before 1969, the district court of each county was vested with jurisdiction over all water rights adjudications. To receive a decreed right, an appropriator petitioned the court.

An adjudication followed, with notice to affected parties. Information about filings and administration of water rights was available from the state engineer and local water commissioner. As a result of this judicial proceeding, decrees were issued and priorities established among competing users. Conditional decrees were available, with final decrees issued upon application of the water to a beneficial use within a reasonable period of time.

2. The Water Rights Determination and Administration Act of 1969

This legislation repealed the 1919 Act and divided the state into seven water divisions corresponding to the seven major drainages in Colorado. Special water courts in each division have jurisdiction over water rights determinations. Any person seeking to obtain a decreed right or change in water right, must file an application with the clerk of the water court. A referee initially determines whether to approve, disapprove, or approve in part the application. If approved, priority dates back to the date the petition was filed with the clerk. Colo. Rev. Stat. §§ 37-92-101 et seq. (1973). See generally, II. W. Hutchins, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 470-486 (1974), D. Getches, WATER LAW IN A NUTSHELL 156-158 (1984).

VII. INFLUENCE OF FEDERAL LAW

A. Federal and Indian Reserved Water Rights

The United States Supreme Court recognized in United States v. Rio Grande Dam and Irrigation Company, 174 U.S. 690 (1899),

the right of the federal government to retain or reserve as much water as it needed to develop its lands. The Court based its decision on the navigation power of the federal constitution. However, in dictum, the Court noted that the United States owned much of the land riparian to the river, and said that a state could not, absent specific congressional authority "destroy the right of the United States, as owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the governmental property." Rio Grande Dam & Irrigation Company, 174 U.S. at 703. See III Hutchins, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 38-53 (1974), D. Getches, WATER LAW IN A NUTSHELL 291-94 (1984). Then, in United States v. Winters, 207 U.S. 564 (1908), the Court held that the United States had impliedly reserved enough water to fulfill the purposes of Indian reservations. Priority of the right dates from the establishment of the reservation, regardless of whether the water has ever been actually used. Continuing issues involving federal or Indian water rights are raised in New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976); U.S. v. New Mexico, 438 U.S. 696 (1978); and Arizona v. San Carlos Apache Tribe, 103 S. Ct. 3201 (1983) (construing the McCarran Amendment, 43 U.S.C. § 666).

B. Reclamation Act of 1902

In 1902, Congress passed the Reclamation Act, 43 U.S.C. §371 et seq. Stemming from a desire to aid the settlement of the arid West, this act authorized the construction of irrigation projects in the western states by the federal government. See D. Getches,

WATER LAW IN A NUTSHELL, 359-361 (1984), R. Dunbar, FORGING NEW RIGHTS IN WESTERN WATERS 46-51 (1983). The first project in the basin was a reservoir built 125 miles north of El Paso, at Elephant Butte, New Mexico. The reservoir was to insure that the United States could fulfill the terms of the Mexican Water Treaty of 1906, 34 Stat. 2953, T.S. No. 455, guaranteeing delivery of 60,000 acre feet of the Rio Grande to Mexico, and for irrigation of New Mexico and Texas homestead land. The reservoir, with a 2,600,000 million acre capacity, was completed in 1916. See III Hutchins, WATER RIGHTS IN THE NINETEEN WESTERN STATES 133-34 (1974), Colorado Water Conservation Board, San Luis Valley Project 10-12 (1939), City of El Paso v. Reynolds, 563 F. Supp. 379, 383 (D.N.M. 1983). The leading recent case on the 1902 Reclamation Act, dealing with the delicate relationship between state and federal law, is California v. U.S., 438 U.S. 645 (1978).

