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A Century and a Half of Interbasin Diversions or 100 Years Since Coffin v. Left Hand Ditch Co.

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A CENTURY AND A HALF OF INTERBASIN DIVERSIONS
OR
100 YEARS SINCE COFFIN V. LEFT HAND DITCH CO.

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

a short course sponsored by the
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I. INTRODUCTION

There is nothing novel about transbasin (interbasin) diversions. They have occurred in both ancient and modern times, in many places in the world. They exist throughout the United States in both riparian and appropriation jurisdictions.

Debates in this country, about interbasin transfers in the 1960's, and more recently, took place because of (a) the size of the transfers proposed, (b) the fact that these transfers would carry water over state boundaries, and (3) the fact that the water would be used in states lying entirely outside the basin or origin.

The same criteria should be applied in evaluating interbasin transfers as are applied in evaluating in intrabasin water projects.

For general analyses of the law of interbasin transfers, see

National Water Commission study No. 7

"The Law of Interbasin Transfers" 1971

Weatherford "Legal Aspects of Interregional Water Diversion" 15 UCLA

L. Rev. 1294 (1968)

INTERBASIN TRANSFERS UNDER THE PRIOR
APPROPRIATION SYSTEM

A. Generally

Interbasin transfers have always been authorized under the prior appropriation system.

Coffin v. Left Hand Ditch Co.

6 Colo. 443 (1882)

Irwin v. Phillips 5 Cal. 140 (1855)

When the appropriation system was codified in the western states in the late 1800's and early 1900's the codes retained the common law rule authorizing interbasin transfers.

See Trelease, Arizona v. California, Allocations of Water Resources to People, States and Nation, 1963

Supreme Court Review 158, 186 (1963)

Many large interbasin transfers exist in the west.

Colorado River Aqueduct

California State Water Project

Colorado - Big Thompson Project

Frying Pan - Arkansas Project

Salt Lake City Aqueduct

All American Canal

B. Area of Origin Protection

1. For regions where all the water is legally committed:

When a city or energy facilities needs water for additional growth, the "area of origin" is often the nearest irrigation project. The right to "just compensation" is often the project's best and only legal protection.

2. For regions where some water is still uncommitted:

Several states have enacted statutory protections for areas or basins or origin.

See generally:

Weatherford, "Legal Aspects of Interregional Water Diversion, 15 U.C.L.A L. Rev. 1294 (1964)

Oeltjen, Harnsberger, and Fischer "Interbasin Transfers Nebraska Law and Legend" 51 Neb. L.Rev. 87 (1971)

Johnson "The Area of Origin and a Columbia River Diversion" 46 Wash. L.Rev. 245 (1971)

National Water Commission Study No.7
"The Law of Interbasin Transfers"
(1971)

California, Colorado, Nebraska, Oklahoma and Texas have enacted area of origin protection statutes.

California

Cal. Water Code §10505

(West Supp. 1967)

Cal. Water Code §11460-61, 11463 (West Supp. 1967)

Cal. Atty. Gen., Report of the Attorney General's Committee of Water Lawyers on County of Origin Problems (Jan.1957)

County of Origin Subcommittee of the Joint Committee on Water Problems Report, 3 Sen. J., Cal. Reg. Sess. app. 50-75 (1957)

Colorado

Colo. Rev. Stat. Ann. §150-5-13 (2) (d) (1963)

Biese "Compensatory Storage"

22 Rocky Mt. L. Rev. 453 (1949-50)

Oklahoma

H.J.R. No. 502 (title viii [1957] Okla. Laws 670, referred to in Okla. Rev. Code Ann. Tit. 82, §1078 (1970)

H.J.R. No. 502 tit. ix [1957] Okla Laws 670

Texas

Ch. 297, §3(b) (1965) Tex. Laws 583
Tex. Rev. Civ. Stat. Ann. art. 7589
(1954) Johnson & Knippa "Transbasin
Diversion of Water, 43 Tex. L. Rev.
1035 (1965)

The Colorado River Basin Project Act of
1968 included protections for the basin or
origin: "All requirements, present and
future, for water . . . [in the area of origin]
shall have a priority of right in perpetuity
to the use of the waters of that river basin,
for all purposes."

Areas of origin would be given a financial
guarantee, supported by a development fund,
to assure a supply of water "adequate to
satisfy their ultimate requirements at prices
to users not adversely affected by the
exportation . . ."

Colorado River Basin Project Act. P.L.
90-537, Sec. 203, Sept. 30, 1968, 82 stat.
885, 887, 43 USCA 1513.

II. INTERBASIN TRANSFERS UNDER THE RIPARIAN SYSTEM

Riparian rights law allows interbasin transfers if "reasonable", and if no damage, actual or potential accrues to riparians.

