

University of Colorado Law School  
**Colorado Law Scholarly Commons**

---

Two Decades of Water Law and Policy Reform: A  
Retrospective and Agenda for the Future (Summer  
Conference, June 13-15)

Getches-Wilkinson Center Conferences,  
Workshops, and Hot Topics


---

6-14-2001

## Clarifying State Water Rights and Adjudications

Greg Hobbs

Follow this and additional works at: <http://scholar.law.colorado.edu/water-law-and-policy-reform>

 Part of the [Administrative Law Commons](#), [Environmental Law Commons](#), [Environmental Policy Commons](#), [Indian and Aboriginal Law Commons](#), [Natural Resources and Conservation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Property Law and Real Estate Commons](#), [State and Local Government Law Commons](#), [Sustainability Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

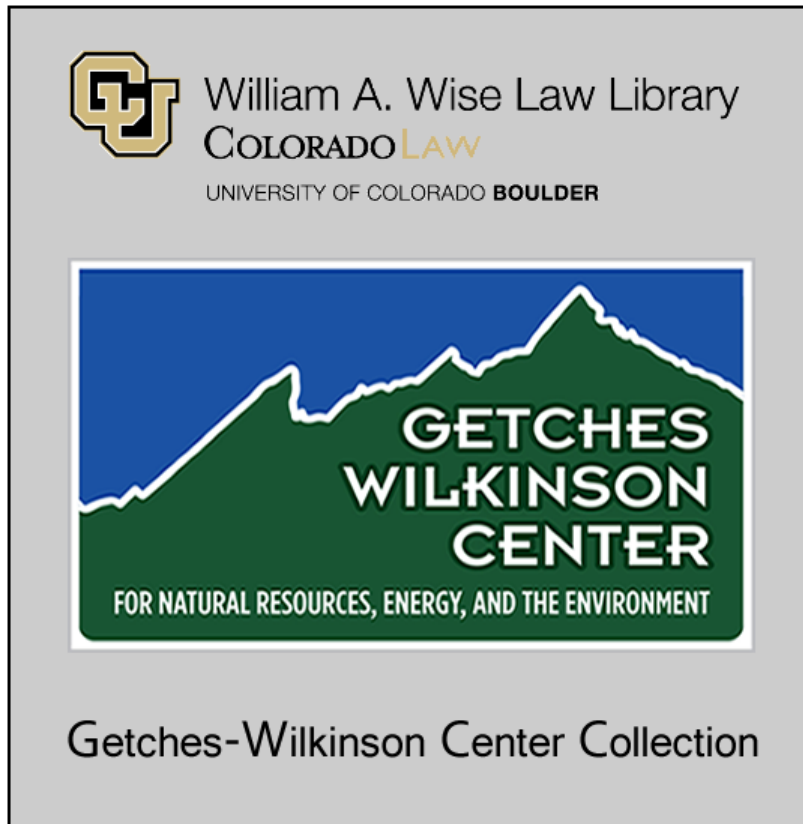
---

### Citation Information

Hobbs, Greg, "Clarifying State Water Rights and Adjudications" (2001). *Two Decades of Water Law and Policy Reform: A Retrospective and Agenda for the Future (Summer Conference, June 13-15)*.

<http://scholar.law.colorado.edu/water-law-and-policy-reform/11>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



Greg Hobbs, *Clarifying State Water Rights and Adjudications, in TWO DECADES OF WATER LAW AND POLICY REFORM: A RETROSPECTIVE AND AGENDA FOR THE FUTURE* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law, 2001).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

# CLARIFYING STATE WATER RIGHTS AND ADJUDICATIONS<sup>1</sup>

**Justice Greg Hobbs**

**June 14, 2001**

## **TWO DECADES OF WATER LAW POLICY AND REFORM: A RETROSPECTIVE AND AGENDA FOR THE FUTURE**

**Natural Resources Law Center  
University of Colorado School of Law**

### ASK ME

Some time when the river is ice ask me  
mistakes I have made. Ask me whether  
what I have done is my life. Others  
have come in their slow way into  
my thought, and some have tried to help  
or to hurt: ask me what difference  
their strongest love or hate has made.

I will listen to what you say.  
You and I can turn and look  
at the silent river and wait. We know  
the current is there, hidden; and there  
are comings and goings from miles away  
that hold the stillness exactly before us.  
What the river says, that is what I say.