VIII. INTERSTATE COMPACTS

Because the Rio Grande is overappropriated, Elephant Butte Reservoir did not solve the problem of meeting the delivery requirements of the 1906 Mexican Water Delivery Treaty. Thus, in 1923 Colorado, New Mexico, and Texas agreed to enter into a compact that would guarantee water deliveries to Mexico. See R. Dunbar, FORGING NEW RIGHTS IN WESTERN WATERS 144-145 (1983). In 1938 a permanent agreement was readied and was subsequently ratified by the legislature of each state and approved by the United States Congress. 53 Stat. 785 (1939) N.M. Stat. Ann. 572-15-23 (1978), Tex. Stat. Ann. Art. 7466e-1 (Vernon 1954), Colo. Rev. Stat. § 37-66-101 (1978). The Compact imposes a spe-

cific delivery schedule on Colorado and New Mexico as measured at several upstream gauges on the Rio Grande mainstem and on the Conejos in Colorado. The actual delivery amount required varies, according to the natural supply. In addition, a system of debits and credits is included in the delivery schedule for both Colorado and New Mexico. In 1966, Texas and New Mexico brought an action against Colorado seeking repayment of Colorado's accrued debit of 939,900 acre feet. Subsequent to the filing of the suit, the three states entered into a stipulation, agreeing to stay the litigation, if Colorado meets its future delivery obligations on an annual basis, without an allowance for accumulated debits. See Alamosa-La Jara Water Users Protective Association v. Gould, 674 P.2d 914, 919 (Colo. 1984), Texas v. Colorado, 391 U.S. 901 (1968), C. DuMars, M. O'Leary, A. Utton, PUEBLO INDIAN WATER RIGHTS 82-83 (1984). See generally, S.E. Reynolds & P. Mutz, Water Deliveries Under the Rio Grande Compact, 14 Nat. Res. J. 200 (1974), R. Hill, Development of the Rio Grande Compact of 1938, 14 Nat. Res. J. 163 (1974).

IX. GROUNDWATER LEGISLATION

A. New Mexico

Unlike surface water, where the prior appropriation doctrine has been recognized since the 1800's and a central administrative system firmly in place, groundwater did not become part of the appropriation system until 1931. That year, the legislature rejected the English doctrine, which gave landowners absolute ownership of water beneath their parcels, and passed a bill recognizing appropriative rights in ascertainable basins.

Patterned after the 1907 Surface Water Code, the 1931 Act provided for appropriation of groundwater by an application for a permit to the State Engineer. See New Mexico Session Laws, 1931 pp. 229-31, R. Dunbar, FORGING NEW RIGHTS IN WESTERN WATERS, 162-72 (1983). The constitutionality of the 1931 Act was upheld in State ex rel. Bliss v. Dority, 55 N.M. 12, 225 P.2d 1007 (1950). In 1953, the legislature declared all the groundwaters of the state, not just those in ascertainable basins, "public waters . . . subject to appropriation for beneficial use." R. Dunbar, supra at 170, quoting New Mexico Session Laws, 1953 pp. 108-9.

B. Colorado

In Colorado, opposition to the annulment of the English rule persisted until passage of the Colorado Groundwater Management Act of 1965. Colo. Rev. Stat. § 37-90-101 et seq. (1973). That act employs a modified appropriation doctrine to govern administration of designated groundwater basins. The statute requires refusal of a permit only if unreasonable harm to senior rights or unreasonable waste would result. Colo. Rev. Stat. § 37-90-101 et seq. (1973). See Colo. Rev. Stat. § 37-90-103(20) (1973) for a definition of waste.

The 1969 Water Rights Determination and Administration Act, Colo. Rev. Stat. §§ 37-92-101 et seq. (1973), applies surface water appropriation rules to tributary groundwater.

". . . as incident thereto, it is the policy of this state to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all the waters of this state."

Colo. Rev. Stat. § 37-92-102(1) (1973).

Non-tributary groundwater found outside designated basins is governed by Colo. Rev. Stat. § 37-90-137 (1973), which requires a "well permit" from the State Engineer prior to drilling. See State Dep't of Natural Resources v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294 (Colo. 1983). See F. Trelease, WATER LAW CASES AND MATERIALS 458 (1979) and Supplement at 90 (1984). See generally, D. Getches, WATER LAW IN A NUTSHELL 229-273 (1984).