Stratton v. Mt. Hermon Boys School

216 Mass. 83, 103 N.E. 87 (1913)

McCord v. Big Brothers Movement

120 NJ eq. 446, 185 A 480 (1936)

A preference for riparian uses is widely recognized by states adhering to the riparian rights system.

Rancho St. Margarita v. Vail

11 Cal. 2d 501, 81 p² 533 (1938)

Tulare Irrig. Dist. v. Lindsay -

Strathmore

Irrig. Dist. 3 Cal 2. 489, 45 p² 972

(1935)

Wasserberger v. Coffee 180 Neb. 149,

141 NW² 738 (1966)

Bradford v. Cressey 45 Me. 9 (1958)

See Rest. of Torts (Second) §856, Comment
a (1979)

Cities are generally not considered "riparians" as to their municipal water supply systems.

Pernell v. City of Henderson

220 NC 79, 16 SE² 449 (1941)

Kennebunk, Kennebunkport and Wells

Water Dist. v. Maine Turnpike Authority

145 Me. 35, 71 A² 520 (1950)

2 Nichols on Eminent Domain §5.795 (1976)

Cities are generally given condemnation authority to acquire water for municipal supply from sources and basins outside the city limits.

See, e.g., Los Angeles v. Aitken

10 Cal. App.² 460, 52 P² 585 (1935)

West Hartford v. Bd. of Water Commissioners

68 Conn. 322, 36A 786 (1896)

Dimmock v. City of New London

157 Conn. 9, 245 A² 569 (1968)

A 1905 N.Y. statute authorized New York City to acquire water from the Catskills by condemning all downstream riparian rights. See Lee, Acquisition of Riparian Rights in New York. Proc. ABA, Sec. of Mineral and Natural Resources Law, 13 (1964)

The Chicago drainage canal takes water out of one basin into another.

See generally: Ziegler, "Acquisition and Protection of Water Supplies by Municipalities" 57 Mich. L. Rev. 349 (1959)

The United States Supreme Court has approved interbasin transfers in the eastern states. In *New Jersey v. State of New York* 283 U.S. 336, 51 S. Ct. 478, 75 L. Ed. 1176 (1930) the Court upheld a diversion of water from the Delaware River watershed to the Hudson River watershed for New York municipal supply, saying:

"The removal of water to a different watershed obviously must be allowed at times unless states are to be deprived of the most beneficial use on formal grounds. In fact it has been allowed repeatedly and has been practiced by the states concerned."

The court's decree of 1930 was amended in 1954, 347 U.S. 995, 74 S. Ct. 867. Subsequently the Delaware River Compact became effective in 1961 giving the Basin Commission (with representatives from New York, New Jersey, Pennsylvania, Delaware, and the United States) power to declare an emergency and thereafter vary the decreed releases by unanimous vote.

Congress has the power to legislate interbasin transfers. *Arizona v. California* 373 US 546,

83 S. Ct. 1948, 10 L. Ed² 572 (1963).

Although it has never authorized such a transfer to a state lying entirely outside the basin of origin (herein called a "Major Interbasin Transfer")

The interstate compact mechanism is not well suited to implementing a Major interbasin transfer.

A state presumably has no right to an equitable apportionment of a river whose basin lies entirely beyond the borders of the state although no court has ever spoken on this issue.

III. WHY IS THE QUESTION OF INTERBASIN TRANSFERS

• AN ISSUE NOW?

A. Generally

It is a widely held perception that the arid southwest will eventually have to import substantial quantities of water in order to continue growing, and that the Columbia River (170 maf annual flow) is a logical source to provide supplemental water for the Colorado Basin (14 maf annual flow)

See: "The Salinity of Rivers" in Scientific American, Vol. 245:14 pp. 54-65 July, 1981

Author Arthur F. Pillsbury said:

"Eventually . . ., some grand-scale water-diversion concept will be needed, simply because much of the West, including the High Plains of Texas and New Mexico and from there northward through Nebraska, is short of water"

The interbasin transfer issue continues to come up because (a) uncommitted water sources in the arid southwest are now almost non-existent, (b) groundwater aquifers are being mined to uneconomic depths, (c) new demands for water continue to arise from municipal population growth, agricultural expansion, and energy development especially coal and oil shale.

See "Energy From the West: A Technology Assessment of Western Energy Resource Development";

Devine, Ballard and others
University of Oklahoma Press (1981)

Major interbasin transfers are especially attractive to water-short regions (a) because of anticipated federal subsidies for such projects (assuming continuation of past federal practice) (b) because areas of origin are far away, out of state, and insulated from local political pressures and (c) areas of origin (such as the Pacific Northwest) would suffer less direct, immediate, and substantial damage from water export than would, for example, an irrigation district in the southwest that could be totally dried up if its water were taken for nearby municipal and energy development.

