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## **New Challenges to State Water Allocation Sovereignty**

by

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# Symposium Introduction: New Challenges to State Water Allocation Sovereignty

## ABSTRACT

*Western states are facing new challenges to their traditional water allocation primacy beyond the perennial problems of federal reserved rights and reclamation law. These challenges come from recent Supreme Court decisions announcing federalism doctrines that may allow a court to displace state law, and from state court decisions that may require the modification of vested rights. They also come from federal environmental regulatory programs and from market pressures to reallocate irrigation rights to more economically efficient uses. To maintain their traditional allocation primacy, states must consider new planning and regulatory initiatives to articulate the state's interest in water allocation more clearly than has been the case in the past.*

## A BRIEF HISTORY OF STATE PRIMACY IN WATER LAW

Water has played a crucial role in the settlement and development of the United States, and in the arid West water remains the determinative influence.<sup>1</sup> Dreams of making the desert bloom made up an important part of the myth of the West as a place of unlimited opportunity, individual fulfillment, and freedom.<sup>2</sup> Concomitant with the dream came the reality that access to water in usable quantities was necessary to fulfill the national goal of settling the west and developing an agrarian economy. A hostile terrain and a variable climate that provided a water "feast" in the spring and absolute "famine" during the summer months caused many to question the appropriateness of the common law of riparian rights. This doctrine restricts the right to use water to the owners of land abutting a stream or lake. Many believed this system would produce water monopolies and frustrate the implementation of the Homestead laws. As a result the Rocky Mountain states rejected the doctrine in the late nineteenth century in

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1. The most elegant exposition of this thesis is W. STEGNER, *THE AMERICAN WEST AS LIVING SPACE* (1987).

2. This theme is beautifully developed in R. ATHEARN, *THE MYTHIC WEST IN TWENTIETH-CENTURY AMERICA* (1986).

favor of the doctrine of prior appropriation<sup>3</sup> and prior appropriation became western water law. In contrast to the common law of riparian rights, prior appropriation gave relatively secure individual property rights to use water wherever it was needed subject to modest judge-made anti-speculative and anti-waste limitations. Western water law promoted maximum access to scarce supplies among competing claimants by allowing virtually any individual or local entity with the necessary capital the ability to obtain a water right. The doctrine blossomed early in the mining camps of the mountains and in the acequias of the Southwest as local custom. Eventually prior appropriation became state customary law, and ultimately in the late nineteenth century, states declared themselves the owners of their waters in trust for the public (their citizens) in order to establish prior appropriation as the fundamental ground rule for the acquisition and exercise of private rights.

Most states followed the Wyoming system of allocating water by a permit. This system, coupled with the doctrine that a water right was a quasi-exclusive property right (not tied to the locus of use), allowed the western states to oversee the movement of water to places of highest demand.<sup>4</sup> Under this system, urban users could purchase the water rights of less economically productive rural users and thereby meet growing demands. Because the western states created the system of water allocation, they assumed that they alone could control the use of western waters, and for most of this century state allocation policy has been paramount to subsequently developed federal allocation policies. Even during the progressive conservation era, the federal policy was one of deference to state water law.

In 1902, the federal government committed itself to a federal reclamation program for the West. Greater assertions of federal power over western waters accompanied the federal policy. However, the states were able to subordinate federal allocation policy to state allocation policy because federal river basin development was never fully implemented and therefore no sweeping federal policy was needed. Furthermore, prior appropriation meshed nicely with federal reclamation policy because it supported the capture and storage of water in federally constructed reservoirs for both irrigation and municipal use. In the eyes of the western

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3. The best history of the development of western water law is R. DUNBAR, *FORGING NEW RIGHTS IN WESTERN WATERS* (1983). California is the major exception to the rejection of the common law. The state supreme court adopted the common law in 1886, *Lux v. Haggin*, 69 C. 255, 10 P. 674, and continues to adhere to it despite the adoption of a prior appropriation permit system in 1913. See Freyfogle, *The Evolution of Property Rights: California Water Law As A Case Study*, in *PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 73* (P. Hay & M. Hoeflich eds. 1988).

4. See G. NASH, *THE AMERICAN WEST IN THE TWENTIETH CENTURY: A SHORT HISTORY OF AN URBAN OASIS* (1973).

politicians and farmers, the federal government put up the capital for the reservoirs and distribution systems,<sup>5</sup> but the western states continued to control the distribution of water by the law of prior appropriation. This was the nature of the federal-state partnership in water resources.