William Stafford<sup>2</sup>

---

<sup>1</sup> This paper includes material from the author's forthcoming article "State Water Politics Versus An Independent Judiciary, The Colorado and Idaho Experiences" for the *Quinnipiac Law Review*.

<sup>2</sup> William Stafford, "Ask Me" in *The Way It Is, New and Selected Poems by William Stafford* 56 (1998).

## THE MCCARRAN LANDSCAPE

### A. Creation of Use Rights in Water, A Public Resource

Congress carved the states west of the continental divide out of the public domain from lands it had acquired primarily as a result of the 1803 Louisiana Purchase, the 1846 Oregon Compromise, and the 1848 Treaty of Guadalupe Hidalgo.<sup>3</sup> While the discovery of gold and silver jump-started the entire region's settlement, public land and water have been the most enduring treasures of the West, along with its magnificent landforms and vistas. Reducing public land and water to possession and ownership has been a preoccupation of territorial and state law from the outset.<sup>4</sup>

Congress created wealth in the western states by making the public land and water available for ownership and use. The Homestead Act of 1862,<sup>5</sup> the Railroad Acts of 1862 and 1864,<sup>6</sup> and other significant statutes in a long series resulted in the disposition of two-thirds of the West's surface acreage into state and private ownership.<sup>7</sup> The other one-third remaining today in federal ownership<sup>8</sup> is principally comprised of lands managed by Forest Service and Bureau of Land Management.<sup>9</sup> They include the critical watersheds the states depend upon for water supply. On them, through them, from them exist the reservoirs, rights-of-way, ditches and pipelines necessary to store and convey water to farms, cities, and businesses.

Congress early decided to separate legal interests in land and water. Through federal statutes, it authorized conveyance of patents to land without interests in water. Water remained a public resource subject to disposition through the operation of state and federal law. Most

---

<sup>3</sup> See Loren L. Mall, *Public Land and Mining Law* (3d Ed.) 7-8 (1981).

<sup>4</sup> For example, Colorado defined "any right to occupy, possess and enjoy any portion of the public domain" to be "a chattel real possessing the legal character of real estate," a departure from the common law concept of "naked possession" that the Colorado Supreme Court termed "remarkable" in *Gillett v. Gaffney*, 3 Colo. 351, 358 (1877). See *Board of County Commissioners v. Vail Associates, Inc.*, Nos. 98 SC869 & 99SC126, Slip.op. at 11 n.8 (Colo. Feb. 26, 2001).

<sup>5</sup> See 37<sup>th</sup> Cong., 2d. Sess., ch. LXXV, 12 Stat. 392-94 91862).

<sup>6</sup> See Act of July 1, 1862, 37<sup>th</sup> Cong., 2d Sess., ch. CXX, §3, 12 Stat. 489, 492, amended by Act of July 2, 1864, 38<sup>th</sup> Cong., 1st Sess., ch. 216, § 4, 13 Stat. 356, 358. See *McCormick v. Union Pacific Resources*, 14 P.3d 346, 352-53 (Colo. 2000).

<sup>7</sup> For a review of the public land laws, see Mall, *supra* n. 4, and Benjamin Horace Hibbard, *A History of the Public Land Policies* (1939).

<sup>8</sup> See Public Land Law Review Commission, "One Third of the Nation's Land, A Report to the President and to the Congress" 19-22 (1970).

<sup>9</sup> See National Forest Management Act, 16 U.S.C. §§ 1600 et. seq.; Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784.

notably through the 1866 Mining Act,<sup>10</sup> the 1870 Placer Law,<sup>11</sup> and the 1877 Desert Land Act,<sup>12</sup> Congress (1) conceded to the states and territories jurisdiction to create property interests in the use of all available unappropriated waters on the public domain, subject to the right of the government, at anytime in the future, to reserve then-unappropriated waters for federal purposes, and it (2) provided for water users to have occupancy of retained federal land for the purpose of constructing and maintaining storage and conveyance works necessary to place the water to use for state and private purposes.<sup>13</sup> The Public Land Law Review Commission in 1970 reported that federal lands are the source of most of the water in the 11 coterminous western states, providing approximately 61 percent of the total natural runoff occurring in the region.<sup>14</sup>

