SLIDES: Groundwater Law and Administration: From Conflict to Reform

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Groundwater Law and Administration: From Conflict to Reform

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Groundwater Rights Generally

- Groundwater is not subject to a single common legal doctrine in West like prior appropriation.

- Rights to groundwater may be based on:
  - overlying land ownership
  - established prior uses
  - concept of water as shared public resource

- Common law and legislation usually reflect more than a single theory of rights.
Groundwater Legal Regimes

- Land ownership
  - Absolute ownership – unlimited right to pump under land owned
  - Correlative rights – reasonable share of total supply based on acreage

- Prior use / balancing of interests
  - Protect senior users
  - But allow new economic uses
  - Encourage efficiency
  - Assure sustained supply

- Public resource subject to management through state permit systems
  - Well permits
  - Water right permits
Conjunctive Management of Groundwater and Surface Water

- Defined as joint use or management of groundwater and surface water sources, i.e., a single resource
- States are increasingly managing connected groundwater and surface water as a single system
- State administrators have duty to enforce priorities, and deny groundwater permit if interference with vested surface rights
- But administrative rules may still require efficient use, consistent with beneficial use doctrine
Recent Developments in ID & CO: Conflict, Administration, Litigation, Legislation and Policy

- Two states grappling with development and implementation of conjunctive management are Idaho and Colorado.

- On major river systems in these states, conflict between groundwater and surface water users has led to development, refinement and reform of conjunctive management principles through:
  - Administration of water rights
  - Litigation between users and with state
  - Legislation
  - Policy formulation
Idaho: Conjunctive Management of the Snake River & Eastern Snake Plain Aquifer (ESPA)

- Conjunctive management dictated by physical setting and historic development in Snake River Basin
  - Acknowledgement that Snake River and ESPA are interconnected
  - Prior development of surface water in lower basin / subsequent use of groundwater in upper basin
  - Thousand Springs hydrology, and the “zero flow” or “two rivers” policy

- Litigation compels conjunctive use & administration
  - Musser case found State duty to administer conjunctively
  - State developed conjunctive management rules (CMRs)
  - American Falls case found CMRs facially constitutional
  - But litigation continues over CMRs as applied, including issues such as:
    - Limiting seniors to proven beneficial use, which could be less than decree
    - Limiting senior storage entitlement to “reasonable carryover storage”
Swan Falls Litigation Between Idaho Power Co. (IPC) & State of Idaho

- **Historical development**
  - Idaho Power Co. (IPC) established rights to surface water on mainstem lower Snake River in early 1900s
  - Groundwater development upstream occurred later
  - But allegations that IPC subordinated to upstream uses

- Litigation led to Swan Falls Agreement, establishing minimum flows while subordinating to other uses

- SRBA renewed litigation over interpretation of Agreement, and relation to conjunctive management
Swan Falls Litigation (cont’d)

- **The Role of Recharge**
  - Improves water levels in both aquifer and river
  - Statutory authorization of recharge water rights, with protection of existing uses
  - Litigation re whether Swan Falls Agreement subordinated hydropower to recharge

- **Settlement between State & IPC (statutory component)**
  - Consolidates existing state authority re recharge
  - Clarifies SF Agreement doesn’t preclude recharge
  - IWRB approval of recharge beyond 10,000 afa, and opportunity for input of effects of recharge
Idaho Adoption of Comprehensive Aquifer Management Plan (CAMP)

- Continuing conflicts between groundwater and surface water users led to development of CAMP by the Idaho Water Resource Board, and recent adoption by statute
- CAMP establishes a long-term program for managing water supply and demand in the ESPA
- Goal is to incrementally achieve net ESPA water budget change of 600,000 afa by 2030 through:
  - Aquifer recharge
  - Ground to surface water conversions
  - Demand reduction strategies
- Actions designed to stabilize and improve spring flows, aquifer levels and river reaches, i.e., conjunctive management policy
Colorado: Conjunctive Management of Groundwater Produced by Coalbed Methane Development

- Coalbed methane wells and water
  - About 5,000 coalbed methane wells operate in Colorado
  - Coalbed methane capture made possible by presence and controlled extraction of groundwater
  - San Juan Basin wells remove nearly a billion gallons of water per year

- Colorado conjunctively manages tributary groundwater with surface water under its prior appropriation doctrine

- Rancher relying on seeps and springs for irrigation sued State Engineer claiming failure to regulate wells under state water law

- Sought determination that withdrawal of groundwater during CBM process constitutes a “beneficial use” giving rise to appropriative water rights subject to administration and permitting by State Engineer
Vance v. Wolfe
(Colo. Sup. Ct. 07SA293)

- WD7 water court had held that CBM production constitutes an appropriation for a “beneficial use”
  - State Engineer could not allow out-of-priority diversions for CBM production without a well permit
  - Augmentation plan also necessary to replace out-of-priority depletions

- Supreme Court affirmed, finding a water permit was necessary for CBM gas drilling
1969 Act in CRS 37-92-103(4) defines “beneficial use” as “the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made.”

Extraction of water for CBM process is “beneficial use”
- “uses” water (extracting it from ground and storing in tanks)
- to “accomplish” a particular “purpose” (release of methane gas)

Rejected argument that extraction of water is merely a “nuisance” rather than a “beneficial use”
- Integral part of CBM process itself
- That water may be a nuisance after extraction doesn’t change result
Legislation – House Bill 1303

- Gives State Engineer more authority to determine which oil and gas wells are “tributary” to nearby streams, and thus subject to conjunctive administration
  - Need not go to water court to get determination a well is tributary

- Delays requirements for oil and gas companies to get rulings and permits from State Engineer’s office until March 31, 2010

- For wells deemed “tributary,” companies have until 2013 to file an augmentation plan for replacement of water pumped from wells
Conclusions & Observations

- Growing understanding of interconnectedness of groundwater and surface water sources

- Unique physical situations lead to targeted solutions, and incremental development of conjunctive management legal principles and authorities

- Conflict between groundwater and surface water users has led to “reform” of conjunctive management principles through
  - Court decisions
  - Settlements
  - Legislation
  - Policy