This partnership based on federal dollars and state law worked well during the first two-thirds of this century because it was consistent with both state and federal policies for land settlement. At the federal level, the primary interest in the public lands was disposition, not management or development. At the same time, western states policy supported placing new citizens on those lands available for disposition. Strong cultural views supported the state prior appropriation doctrine as well. From the perspective of the pioneer, he was conquering the West and through the doctrine of prior appropriation, its waters. He was reasserting the discovery and conquest justification advanced by the European nations to claim sovereignty over the nation itself. This trend continued and western water institutions arose before the federal government asserted a strong interest in the minerals and waters located on the public domain.

After the Civil War, for financial and other reasons, the federal government did make an effort to assert title to the minerals located on the public domain. Title to water would have been a logical corollary but the western states, which played a significant role in Lincoln's control of the Union during the Civil War, were powerful enough to secure legislation that confirmed mining and water use customs. Thus, western political influence was sufficient to withstand the assertions of federal power that the federal government urged during the progressive conservation era.<sup>6</sup>

State influence perhaps reached its apogee when Justice Sutherland read post-Civil War public domain history to constitute a federal severance of water from federal lands and as a clear decision by the federal government to allow the states to freely develop whatever water allocation rules they chose. His opinion in *California Oregon Power Co. v. Beaver Portland Cement Co.*<sup>7</sup> became the constitutional foundation for future arguments justifying the western states' rights to exclusive control in the allocation of their waters. As recently as 1978 Justice Marshall relied on the same history and general federal acquiescence in *California Oregon Power* in refusing to allow persons who have "discovered" the valuable

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5. For recent critical reassessments of the reclamation era see D. WORSTER, *RIVERS OF EMPIRE: WATER, ARIDITY, AND THE AMERICAN WEST* (1985) and M. REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* (1986).

6. In *Kansas v. Colorado*, the United States urged the entry of a decree that "embrace in terms or in effect recognition of the national law and of the Government's right to direct the matter of water distribution on this non-navigable interstate stream," 206 U.S. 46, 64-76 (1907), but the majority denied the power of the federal government to implement a reclamation program contrary to state law, *id.* at 91-92.

7. 295 U.S. 142 (1935).

“mineral” water on the public domain to use the Mining Law of 1872 to create a federal law of water rights.<sup>8</sup>

After *California Oregon Power*, western states assumed that the federal government would not assert (and perhaps could not constitutionally assert) any interest in water, except for the protection of commercial navigation. In their view, to do more would have been fundamentally inconsistent with the state primacy in water allocation.

The western states' expectation of exclusive and perpetual state control over water resources, while vociferously argued, was on somewhat shaky ground as a matter of both constitutional law and political reality. The commerce and property clauses give the federal government complete power to displace state law should it choose to do so. Indeed, virtually all of the seminal “commerce clause” cases arose out of disputes involving water resources, either as a matter of navigation,<sup>9</sup> or environmental pollution.<sup>10</sup> These decisions, coupled with *McCulloch v. Maryland*,<sup>11</sup> should have given even the most adamant states rights advocates pause.

Samuel Wiel, in the third edition of his great treatise, warned the western states that the conservation era might produce some fundamental changes in western water law.<sup>12</sup> Indeed, the federal government did begin to assert an interest in water allocation in *United States v. Rio Grande Dam & Irrigation Co.*,<sup>13</sup> but the impact on the western states went almost unnoticed when compared to the contemporary shock of the federal government's successful assertion of the exclusive power and duty to reserve and manage the retained public lands. Thus state expectations of exclusive control remained high, despite some clear suggestions to the contrary from the high court at the turn of the century.

At the height of the progressive era in *Kansas v. Colorado*,<sup>14</sup> the Supreme Court asserted the power to equitably apportion interstate waters and simultaneously denied the federal government's power to allocate interstate waters for the reclamation of arid lands.<sup>15</sup> Equitable apportionment in the West ultimately came to mean in part the application of the doctrine of prior appropriation across state lines.<sup>16</sup> Equitable apportion-

8. *Andrus v. Charleston Stone Products Co.*, 436 U.S. 604 (1978).

9. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 6 L.Ed. 23 (1924); *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 Hous.) 299, 13 L.Ed. 996 (1851); *Wilson v. The Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 7 L.Ed. 412 (1824).

10. See the extensive discussion of the federal common law of water pollution in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

11. 17 U.S. (4 Wheat) 316, 4 L.Ed. 579 (1819).