The custom of appropriation, first in time of use, first in right for the amount of water placed from the natural streams to beneficial use, was the chosen law of the western territories and states,<sup>15</sup> California also recognizing pre-existing riparian rights.<sup>16</sup> Each state adopted its own water allocation mechanism, confirming uses solely through judicial proceedings, as in Colorado's instance,<sup>17</sup> or through a combination of administrative and judicial proceedings in the other western states.<sup>18</sup>

The western states universally recognize that waters of the natural stream are a public resource. Private rights therein arise only by use of theretofore unappropriated waters, in the amount of the appropriation, taken at an identified point of diversion, for a beneficial use, in order of priority from the available source of supply, subject to the exercise of prior uses.<sup>19</sup> The most important function of a water right is to afford legal protection for its owner to intercept water in priority at the point of the right's operation, wherever that is in the watershed within the state. Thus, a senior water right located downstream commands the passage of the needed water

---

<sup>10</sup> See 39<sup>th</sup> Cong., 1<sup>st</sup> Sess., ch. CCLXII, 14 Stat. 251-53 (1866); codified at 43 U.S.C. § 661.

<sup>11</sup> See 41<sup>st</sup> Cong., 2d Sess. Ch. CCXXXV. 16 Stat. 217-18; codified at 43 U.S.C. § 661.

<sup>12</sup> See 44<sup>th</sup> Cong. 2d Sess., ch. 107, 19 Stat. 377 (1877); codified at 43 U.S.C. § 321.

<sup>13</sup> See *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-65 (1935).

<sup>14</sup> See "One Third of the Nation's Land," *supra* n. 10 at 141-55.

<sup>15</sup> See, e.g., *Coffin v. Left Hand Ditch Company*, 6 Colo. 443, 447-49 (1882).

<sup>16</sup> See Joseph L. Sax, Barton H. Thompson, Jr., John D. Leshy, Robert H. Abrams, *Legal Control of Water Resources, Cases and Materials*, Third Edition, 295-97 (2000).

<sup>17</sup> See Gregory J. Hobbs, Jr., "Colorado's 1969 Adjudication and Administration Act, Settling In," 3 *Univ. Den. Water Law Review* 1-19 (1999).

<sup>18</sup> See John E. Thorson, "State Watershed Adjudications: Approaches and Alternatives," 42 *Rocky Mt. Min. L. Inst.* § 22.01, 22-6 to 22-13 (1996); Sax, *supra* n. 19 at 183-87.

<sup>19</sup> See Sax, *supra* n. 19 at 280; see, e.g., *Santa Fe Trail Ranches v. Simpson*, 990 P.2d 46, 53-54 (Colo. 1999).

past the upstream junior users. Historically, large downstream agricultural rights have exercised this control, requiring municipal and other later evolving demands for water to take the risk of shortage or develop alternative sources of supply.

From their inception, the western territories and states proceeded without interruption to create property rights in water under territorial and state law. Four significant events altering the states' presumed sole possession of the field occurred at the turn of the Nineteenth to the Twentieth Century. The federal forest reservations came into being, their principal governance statute being the 1897 Forest Organic Act, which included a state and federal water law savings provision.<sup>20</sup> Second, with passage of the 1902 Reclamation Act,<sup>21</sup> which directed that water rights for the projects be obtained in accordance with state law, the United States began to construct and manage federal water projects, for the benefit of state and local sponsors and to achieve ancillary federal purposes, such as recreation, flood control, and power production. Third, in 1908, the United States Supreme Court in a case involving a tribal reservation<sup>22</sup> determined that federal reservations--in absence of an express reservation of water--carry with them an implied reservation of sufficient theretofore unappropriated water necessary to prevent defeat of the reservation's primary purposes. Fourth, the Supreme Court in 1907 first exercised its original jurisdiction to resolve water allocation disputes between states, fashioning the law of equitable apportionment of interstate streams between states.<sup>23</sup> This, in turn, gave rise to a fifth major occurrence, entry of interstate water compacts between states, approved by Congress under the compact clause of the United States Constitution, commencing in the 1920s.<sup>24</sup>

Hence, from the earliest part of the Twentieth Century, the states have known of the existence of retained Congressional authority to reserve unappropriated waters for federal purposes. The Winters doctrine had been presaged in an 1899 Supreme Court case,<sup>25</sup> and the year before the enactment of the 1964 Wilderness Act the Supreme Court applied the reserved rights doctrine not only to Native American reservations, but also to certain recreation and

---

<sup>20</sup> See National Forest Organic Act of 1897, ch. 2, § 1, 30 Stat. 36. (1897); 16 U.S. C. § 481 (1994).