X. COMPLEX MODERN DISPUTES

A. Colorado v. New Mexico

In 1975, a Colorado corporation, CF&I Steel, obtained a conditional decree to make the first Colorado appropriation of the Vermejo River. The New Mexico users, fearful their senior rights would be impaired by the Colorado diversion, brought suit to enjoin CF&I from diverting. A special master applied the doctrine of equitable apportionment and awarded Colorado 4,000 acre feet.

1. Colorado I

The Supreme Court remanded the case back to the special master, and held that in balancing the equities "it is entirely appropriate to consider the extent to which reasonable conservation measures by New Mexico might offset the proposed Colorado diversion and thereby minimize any injury to New Mexico users." Colorado v. New Mexico, 459 U.S. 176 (1982).

2. Colorado II

In reversing the special master, who had reinstated his original decree, the Court clarified its earlier holding. They held that Colorado had the burden of proving unreasonable downstream waste by clear and convincing evidence, and that there were specific, financially feasible conservation measures, that would in fact preserve the water supply. Colorado also had the burden of showing that its own diversion maximized the value of water.

Colorado v. New Mexico, ___ U.S. ___, 104 S. Ct. 2433 (1984).

See generally, Tarlock, Colorado v. New Mexico and Interstate Water Allocation, 56 U. Colo. L. Rev. ___ (1985).

B. City of El Paso v. Reynolds

The residents of El Paso, Texas challenged N.M. Stat. Ann. § 72-12-19 (1978) and Article XVI §§ 2 and 3 of the New Mexico Constitution, both of which prohibit the transport of groundwater from New Mexico for use in any other state.

The New Mexico federal district court held the statute and the Constitution to be an unconstitutional violation of the Commerce Clause. In reaching its decision, the court relied on the recent Supreme Court decision, Sporhase v. Nebraska, 458 U.S. 941 (1982). The Sporhase court held that water is an article of commerce, and as such, a state may discriminate in favor of its citizens only to the extent that water is essential to human survival. The New Mexico court found "there is no present or imminent shortage of water in New Mexico for health and safety needs." City of El Paso v. Reynolds, 563 F. Supp. 379, 389 (D. N.M. 1983).

In 1984, New Mexico enacted two pieces of legislation. One repealed the unconstitutional statute. The other enacted a two-year moratorium on new appropriations of groundwater hydrologically connected to the Rio Grande, below Elephant Butte, the same area where El Paso was seeking an appropriation. In a second opinion, the district court found the moratorium statute unconstitutional because "the true purpose of the statute is to prevent El Paso from obtaining any groundwater from New Mexico." City of El Paso v. Reynolds, 597 F. Supp. 694, 707 (D. N.M. 1984).

C. Alamosa-La Jara Water Users Protection Association v. Gould

The controversy arose when the State Engineer attempted to promulgate rules and regulations to satisfy a 1966 stipulation between Colorado, New Mexico and Texas, under which Colorado agreed to meet its obligations under the 1938 Rio Grande Compact. The Court held:

1. The Rio Grande and Conejos Rivers were to be administered separately under the compact schedules, despite the fact that senior water rights on the Conejos had been curtailed when more recent users on the Rio Grande had continued to divert water.

2. The Alamosa, La Jara, and Trinchera Creeks are not included in the compact obligations, because practically none of their waters reach the Rio Grande.

3. The concept of maximum utilization (see § VII supra) requires that each diverter establish a reasonable means of effectuating his diversion. Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961). Thus, "under certain circum-

stances, surface stream appropriators may be required to withdraw underground water tributary to the stream in order to satisfy their surface appropriations." Alamosa-La Jara Water Users Protective Association v. Gould, 674 P.2d 914, 933 (Colo. 1984).