12. 1 WIEL, *WATER RIGHTS IN THE WESTERN UNITED STATES* 136-138 (3d ed. 1911).

13. 174 U.S. 690 (1899).

14. 206 U.S. 46 (1907).

15. 206 U.S. at 92.

16. *Colorado v. New Mexico*, 467 U.S. 310 (1984); *Wyoming v. Colorado*, 259 U.S. 419 (1922). See generally Tarlock, *The Law of Equitable Apportionment Revisited, Updated and Restated*, 56

ment strengthened state sovereignty because the western states were induced to firm up the rights of their citizens to interstate waters through the negotiation of compacts.<sup>17</sup>

The major exception to state sovereignty during the early reclamation era, which the states minimized and still often refuse to accept today, is found in the Property Clause. The Court in *Rio Grande Irrigation Co.*<sup>18</sup> had suggested that the United States Constitution, in addition to granting the power to regulate impoundments to protect navigation under the commerce clause, gave the federal government under the Property Clause proprietary claims to western waters. *Rio Grande Irrigation Co.* was arguably applied in 1908 to claim federal proprietary rights for the benefit of Indian reservations. The famous *Winters v. United States*<sup>19</sup> case seems to have initially been read solely as an Indian treaty case. Federal reserved rights were extended to non-Indian federal enclaves by the Supreme Court when the Justice Department invited the Court to do so in *Arizona v. California*.<sup>20</sup>

While the rhetoric of some politicians occasionally argued for federal displacement of state allocation primacy, political reality demonstrated otherwise and federal preemption was held at bay.<sup>21</sup> Federal interests in water allocation conflicted with state allocation primacy in only two limited areas. First, judicial recognition of federal reserved rights for Indian reservations and other public lands, without the need for compliance with the state laws of beneficial use, continues to be a source of tension.<sup>22</sup> Second, federal reclamation policy, premised on small homesteads, limited the distribution of project waters to persons owning 160 acres or a husband and wife owning 320 acres. This provision became the source of much conflict in California where large land-holding corporations are served by the Bureau of Reclamation. Even though the acreage limitation has been liberalized,<sup>23</sup> the tension continues in the Central Valley. No state has seriously argued that either the federal assertions of water rights for federal reservations or rights under the Reclamation Act violate the Constitution. The arguments have instead been

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U. COLO. L. REV. 381 (1985). The Supreme Court in 1963 ultimately upheld a congressional division of the Colorado River by the Boulder Canyon Project Act in *Arizona v. California*, 373 U.S. 546.

17. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

18. 174 U.S. 690 (1899).

19. 207 U.S. 564 (1908).

20. 373 U.S. 546 (1963). The holding in *Arizona v. California* was predictable from the Supreme Court's reasoning in *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955).

21. See Goldberg, *Interposition Wild West Style*, 17 STAN. L. REV. 1 (1964).

22. See, e.g., Leshy, *Water and Wilderness Areas: Law and Politics*, 23 LAND & WATER L. REV. 389 (1988); Tarlock, *Protection of Water Flows For National Parks*, 22 LAND & WATER L. REV. 29 (1987).

23. Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1261.

directed toward limiting the breadth of the federal rights that exist in these areas.

## NEW CHALLENGES TO STATE PRIMACY AND STATE RESPONSES

With respect to water resources, the twentieth century is not ending the way it began. In addition to Indian<sup>24</sup> and public land reserved rights, states are facing new challenges to their traditional allocation primacy. These new threats are both external and internal. The challenges stem from widely held perceptions that the era of government-funded irrigation projects is over and that because the amount of water available is finite, there will be a need to reallocate water to higher valued consumptive and non-consumptive uses. These challenges come from four major sources: (1) Congress, (2) the Supreme Court, (3) state supreme courts, and (4) state agencies regulating water resources. These entities are driven by market pressures to reallocate water both interstate and intrastate, and by political pressures to allocate water to promote "public welfare values."

Western states are responding to these new challenges in a variety of innovative ways that pose new legal, economic, and political problems. The articles in this volume focus on the various state responses to the new federal and state judicial threats to traditional state primacy. They indicate that the challenges to state supremacy are real. It is the authors' view that *state and regional* water planning and environmental and conservation regulations must be intensified so that states can articulate and prove their need to control their water resources in the face of the "new federalism" that seeks to override traditional areas of state choice.