<sup>21</sup> See Reclamation Act of 1902, ch. 1093, § 8, 32 State 390; 43 U.S.C. § 383.

<sup>22</sup> See Winters v. United States, 207 U.S. 564, 577 (1908).

<sup>23</sup> See Kansas v. Colorado, 206 U.S. 46 (1907).

<sup>24</sup> See, U.S. Const. Art. I, Sec. 10(3); e.g., Colorado River Compact, 43 U.S.C. 617 (1928 Boulder Canyon Project Act ratifying the Colorado River Compact); see also 42 Stat. 171 ch. 72 (1921) (Congressional consent to enter into compact).

<sup>25</sup> See United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 703 (1899).

wildlife areas and a national forest as well.<sup>26</sup> The states themselves encouraged the United States to have a significant presence on intrastate and interstate streams, primarily to secure federal funding for water projects they could not afford or did not choose to finance themselves. In regard to the reclamation program, the states understood that the Bureau of Reclamation would hold water rights appropriated under state law, originally for the benefit of agricultural users, later extended to a variety of purposes, including municipal, industrial, power production, flood control, fish and recreation, and water compact deliveries.<sup>27</sup> The tribal rights<sup>28</sup> and agency rights for primary purposes of federal reservations were another matter. These arose out of federal law, in particular Congressional exercise of the property clause.<sup>29</sup>

### **B. Interest of the States in Adjudicating Federal Claims**

The immunity of the United States to compelled appearance in state court proceedings became an increasing problem as the states continued to exercise their Congressionally-conferred and repeatedly-recognized authority to create water rights in unappropriated public waters. Whether state-law based, as with the reclamation projects, or federal-law based, as with the tribal and federal land reservations, water rights of the United States were not subject to determination by state forums. Whatever litigation occurred to determine federally held water rights occurred in federal court, while the states proceeded on a separate track as to state based claims not owned by the United States.

The situation became intolerable to the western states.<sup>30</sup> The security and dependability of water rights turn squarely on the enforceability of their priority in times of short river supply. The right to divert a certain amount of water from the available natural stream supply at a specific location, to the exclusion of all others not then in priority, is the essence of a water right. The reason for adjudicating a federal reserved water right is the same for all other rights to the

---

<sup>26</sup> See *Arizona v. California*, 373 U.S. 546, 601 (1963). See also *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 444-45 (1955)(upholding authority of Federal Power Commission to license power projects on reserved lands, subject to prior vested rights); *California v. United States*, 438 U.S. 645, 662 (1978) (stating that “except where the reserved rights or navigation servitude of the United states are invoked, the State has total authority over its internal waters”).

<sup>27</sup> See *Arapahoe County v. Crystal Creek Homeowners Ass'n*, 14 P.3d 325, 337, 328-40, 342 (Colo. 2000).

<sup>28</sup> See Susan M. Williams, *The Winters Doctrine On Water Administration*, 36 Rocky Mt. Min. L. Inst. § 24-1, 24-6 to 24-8 (1990).

<sup>29</sup> See U.S. Const. Art. IV, Sec. 3(2).

<sup>30</sup> See Thorson, *supra* n. 21 at 22-16 to 22-24.

use of water—to realize the value and expectations that enforcement of that right’s priority secures.<sup>31</sup> In times of short supply, water users depend on the state to exercise its police power to curtail junior uses in favor of senior uses, regardless of the identity of the owner of the right, state or federal. To accomplish this, the amount and priority of rights drawing on the watershed must be determined.

Because the states could not hail the federal agencies and tribes into state court, they were unable to secure reliability for state-created water rights and meet future needs due to uncertainty about the nature, extent, and priority of federal water rights. In sum, administration of rights within the watershed, who gets to divert and who must be curtailed, cannot occur in absence of comprehensive identification and adjudication of all rights entitled to command delivery of available water to their place of use, whether state or federally law-based.

Accordingly, after a prolonged effort and over the resistance of the Justice Department and federal agencies, Congress passed the 1952 McCarran Amendment permitting state joinder of the United States and the tribes in state court water adjudications.<sup>32</sup> In order to assert this jurisdiction, states relying primarily on administrative mechanisms commenced comprehensive adjudications to determine the rights of all users, the federal entities included.

