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SLIDES: Rethinking Western Water Law: Whatever Happened to the Public Interest?

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Rethinking Western Water Law

Whatever Happened to the Public Interest?

Mark Squillace
Natural resources Law Center
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The West is running out of water

- High Country News: “Western Water is Petering Out” (Nov 30 2007)
- Water-Wired: “Western Drought Effects: What Happens in Vegas Won't Stay in Vegas” (January 19, 2008)
- National Geographic: “Lake Mead May Dry Up by 2021” (February 23, 2008)

October, 2007: Lake Mead was 118 feet below maximum elevation or 46% of capacity!



Forces that will drive the future of Western water law

- Climate change
 - Changes in rain and snow patterns
 - Changes in evaporation and evapotranspiration rates
- Population growth
 - Between 2000 and 2040, Western states population is projected to grow by 65%
- Drought

How did we get here?

- Water rights are generally treated as permanent property rights
 - Periodic adjustments, while possible, are rarely made
- The oldest water rights – usually agricultural rights – were often overly generous
 - Agricultural sector consumes from 80-95% of water resources in the West
 - States have been reluctant to demand more efficient uses

What does this mean for water law?

- Can we sustain a system that is not very flexible and responsive to changing values and needs?
- Can we rethink (without rewriting) Western water law to offer the kind of flexibility that will be needed to address the challenges?

The limits of water rights

- They surely are property rights but...
 - They are only a use right. More like an easement than land
 - The water itself is the property of the state
 - And in virtually every Western state – *the only exception being Colorado* – water rights are supposed to be administered in the public interest

The Public Interest Standard

- **Wyoming Constitution, Article 8, §3:** “No appropriation shall be denied, except as demanded by the public interests.” (Same language as Nebraska)
- **New Mexico Stat. Ann. § 72-5-7:** [The State Engineer] may ... refuse to consider or approve any application ... if, in his opinion, approval would be contrary to the conservation of water within the state or detrimental to the public welfare of the state. (Similar to Utah.)
- **Colorado:** Board of County Comm’rs v. United States, 891 P.2d 952 (Colo. 1995). “Conceptually, a public interest theory is in conflict with the doctrine of prior appropriation because a water court cannot, in the absence of statutory authority, deny a legitimate appropriation based on public policy.”

How well does Western water law protect the public interest?

- As a matter of decision-making routine, States generally fail to consider public interest criteria “on the record” of agency decisions
- Many states with public interest standards fail even to define the term, thus hindering its application
 - Make no mistake, a public interest requirement is not and should not be seen as strictly concerned with aesthetic, fish and wildlife, and recreational needs
 - It almost certainly includes economics, opportunity costs, customs and cultures, and human needs (E.g., Alaska statute)

Can we fix the problem?

- Water rights should not be granted unless and until the water official determined **on the written record of the decision** that its issuance would not prove detrimental to the public interest
 - Without a record, judicial review of the decision on public interest grounds is not possible (**Overton Park**)
- Can/should states use the public interest standard to routinely limit water rights to a term of years sufficient to protect investment and no more?
 - Rights could be renewed but a new evaluation of public needs and interests would be made and rights adjusted accordingly

Is it too late?

- Certainly not for new rights
- But would the imposition of standards, term limits, or other limits on existing water rights effect a “taking” of private property under the 5th Amendment?
 - Would the imposition of standards result in a total taking?
 - If not, look at the character of the action (e.g., is it a “physical invasion?”) and whether it interferes with “reasonable, investment-backed expectations”?

Natural Resources Law Center Study

- Survey Western states' water law to determine the extent to which they establish and use public interest standards for allocating water
- Review decisions approving applications for water rights in selected States to determine whether and how these States have considered the public interest in reaching their decision
- Analyze the likely consequences and impacts that might be expected if the States were to address their public interest/public ownership obligations on the record

Proposed Outputs from NRLC Study

- Develop model guidelines, rules, and other recommendations for implementing public interest/public ownership standards
- Meet with States, citizen groups, and other interested parties to discuss the findings of the study and to develop strategies for restoring public interest standards

The Future of Western Water Law?

- Water rights will be administered more flexibly
 - Regulation of and restrictions on water rights will grow just as the regulation of land has grown
 - The public interest in water will be better defined to expressly encompass, among many other things, aesthetic, ecological, and recreational values, and ways will be found to restore public rights that have been lost
- Water rights will be protected as property but the strict regulation of water uses will not be enough to support takings claim
 - Priorities will be protected, but not perhaps for the amounts of water historically used

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