## JUDICIAL THREATS TO STATE SOVEREIGNTY

Modern threats to state sovereignty come from both state and federal courts. The most significant feature of the new challenges is that they permit judicial supervision of a wide variety of water resource allocation programs through the development of common law or judge-made restraints. Unlike the cases that extended federal regulatory control over rivers and federal multiple purpose projects, the new decisions do not involve review of previous Congressional decisions to extend federal power. In fact, the federal government need not be a party to many lawsuits invoking federal supremacy or preemption. The decisions that may have the greatest effect on state allocation are briefly discussed in

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24. For a discussion of Indian reserved rights and recent state and federal initiatives to reduce federal-state tensions see Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Water Rights*, 28 NAT. RES. J. 63 (1988); Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights*, 22 LAND & WATER L. REV. 631 (1987).

this section, with emphasis on their possible long term implications.

One authority for the United States Supreme Court to regulate interstate allocation of water resources, even where Congress has not done so, is found in its filling in of the "great silences" in the so-called "dormant commerce clause." A review of the cases applying this provision demonstrates that this clause is not silent and it certainly has not been dormant. The clause is not silent because it states expressly that the Congress has the power to regulate commerce among the states—the Court is not mentioned. It is not dormant because the Court has repeatedly used it as a prophylactic measure to evaluate and strike down state laws which the Court considers violative of broadly shaped, judicially fashioned prohibitions against trade restraint or principles of antitrust law as loosely applied to the states.

Perhaps the most euphoric moment for the Supreme Court in the exercise of this clause came when Justice Jackson in *Hood and Sons v. DuMond*,<sup>25</sup> gave the Court credit for ensuring the prosperity of the nation when it woke this dormant clause from its slumber. He concluded that "even more than by interpretation of its written word, this court has advanced the solidarity and prosperity of this nation by the meaning it has given to these great silences of the Constitution."<sup>26</sup> The Court has built a theory of a national common market from Mr. Justice Jackson's opinion in *Hood and Sons*. State protectionism is viewed as "inconsistent with the very idea of political union."<sup>27</sup> Like all visions, it has taken on a life of its own. The prohibition against unacceptable anti-competitive behavior among states has been extended to other interstate disputes that may not require the blunt instrument of the dormant commerce clause to do interstate equity. In fact, application of the doctrine may do interstate inequity.

A nation fraught with restrictive trade restrictions such as those which destroyed the Articles of Confederation would not be prosperous. However, the simple truth is that Congress would not stand idly by and let this happen. Those first heady days of the Roosevelt administration amply demonstrate that Congress can act to regulate commerce when need be as far down as the grass roots of Mr. Filburn's wheat.<sup>28</sup>

One might also assume that should the nation be brought to its knees by water embargoes from such politically powerful states as South Dakota, Montana, New Mexico, and Nebraska, Congress would surely act with

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25. 336 U.S. 525 (1949).

26. 336 U.S. 525, 535 (1949).

27. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1113 (1986).

28. See *Wickard v. Filburn*, 317 U.S. 111 (1942).



equal vigilance to protect the nation from any tariff barriers imposed by these states. Contrary to our whole political experience, up to now the Court has refused to assume that the Congress is capable in this area and has stepped into the perceived void to ensure the nation's prosperity. If, however, one peered into the future through the looking glass darkly, one might see that the Court has come down on exactly the wrong side of this issue.

In the future the Court's role with respect to water resources may well be one of protecting the smaller resource-producing states from a Congress controlled by the more powerful resource-consuming states. It does not take an expert demographer to notice the difference between the populations of the resource-producing states and the resource-consuming states that contain major urban centers. This difference results in a rather obvious difference in representation in the Congressional House of Representatives. At some time in the future, in the face of domestic water scarcity, federal legislation could be proposed which could virtually strip these smaller states of their water and mineral resources for use in the major urban centers. If the political protection afforded the smaller population states by representation in the U.S. Senate is not sufficient to prevent passage of such a law, the appropriate role for the Court may be to restrain Congress and protect these smaller population states from the more politically powerful ones.<sup>29</sup>

It is also unclear that unlimited competition between states for the sale of their products or for disposition of their resources always yields positive results. It could be argued that it was the unlimited competition by the states for sale of labor-intensive products that led certain states to seek a competitive edge by permitting their children to work at a younger age and for less pay. The federal child labor laws were necessary to hold this destructive competition in check.<sup>30</sup> In the context of resources, Appalachia could be considered in some ways a monument to unlimited competition for coal resources at the expense of the environment which produced them.<sup>31</sup>

At this stage in history the compelling national need for the Court to force Nebraska to disgorge her water resources for use in Colorado is

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29. If Congress did pass draconian legislation stripping states of their control of their water rights, persons from the states affected, who during the civil rights era, were happy to see the mere passage of hamburger condiments through commerce sufficient to sustain federal legislation prohibiting racial discrimination at the state level, may find themselves choking on "Ollie's Barbecue Sauce" when the commerce power is used to regulate their water resources. See *Katzenbach v. McClung*, 379 U.S. 294 (1964).