Three Colorado cases ultimately decided by the United States Supreme Court established that federal courts and state courts, because of the McCarran legislation, have concurrent jurisdiction to determine federal rights. However, when a McCarran proceeding has been initiated in the state court, the federal court should defer to state judicial determination of the federal rights, whether or not the federal litigation was filed first.<sup>33</sup>

Implicit in the refusal of federal courts to exercise their concurrent jurisdiction, in deference to comprehensive state water adjudications, is that the federal agencies and tribes will have equal access to fair state judicial forums, along with state and private claimants. As Justice Brennan wrote for the Court in the Colorado case recognizing the authority of the states to join tribal claims under McCarran:<sup>34</sup>

---

<sup>31</sup> See *Navajo Development Co. v. Sanderson*, 655 P.2d 1374, 1380 (1982).

<sup>32</sup> See Bennett W. Raley, *Chaos in the Making: The Consequences of Failure to Integrate Federal Environmental Statutes with McCarran Amendment Water Adjudications*, 41 *Rocky Mt. Min. L. Inst.* 24.1, 24-21 to 24-30 (1995).

<sup>33</sup> See the Colorado trilogy: *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810, 820 (1976); *United States v. District Court*, 401 U.S. 527, 530 (1971); *United States v. District Court*, 401 U.S. 520, 525 (1971).

<sup>34</sup> See *Colorado River Dist. v. U.S.*, 424 U.S. at 820.



We emphasize, however, that we do not overlook the heavy obligation (of the federal courts) to exercise jurisdiction. We need not decide, for example, whether, despite the McCarran Amendment, dismissal would be warranted if more extensive proceedings had occurred in the District Court prior to dismissal, if the involvement of state water rights were less extensive than it is here, or if the state proceedings were in some respect inadequate to resolve the federal claims. (Emphasis added).

Additionally, when joined by a state in a McCarran proceeding, the United States must assert all federal claims to water rights; if not, the priority of the federal rights, included reserved rights along with appropriative rights, may be postponed to intervening state and private junior rights.<sup>35</sup> In turn, this has compelled federal agencies and tribes to participate in litigation they might otherwise have postponed or foregone entirely. Moreover, Congressional adoption of a plethora of environmental laws starting in the 1960s has caused federal agencies to manage the lands they administer with greater attention to values other than resource extraction, such as recreation, fish and wildlife, wild and scenic river, national park, and wilderness area preservation, among others.

Members of the water bar have pointed out that failure of the United States to claim state or federal appropriative water rights for environmental purposes, such as endangered species protection, defeats the purposes of the McCarran Amendment and the federal environmental laws, when reserved water rights do not exist or are uncertain. The argument is that a secure water right that can be administered in priority vis-à-vis other water rights is the most rational and consistent way to accommodate important state and federal interests in water. Resort to regulatory mechanisms on an ad hoc basis, such as by-pass flows imposed by the Forest Service as a condition for right-of-way permit renewal--diminishing the yield of pre-existing water rights--undermines reliability, promotes disorder, intensifies hostility, leads to takings actions, and generally favors chaos over law.<sup>36</sup>

In short, whether for a traditional type of consumptive use, such as agricultural or municipal, or non-consumptive use, such as hydropower or flood control, or for an environmental uses, which are largely non-consumptive, federal officials and agencies who do

---

<sup>35</sup> See *United States v. Bell*, 724 P.2d 631, 636 (Colo. 1986).

<sup>36</sup> See *Raley*, *supra* n. 32 at 24-48. The problem for federal agencies with this approach is that such claims provoke intense state political reaction and litigation, as evidenced by the federal filings in Idaho's Snake River Basin adjudication. The right of the United States to obtain appropriative rights under federal law, in contradistinction to state law, has also been highly controversial and, although the western states except for New Mexico have state law

not assert federal water rights claims in the McCarran proceedings may be in dereliction of their Congressionally-assigned public duties. When these claims are asserted, state judges must give them fair consideration and uphold federal ownership of rights that have a basis in either state or federal law, regardless of political controversy within the state over the filing, existence, nature, or extent of them. McCarran adjudications are underway in the state courts of Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming, with Texas having completed a comprehensive adjudication.<sup>37</sup> The United States Constitution provides for the authority of state judges to apply both state and federal law. Under the supremacy clause, they must uphold federal law when there is federal preemption.<sup>38</sup>

### **C. Completing the Adjudications, The Challenge of Western Growth and Evolving Uses**

Although federal claims for water have spurred the adjudication of water rights throughout the West, the inevitable necessity of doing this was always implicit in the property rights system of western water use allocation. As long as the available water resource can serve existing needs, administration lies in the background as an implicit but unexercised feature of the essential attribute of each water right, its priority. In times of scarcity, administration assumes its necessary place as law enforcer in the distribution of this public resource.

