

United States Water Law & National Parks

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Whiskey is for Drinkin'; Water is for Fightin'

- *Power v. People*: 1892 Colorado case where dispute between 2 irrigators led to one killing the other. Defendant claimed justifiable homicide.
 - What's interesting is not whether the court properly decided the case (it did) but that this defense would be thought workable and that it merited adjudication.

U.S. WATER LAW

- Born of English common law in the east and mining doctrine in the west
- Primarily state law (w/some important federal law as well)

Eastern U.S. Water Law

- Riparian Rights – Surface water available to landowners whose property borders a watercourse.
- Based on notion of abundant, readily available water – everybody is entitled to all of the water (“natural flow”).
- Evolved over time to “reasonable use,” which permits off-tract use.



Rondout Reservoir in Upstate New York, United States, providing water to the region surrounding New York City.

Progression to Permitting

- Droughts, increasing population and industrial uses make pure riparianism increasingly unworkable.
- Shift to permitting and comprehensive managerial regime (“Regulated Riparianism”)
- Sets out terms of use and regulates users.
- Based on principle of reasonable use (the “sandbox principle”).

Western U.S. Water Law



The Glen Canyon Dam on the Colorado River in Arizona, United States.

- Prior Appropriation (in many states; hybrid versions in others)
- Limited Water and Lots of Public Land
- Miners need water and do not own land → Playground Principle (“It’s mine; I got it first!”)
- “First in Time; First in Right – First to divert water from a watercourse and make “beneficial use” of it has superior right as against all future diverters.
- “Beneficial” is term of art. Refers to permissibility of use and also that it not be wasteful.

Progression to Administrative State

- Over time, Prior Appropriation becomes state administered. Permits govern water rights
- Ecological concerns enter the fray (too late) raising issue of Instream Flow, non-diversionary uses, including protected areas.

Relevant Federal Law

- Reserved Rights (*Winters Doctrine*): Federal land reserved for specific use automatically reserves sufficient water for that use (but *only for that use*) – Originally thought to apply only to Indian Reservations but expanded to cover national parks as well – but only the *minimum necessary for the principal use envisioned at the time of the parks' creation*
- Endangered Species Act – Law protecting species and habitat trumps state law.
- Wild & Scenic Rivers Act
- Interstate Compacts – Once enacted become federal law.
- McCarran Amendment (1952) requires federal rights to be adjudicated in state courts. Reserved rights become what the states say they are...

An Unworkable Mix for Parks

- Reserved Rights have never been adjudicated in the East.
- Regulated Riparianism requires water be shared “reasonably” but as number of users increase or water supplies dwindle, allocations to parks are vulnerable.
- Prior Appropriation allocates water rights based on seniority rather than need or efficiency of use.
- Reserved rights date from time of parks’ creation and vulnerable to states’ interpretation
- No precautionary or preventive principle w/in the laws.
- And now... Climate Change

A Way Forward?

- Not so much...
- In the East – negotiated agreements, assertion of reserved rights, flexible management strategies
- In the West – all of the above and maybe eminent domain.
- But all the rigid laws, growing populations and increasing hydrological uncertainty mean...
- The scale of the problem is not even yet understood.



Thank you!

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