30. See *United States v. Darby*, 312 U.S. 100 (1941).

31. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981). While there were many other factors also at work in Appalachia, resource competition between third world nations often involved short cutting on environmental protection measures.

not fully demonstrated by the Court's opinion in *Sporhase v. Nebraska ex rel. Douglas*, nor are the long term policy implications of its holding clear.

### ***Sporhase v. Nebraska ex rel. Douglas***

*Sporhase v. Nebraska ex rel. Douglas*<sup>32</sup> provides the most far reaching new judicial threat to state sovereignty. The narrow holding of the case is that a Nebraska statute that prohibited the transfer of water to another state, unless the host state granted reciprocal export privileges, was an unconstitutional interference with interstate commerce. The broader implications of *Sporhase* are that state laws prohibiting the interstate export of water are presumptively unconstitutional, and that all state laws and administrative policies that either prefer in-state to out-of-state users or pose barriers to the export of water are constitutionally suspect as well.

*Sporhase* exploded the myth that the fictional "ownership" of water resources by a state exempted states from the dormant commerce clause doctrine. Before *Sporhase*, most western states imposed barriers prohibiting the export of state waters based on state constitutional provisions that the state or the public "owned" the waters of the state.<sup>33</sup> States declared that they "owned" the waters in trust to buttress state regulation of the acquisition, use and transfer of rights in an era when the police power was limited. However, in Nebraska and in most western states, state ownership of water was no more than an assertion of the state's police power over all resources. Since Nebraska was merely regulating private use of water resources, its regulations were not exempt from judicial scrutiny under the dormant commerce clause doctrine. Few were surprised when *Sporhase* put to rest the ownership fiction in the form it was being asserted in that state.<sup>34</sup>

*Sporhase* was an easy case; the problems lie in the extent of its application. Nebraska's unconstitutional export ban was typical reflexive parochial legislation—a sort of "water chauvinism" not tied to any well-developed statewide water plan or conservation policy. Even though the Supreme Court struck down the statute, it indicated that water was involved more with the public welfare of a state than other resources, and that demonstrably arid states may be able to assert a "limited preference" for their citizens in times of water scarcity.<sup>35</sup> Western states have studied with great interest the Court's suggestion that more arid states might be

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32. 458 U.S. 941 (1982).

33. See 2 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 389-96 (1971).

34. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. COLO. L. REV. 347 (1985).

35. 458 U.S. at 956.

able to mount successful conservation defenses. Unfortunately the facts of *Sporhase* did not require an elaboration of this possibility. The more substantial interstate dispute triggered by the attempt of a Texas city to appropriate practically all the available groundwater reserves in the south-east corner of New Mexico did provide that opportunity.

El Paso's application for groundwater permits in southeastern New Mexico has produced two district court decisions interpreting *Sporhase*. The first decision gave *Sporhase* a rigid interpretation which if followed would greatly limit the discretion of the states to chart their own destinies. *City of El Paso v. Reynolds* [El Paso I]<sup>36</sup> was extraordinarily restrictive in its interpretation of the arid state's conservation defense suggested by *Sporhase*. *El Paso v. New Mexico* [El Paso II]<sup>37</sup> was more expansive than the previous decision, concluding that states could conserve water in anticipation of scarcity, since a conservation preference that could only be exercised after the water was taken by a sister state would be no preference at all. The court indicated further that facially even-handed statutes should be scrutinized to ferret out unequal conservation burdens between in-state and out-of-state users, and cast serious doubt on the use of moratoria to develop even-handed allocation schemes.<sup>38</sup>

### *Colorado v. New Mexico*

The law of equitable apportionment may likewise pose a threat to traditional state primacy. Interstate rivers have always been subject to equitable apportionment among the states that they touch. State-created rights are subordinate to interstate decrees. In the West, the Court has applied the doctrine of prior appropriation to equity, but it has never followed the doctrine fully, especially in situations where increased interstate sharing was possible with minimum interference with vested rights. In *Nebraska v. Wyoming*,<sup>39</sup> the Court announced a sharing formula that allowed the Court to depart from priority. Generally, however, existing use patterns have been treated as vested rights and have been protected in interstate decrees. Pressures for conservation may accord less weight to older uses of water found as a matter of fact to be wasteful.