The accelerating growth of the West as an urban dwelling place surrounded by a vast expanse of federally-owned open space makes fair and efficient administration of water rights the single most deserving feature of twenty-first century water policy. The American West is home to nearly one-third of the population of the United States. The western states have grown approximately thirty-two percent in the past twenty-five years, compared with a nineteen-percent rate in the rest of the nation; by the year 2025, the West will likely add another twenty-eight million residents.<sup>39</sup>

Colorado is a prime example. It was the fourth fastest growing state in the years 1990-94, with a population increase of eleven percent. Its population in 1995 was 3,747,000; its

---

mechanisms for instream flow water rights, they typically hold these in state ownership and do not allow federal agencies or others to appropriate or hold them.

<sup>37</sup> See Thorson, *supra* n. 21 at 22-36. For example, the Arizona proceedings involve 77,000 water right claims, and the Idaho Snake River proceedings involve 185,000 claims. *Id.* at 22-37, 22-39.

<sup>38</sup> See U.S. Const. Article VI, Secs. 2 and 3.

projected population for the year 2000 is 4,168,000. Of the western states, only Nevada (twenty-two percent increase), Idaho (sixteen percent increase), Arizona (fourteen percent increase), and Utah (thirteen percent increase) outstripped Colorado's growth in the past twenty-five years.<sup>40</sup> Historians and demographers alike acknowledge that the West hosts an urbanizing culture despite its reputation for vast expanses.<sup>41</sup> With growth comes the challenging of serving multiple demands for water.

Progressive conservationists recognized early in the twentieth-century that comprehensive planning and multi-purpose river basin development was a key to the nation's well-being. Along with navigational improvements and irrigation, they urged the construction of works for power generation, flood control, municipal, and manufacturing use.<sup>42</sup> The Great Depression produced a generation of Americans anxious to promote and subsidize reclamation projects as a means of putting the country's unemployed back to work.<sup>43</sup> The post-World War II period brought about the culmination of projects that, in Stegner's words, "remade the map of the west" from the 95<sup>th</sup> meridian to the Pacific Ocean.<sup>44</sup> These are the projects the West increasingly depends upon in an era that discourages new project construction.

The utility of the existing development required the integration of federal and state water policies, for which "the states have demonstrated a capacity—albeit an uneven capacity."<sup>45</sup> Adjudications in state court of federally held appropriative rights, along with all other rights,

---

<sup>39</sup> See Report of the Western Water Policy Review Advisory Commission, Water in the West: Challenge for the Next Century 2-14 (1998).

<sup>40</sup> See id. at 2-17. The reported 2000 census reports a population of 4,301,261 for Colorado. See [www.RockyMountainNews.com/census2000/stateNumbers.cfm](http://www.RockyMountainNews.com/census2000/stateNumbers.cfm)

<sup>41</sup> "Most Westerners are urban people. A much higher percentage of our population lives in units that the Census Bureau describes as urban than any other region of the United States." William H. Hornby, "Recognizing The West As An Urban Place," in A Society to Match the Scenery: Personal Visions of the Future of the American West 120, 120 (Gary Holthaus et al. eds., 1991).

<sup>42</sup> See Samuel P. Hays, Conservation and the Gospel of Efficiency, the Progressive Conservation Movement, 1890-1920, 106 (1959).

<sup>43</sup> See Daniel Tyler, The Last Water Hole in the West, The Colorado-Big Thompson Project and the Northern Colorado Water Conservancy District 28 (1992).

<sup>44</sup> Wallace Stegner, Beyond the Hundredth Meridian, John Wesley Powell and the Second Opening of the West 353 (1954).