B. Columbia River diversion proposals, and others of the 1960's

The genesis of the discussion about Major inter-basin transfers lies in the proposals of the 1960's to transfer water from the Columbia River basin into the Colorado Basin, from the Mississippi and East Texas Rivers to the High Plains of Texas, and to consider other grander water transfers, e.g., from Canada and Alaska to the southwest and Central U.S. and into Mexico. Some nineteen such proposals were published between 1963 and 1968,

none of which has yet been implemented, or has been given serious congressional consideration.

Most of these proposals appeared because Arizona v. California, 373 US 546, 83 S. Ct. 1468, 10 L. Ed² 572 (1963) highlighted the fact that insufficient water was available to meet the expectations of the Colorado Basin states; at the same time the High Plains area of Texas was becoming more conscious of its own dwindling water supply. Three illustrative Major Interbasin transfer proposals were:

Western Water Project. Divert 15 maf of water from Columbia River at the Dalles, Oregon to Lake Mead, involving a 4900 foot pump lift. Estimated cost (1964) 12.4 billion. (About 36 billion, 1980)

North American Water and Power Alliance
(NAWAPA)

Divert 110 maf from Yukon River in Alaska through Columbia Gorge for use in western United States, east to the Great Lakes, and south into Mexico. Estimated cost (1964) 100 billion (About 300 billion, 1980)

Texas Water Plan of 1968. Divert water from the Mississippi and East Texas Rivers 17 maf for transfer to High Plains area of Texas, and New Mexico. Estimated cost, 10 billion (1968) (About 28 billion, 1980)

Why are these interbasin transfer proposals different than the dozens of interbasin transfers that already exist throughout the nation?

1. They are much larger, and more costly.
2. They would transfer water over one or more state lines.
3. For use in a state that lies entirely outside the basin of origin. No such water transfers now exist in the United States.

The Lower Colorado River Basin Project Act (LCRBP), introduced in Congress in 1965 called for the study of alternative sources of supplemental water from outside the basin, including the Columbia River. (See Kuchel bill, e.g., S. 861, 90th Cong. 1967.) Several other bills also called for the study of water transfers from the Columbia to the Colorado. See Clark Northwest-Southwest Water Diversion-Plans and Issues, 3 Willamette L.J. 215 (1965): Englebert "The Origins and Policy Issues of the Pacific S.W. Water Plan. New Horizons For Resources Research: Issues and Methodology (Papers of the 1964 Western Resources Conference) University of Colorado Press (1965).

Support for these proposals died about 1968 because of (1) elimination of proposed Bridge and Marble Canyon Dams (2) budgetary competition from the Vietnam War (3) political opposition from areas of origin, and (4) changing economic criteria for evaluating such proposals. (See Water and Choice in the Colorado Basin. National Academy of Sciences (1963); National Water Commission Study 585-72-037 Interbasin Water Transfers, A Political and Institutional Analysis; March, 1972

IV. THE 1968 LEGISLATION

In 1968 a "compromise" was reached and two laws were enacted. These laws:

1. Created the National Water Commission to study the nation's water problems, including interbasin transfers as one alternative solution to regional water shortages. National Water Commission Act. P.L. 90, 82 Stat. 868, 42 USCA 1962a, note (1971 Supp.)
2. Declared a ten year moratorium on any feasibility study of a Columbia River Diversion to the Colorado Basin. In 1978 this moratorium was extended for another ten years.
3. Authorized the Central Arizona Project as well as other projects in the Upper Colorado Basin states. Colorado River Project Act of 1968 P.L. 90-537.

The National Water Commission Recommendations

In 1973 the National Water Commission recommended that the moratorium be repealed at the same time that new criteria are adopted for evaluating all federal water projects including Major interbasin transfers. The new criteria were:

1. That the project be the least costly alternative for providing water.
2. That it produce benefits in the new uses greater than the sum of the costs of construc-

and, in the case of interbasin transfers, the net opportunity costs of foregone uses in the area of origin, all discounted to a common time basis.

3. That the net productivity of the project be compared to that of alternative investment opportunities.
4. That direct beneficiaries pay the full costs of the project, including net losses of the area of origin.

V. A CANADA TO UNITED STATES DIVERSION, LEGAL AND
AND POLICY IMPLICATIONS

The fact of Canadian sovereignty means that any transfer of water from Canada into the United States, or through Canada, e.g., from the Yukon River in Alaska, would require voluntary Canadian assent. The United States would have to "purchase" the right to Canadian water, land, and other resources. On the basis of Canadian-United States negotiations for the Columbia River treaty in the 1950's, and the negotiations concerning the flooding of Canadian soil behind a raised Ross Dam in Washington state in the 1970's and 1980's, one could expect such negotiations to be difficult, and the Canadian "price" to be high.

Under Canadian constitutional law, both the Canadian Federal government, and the affected

Provincial governments, would have to agree
to such a scheme.

VI. SOME CHANGES SINCE 1968

Increasing water shortages in southwest

Current economic climate

Environmental considerations

National Environmental Policy Act

Endangered Species Act.

Other.

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