Litigation between Colorado and New Mexico on the Vermejo River offered the Court an opportunity to test the extent to which the *Nebraska* standard may allow departures from strict priority. *Colorado v. New Mex-*

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36. 563 F. Supp. 379 (D.N.M. 1983).

37. 597 F. Supp. 694 (D.N.M. 1984).

38. Trelease, *Interstate Use of Water*—"*Sporhase v. El Paso, Pike & Vermejo*," 22 LAND & WATER L. REV. 315 (1987). Amazingly, in El Paso II, the court conceded that a statute that placed a moratorium on new wells was even-handed in its application and on its face, but struck it down because the court found that a discriminatory animus motivated its enactment.

39. 325 U.S. 589 (1945).

ico [Colorado I]<sup>40</sup> created a stir by holding that an upstream state *could* bump an earlier but inefficient downstream use in favor of a more efficient future use. The case was remanded for further findings on the issue of comparative efficiency. *Colorado v. New Mexico* [Colorado II]<sup>41</sup> reverted to the principle of prior appropriation among states that follow the doctrine, but did not foreclose the possibility of departures. New Mexico prevailed because the Court's majority was not convinced that New Mexico's use was inefficient given the alternatives, and because Colorado's allegedly more efficient use was found to be speculative because there was no hard evidence of the economic benefits of the proposed uses or any state planning to justify Colorado's new claim on the river. *Colorado I and II* do, however, suggest that interstate priorities may be vulnerable to "adjustment" when a stronger case of need for the water is presented.

### The Public Trust

Existing water users in the western states also face new internal reallocation threats through the development of state created judicial doctrines such as the public trust. The historic public trust doctrine preserved public access to and use of navigable waterways for commerce. It was primarily a source of public rights, but it has also been held to impose limits on the power of states to alienate submerged lands and sever them from the trust.<sup>42</sup> The trust always limited the use of waters that interfered with the public right of navigation, but historically this was not a serious threat to the western states. In recent years the trust has been extended to include and even compel state protection of environmental values in deciding how to use submerged land, and now the trust may apply to navigable waters subject to appropriative rights.

The leading California case *National Audubon Society v. Superior Court*<sup>43</sup> holds that the trust applies retroactively to existing state water permits. This much studied and discussed case<sup>44</sup> is troubling because the public trust has never included standards to enable a court to determine if one resource use was preferable to another. For this reason courts have generally not applied it to invalidate state administrative actions. California, however, has had a long history of judicial scrutiny of efforts to sever the trust from submerged lands, so *National Audubon* has a history in that state.

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40. 459 U.S. 176 (1982).

41. 467 U.S. 310 (1984).

42. *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892).

43. 33 Cal.3d 419, 189 Cal. Rptr. 346, 658 P.2d 709, cert. denied, 464 U.S. 977 (1983).

44. See e.g., Dunning, *The Significance of California's Public Trust Easement for California Water Rights*, 14 U.C. DAVIS L. REV. 357 (1980); *Instream Flows, The Public Trust and the Future of the West*, in *INSTREAM FLOW PROTECTION IN THE WESTERN UNITED STATES: A PRACTICAL SYMPOSIUM* (University of Colorado Natural Resources Center, March 31-April 1, 1988).

The trust doctrine has also been held to reinforce the state's duty to plan and allocate waters in the public interest in North Dakota<sup>45</sup> and Idaho<sup>46</sup> and to recognize recreation stream access rights in Montana.<sup>47</sup> The extent to which the trust doctrine will take root in other western states is still an open question, but the doctrine is being pursued in judicial forums throughout the West.<sup>48</sup>

### FEDERAL PROGRAMS THAT INTERFERE WITH STATE PRIMACY

Because the federal government provided the funds for federal projects, the specter of shared authority for allocation was always present. As long as both parties shared a common goal of water conservation, and conservation meant impoundment, state and federal laws were basically harmonious. As the scope of federal proprietary and regulatory power has expanded in this century, the commonality of goals is beginning to diminish. Federal reclamation projects *may* be operated in a manner inconsistent with state law if Congress decides to preempt state law.<sup>49</sup> Interstate rivers are subject to Supreme Court equitable apportionment; state allocation is subject to the navigation servitude; and Congress itself can allocate interstate rivers.<sup>50</sup>

States face another layer of federal supremacy in the form of regulatory water rights. These rights are created by federal programs that require the allocation of water in a manner inconsistent with state law.<sup>51</sup> The programs are mainly environmental; the two most important are Section 404 of the Clean Water Act, and the Endangered Species Act, but there are other regulatory programs with environmental components that may affect state water rights.