<sup>45</sup> Norris Hundley, Jr., Water and the West, The Colorado river Compact and the Politics of Water in the American West 334 (1975).

have played a pivotal role in recognizing such varied traditional and newly evolving uses as irrigation, municipal, commercial, hydropower, flood control, fish and wildlife, and recreation.<sup>46</sup>

The Winters doctrine has brought to the fore what has always existed in the West, “compelling alternative legal theories regarding human relationships to land and water, none necessarily more important than the others.”<sup>47</sup> The intervention of water rights arising under federal law for Native American tribes, national parks, and recreational areas, together with federal environmental statutes which embody the public’s changing values, has pushed state political and legal change that would have been unlikely otherwise.<sup>48</sup> These alterations in state law have included statutory and judicial precedents expanding the compass of beneficial uses, including instream flows, and instituting conservation measures, although the pursuit of efficiency to reduce waste of the resource, real or perceived, continues to drive further calls to reform.<sup>49</sup> While the prior appropriation doctrine and western water development has been lampooned and lambasted,<sup>50</sup> no one has made a serious proposal for substitution of a water law system that would better serve the needs of humans and the environment with equal or greater security, reliability, and flexibility.

The land sets the limit, not the law, as Mary Austin writes in The Land of Little Rain. The supposedly water-rich Pacific Coast and Southeastern states are now experiencing water scarcity of the type long known to the semi-arid high plains and mountain states. In times of drought crisis, political leaders try to do the best they can, but these belated efforts usually point to the necessity of structural and legal arrangements instituted well in advance.

Western water law is generally posited on serving the more senior rights in times of short supply. Holders of junior rights must expect shortage and, thus, can plan for it. Options include conservation, additional storage, use of non-tributary groundwater, purchase of senior rights, and/or dry year leases whereby farmers for example are paid for the right of cities to have use of

---

<sup>46</sup> See, e.g., Board of County Comm’rs v. Crystal Creek Homeowners’ Ass’n, 14 P.3d 325, 336 (Colo. 2000).

<sup>47</sup> John Shurts, Indian Reserved Water Rights, The Winters Doctrine In Its Social And Legal Context, 1880s-1930s 252 (2000).

<sup>48</sup> See Gregory J. Hobbs, Jr., Colorado Water Law, An Historical Overview, 1 U. Denver Water Law Rev. 1, 19-24 (1997).

<sup>49</sup> See, generally, Janet C. Neuman, Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use, 28 Environmental Law 919-996 (1998).

<sup>50</sup> See, e.g., Charles F. Wilkinson, In Memoriam, Prior Appropriation 1848-1991, 21 Environmental Law v-xviii (1991); Marc Reisner, Cadillac Desert, The American West and its Disappearing Water (1986); Phillip L. Fradkin, A River No More, The Colorado River And The West (1981).

the senior water in dry times. Water markets require transferable rights. To make rights worth transferring requires recognizing the amount of water that can be delivered to them reliably. This means assuring their place in water administration.

Citizens of the United States want it all: strong local, state and national economies along with viable riverine habitats for recreation and fish and wildlife. Yet, here's the age-old dilemma and opportunity of scarcity. Water is a public resource, and the water law has always followed the customs and values of the people. The values now include multiple multiple uses, not fewer uses. More of our citizens, not less, want to be involved in water decisions.

Good policy, it would seem, should foster to the greatest extent possible the security of water use rights. Without reliability, whether for human needs or for the environment, conflict increases, damage results, and government at all levels loses its credibility. Political officials, it would seem, have a fundamental responsibility for formulating a coherent policy regarding this most basic resource of all life. Courts, of course, must continue to enforce state and federal law according to constitutions, statutes, and case precedent.<sup>51</sup>

Surely, the landscape is stark but not bleak. Beneficial use and preservation, state and federal relationships, these are the enduring heritage of water policy done ably. In scarcity is opportunity for community. That's how farmers came to cooperate in the formation and operation of mutual ditch companies. As the ongoing western state water adjudications demonstrate, settlement is often preferable in the effort to secure rights that are interdependent. State water law systems are continually evolving to incorporate the changing customs and values of the people.

Water policy built on the progressive conservation model has no yet proven peer. Science and the public interest were the lodestars of those conservationists. We have since learned that wringing every drop of water out of our watersheds for use in the name of economic efficiency is counter to the health of the watershed and uses required for the making of an interdependent dwelling place for all creatures.