These regulations do not create property rights in any one person; they create rights for the public at large. Yet their regulatory effects control the use of others' property. Thus, they are a hybrid between a regulatory right and a property right. These new regulatory property rights pose special problems for states for two reasons. The first problem is created by the fact that they lack any of the limiting characteristics of property rights. This is illustrated by comparing the Endangered Species Act to federal reserved rights. The courts have defined Indian and non-Indian

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45. *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n* 247 N.W.2d 457 (N.D. 1976).

46. *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

47. *Montana Coalition for Stream Access Inc. v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984).

48. *See e.g., Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085 (1983).

49. Congress thus far has not elected to do so. *California v. United States*, 438 U.S. 645 (1978).

50. *Arizona v. California*, 373 U.S. 546 (1963).

51. *See C. MEYERS, A.D. TARLOCK, J. CORBRIDGE & D. GETCHES, WATER RESOURCE MANAGEMENT* 921-48 (1988).

reserved water rights in such a way that they can be integrated into state water law. Flow releases potentially required under the Endangered Species Act, however, lack any of the limiting characteristics of reserved rights such as a priority date or a minimum "duty" of water. Protection of an endangered species is conclusively presumed a more "beneficial use" than all other uses. Secondly, these new proprietary rights were not fully anticipated when Congress enacted the regulatory legislation, and legislative efforts to integrate these rights into state water law have so far been extremely limited and ineffective.

Thus states are being challenged to integrate these new congressionally created constraints on water use through more aggressive planning and regulatory actions at the state level. Another example is the stream flow requirements under the Federal Water Power Act of 1920.<sup>52</sup> This act allows the Federal Energy Regulatory Commission to impose flow release conditions on its licensees and thus creates regulatory property rights.

### ECONOMIC PRESSURES FOR REALLOCATION

Although the major use of water in the West is for irrigated agriculture, the value of this use is declining. Urban and industrial uses are increasing and creating strong pressures for the reallocation of water. Water law was designed to allow private transferrable rights to be acquired, but the vision of an irrigated garden West, shared by the proponents of the irrigation movement, has at times led to a system that binds water to the land in a number of direct and indirect ways.<sup>53</sup> These restrictions make it difficult to transfer water to new uses. Water transfers have occurred where the price was right, but there are mounting pressures to increase the marketability of water rights.

Making water rights marketable is defined by some as a form of conservation. Thus the concept of conservation is being transformed from one which simply meant a reduction in the quantities of water consumed to one which includes concepts of economic efficiency. This "new" meaning of conservation, defining it in terms of economic efficiency, has created confusion among both water lawyers and economists. Sometimes hydrologic and economic efficiency are consistent, but often they are not. Conservation measures can be technology-forcing irrigation requirements or they can be economic incentives to encourage transfers. For example, agricultural users might be encouraged to save water, and the "saved" water would be sold out of existing priority schedules and the saver could be given clear title. Under this example, the farmer continues to farm

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52. Federal Power Act, 16 U.S.C. § 821 (1982).

53. See Tarlock, *The Changing Meaning of Water Conservation in the West*, 66 NEB. L. REV. 145 (1987).

and the higher valued uses get the "saved" water. However, as "true" conservation becomes more and more equated with economic efficiency, the rationale for maintaining much of the infrastructure of western water allocation falls.

Economists and conservationists argue that water for agriculture and other uses has been heavily subsidized by federal and state governments and that economic conservation suggests these subsidies should end. An analogy is made to marginal cost pricing. Marginal cost pricing, they argue, would in many cases raise the cost of water and create market incentives for conservation.<sup>54</sup> Economic efficiency is often preserved at the expense of equity goals.<sup>55</sup>

Pure economic efficiency arguments are often inadequate when cultural and social values are involved. Pure economic efficiency might suggest that all buildings should be painted the same color and built in the same style, and that all Indian reservations should be eliminated along with economically inefficient rural farming communities. While a society fashioned solely by economists might be very efficient, it is unlikely that one would choose to live there. On the other hand, a society built on an agricultural economy with a negative cost/benefit ratio would not long feed its citizens.

### STATE RESPONSES

The new challenges discussed in this introduction are forcing states to make hard choices about the future of water allocation. Arizona has already faced these choices and made the decision to phase out substantial amounts of irrigated agriculture supported by groundwater mining, and to shift this water to municipal and industrial uses in the state's metropolitan areas. Other states such as Montana and New Mexico have begun an active and intense planning process to face the future. States have the discretion within the limits of federal law to either encourage the market forces or to try to retard them in the name of preserving "traditional" social and economic patterns. Irrespective of state goals on these issues, increased reliance on (1) state and regional water planning, (2) a permit process for screening and conditioning new hybrid water rights, and (3) non-regulatory market options, will undoubtedly be necessary.

States have long had planning programs, but the purpose was primarily to determine how much water was available for appropriation and what storage and distribution projects should be built to augment existing supplies. State "plans" generally formed the basis for federally funded flood

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54. Z. WILEY, *ECONOMIC DEVELOPMENT AND ENVIRONMENTAL QUALITY IN CALIFORNIA'S WATER SYSTEM* (1985).

55. *Id.* note 52.

control and reclamation programs. The withdrawal of federal largess, the environmental movement, external and internal judicial threats, the pressures for market allocation, and the increased economic importance of recreation and other non-consumptive uses dictate that state and regional water planning be broadened in scope. Options that were not seriously considered until recently must now be explored. Once states begin to make important planning choices, they must have the regulatory systems to implement them.

Some states have responded to this complexity by granting increased discretion to state water agencies. While state water agencies have traditionally functioned to protect existing right holders rather than as general regulators, public interest review of new applications to protect public use values is increasing.<sup>56</sup> Whether these traditional agencies have the "political will" and expertise to make these new kinds of discretionary decisions is problematic. Some argue that granting broad discretion to the agencies thrusts water allocations squarely into the arena of political interest groups. They assert that if one liked the "public welfare" interpretations coming out of decisions allocating liquor licenses and determining zoning, one will love the future local decisions determining the highest public welfare value for the use of water.

The non-regulatory option most often discussed is water marketing. While at the intrastate level it has demonstrated clear promise, some argue that it fails to adequately consider nonmarket values in water. At the interstate level, the issue is more complex. States have long claimed that they owned the waters within their boundaries in trust for the people. However, most states have used ownership only to regulate the acquisition of private rights, which as *Sporhase* teaches, is not, in fact, state ownership. Some states, however, such as California, Montana, and New Mexico have entered or seek to enter the market as participants. States would acquire rights and sell the water to users or distributors. State interest in water marketing has been stimulated by the Supreme Court's market participation doctrine,<sup>57</sup> which suggests that states could maintain allocative primacy even after *Sporhase* under limited circumstances. The Court has distinguished between state regulation and market participation for the purpose of negative or dormant commerce clause scrutiny.<sup>58</sup> Market participation is immune from dormant commerce clause scrutiny because

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56. See Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*, 19 ARIZ. STATE L. REV. 681 (1987) for the history and recent applications of public interest review.

57. *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

58. *Compare Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) with *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984). See Rodgers, *The Limits of State Activity in the Interstate Water Market*, 21 LAND AND WATER L. REV. 357 (1986).



the state acts as a sovereign in allocation of its wealth. State water marketing programs have not been tested by this standard, but states such as Montana and South Dakota have explored or are now exploring water marketing as a means of allocating their waters to preferred uses. The major barriers to water marketing may be economic rather than legal. The economic feasibility of state marketing is under study but has yet to be demonstrated, especially in the current energy bust. Should the demand increase, there is no reason to assume that a state should be any less able to participate in the market than a private party.

States are also moving to encourage private water transfers by making water rights more exclusive and freely alienable. Appropriative rights have generally been transferable, but substantial barriers and disincentives exist. To promote an irrigation economy, third party junior right holders must be protected in any transfer. There are mounting pressures for states to examine their water laws and find ways to promote more efficient transfers of water. The merits of maintaining existing patterns of relative stability versus promotion of free transfer will continue to be the subject of intense debate.

### CONCLUSION

Water policy becomes more complex as the range of possible uses of this scarce resource expands and as supplies decrease. Water allocation policy is increasingly driven by the twin dynamics of 1) technological and economic efficiency and 2) the political desire to protect other values in water, such as rural cultures and instream flows associated with fish and wildlife. State primacy now faces new challenges presented by these forces. States must decide when the market should be allowed to allocate water free of traditional protection for irrigation over other uses, and when increased regulation and intervention in the market may be in a state's long term interest. The papers in this volume address these challenges to state allocation primacy and some of the responses to them.