One person's view of waste is another person's gospel of water use. Instream flows were traditionally considered to be a waste of water; today they are fundamental to the implementation

---

<sup>51</sup> The United States Court of Claims has held that the United States Government owes just compensation to water users whose contractually-conferred right to the use of water, in regard to projects holding a state water right, was restricted for the benefit of endangered fish. See Tulare Lake Basin Water Storage District v. the United States, No. 98-101 L, April 30, 2001 (Fed. Cl.).

of public values. The twenty-first century is bound to be the century of water management, as the states strive to live within their interstate water apportionments, growth continues, and the important work of supplying people and protecting the environment proceeds.

Lost in the recent Idaho controversy is the fact that the Idaho Supreme Court, despite denying federal claims for wilderness water rights on rehearing, nevertheless determined that Congressional legislation designating certain Idaho national recreation areas and wild and scenic rivers carried with them expressly reserved water rights, the amount thereof to be quantified on remand.<sup>52</sup> Idaho water users strongly contested the existence of these rights also. Despite the surrounding political rhetoric of state primacy and sovereignty in water matters, it is clear that the Idaho Supreme Court did not take Justice Cathy Silak's reelection defeat over her authorship of the original opinion as a reason to retreat to an unmitigated application of state water law, in the face of the constitution and laws of the United States. These McCarran decisions in Idaho's Snake River Basin Adjudication bode well for the ability of western state courts to go about the judicial business of resolving state and federal water claims.

The role of settlement in these complex adjudications is also important. Subordination of federal claims to present and reasonable future needs of the state is a possibility, in return for recognition of enforceable rights for protection of environmental and tribal values. Those committed to absolutist positions on both sides of the equation always have difficulty with such proposals, but significant differences can make for significant settlement achievements, accommodating important interests. Surely, the Congress has delivered severely contrasting mixed messages through its traditional deference to state law and its reservation and environmental protection statutes.

Water users of all stripes, including those favoring environmental uses, are bound--in the system of water use property rights that Congress and the states have fostered--to the fundamental precept that juniors must stand aside while seniors exercise their rights, when there is not enough supply to fill all uses. Ignoring this in favor of passionate commitment to one's own point of view and interest mistakenly ignores the operative principle that water remains a public resource committed to disposition and use in priority.

---

<sup>52</sup> See *Potlatch Corp. v. United States*, 12 P.3d 1256 (Idaho 2000); *Potlatch Corp. v. United States*, 12 P.3d 1260 (Idaho 2000). The court refused to recognize the reserved water rights claims for certain recreation areas and national wildlife refuges in the State, applying the New Mexico doctrine. See *State v. United States*, 12 P.3d 1284 (Idaho 200); *United States v. Idaho*, No. 25546, 2001 Ida. Lexis 7 (Idaho Feb. 22, 2001).

Water lawyers should look to the boundaries of their advocacy role. Fair judges conducting fair hearings must be the norm. Political decision-making by judges has no place in the separation of powers. That would undermine public confidence even more surely than a handful of controversial decisions.

The media plays a very important role. Through reporting and editorializing, it can stand watch on the maturation and well being of each state's community. Operating in community requires good scholarship, common sense, an eye to history, attention to detail, and well-considered premonitions of future possibilities.

Should water adjudications proceed? The monthly resumes of the Colorado water courts and the decrees they issue demonstrate the reliance a growing and changing state places on the availability of fair and impartial forums for the allocation and reallocation of this indispensable public resource. Surely, the maturation of the West will be evidenced in many important ways by the way its water moves.

The two chambers of the western heart, the two lobes of the western mind, are beneficial use and preservation. Growth and glorious natural habitat, this is the heritage of the public domain. Our rapidly urbanizing western experience--bridled by our love for the vistas, rivers, and all life, our natural optimism, our need for each other--in this our western place, so prized by the entire country, shall carry us forward.

## **THE EAGLE OR THE OTTER**

Some days you look at a river  
You forget you've ever seen one,  
Somehow this particular river seems  
So supple, loose and fine, so immediate.  
You want to turn the wrong way  
Just to cross a bridge, you want to  
Climb a bluff you've always ignored.  
You look over the edge, you see a path  
Through the reds, the goldens, round  
The crook of the bend, down to the edge  
Of the ripple. You feel you could peel  
Back your arms, stick out your chin,  
Lift off and skim the air and the water.  
You might be the eagle or the otter.

Greg Hobbs

(On viewing the Arkansas River below Pueblo 10/29/2000)