

WATER RIGHTS

Overview:

Riparian rights- similarity to England

Appropriative rights-West- last half of 19th century system

- first come, first served

- use it or lose it

Historically- oriented towards flow, rather than volume

Allows selling out a water basin, such as Owens Valley or Mono Lake, while impossible under riparian.

Natural water is not being “beneficially used”- similar to old notions of “conservation” and “reclamation”.

Riparian-everyone cuts back; Appropriative rights-earlier rights in time get all that they need

Examples at start of chapter

- surplus crops- San Joaquin as natural desert, but growing cotton, which is rainy area crop and in horrendous international surplus. Subsidize to growing the crop, on top of the 0.01% of cost of water from federal system

- water not metered in Sacto, Fresno, Reno, & Denver, but immensely expensive dams provide the water

- Inefficiency of water use- not addressed since Reisner wrote in 1989.

- contrast in role of Clean Water Act, while little federal involvement in state water allocation law

Bottom line: little incentive to conserve water

Reisner likes “water marketing”- get efficiency by allowing the buying and selling of water.

- what can be forgotten? Can nature bid for water? Should big companies be able to buy it and prevent people from adequate drinking water? Markets and equity do not converge.

Too much clout in existing users- government does not have guts to charge fair market value for water that it owns.

1/3 of western water from Bureau of Reclamation.

Western water law- state owns water

-private parties get “right to use”; this allows state government to take back as needed

Example are “excessive appropriations”- state taking back when using water just to avoid losing it.

Groundwater and surface water not legally connected in water rights law

-general groundwater rule- only Texas continues to use; similar to mining law, you own everything you find under your land
-subsequent modification every other western state to require “reasonable use”; in CA, SWRCB decides what is reasonable
-well drilling permits

Instream flow protection- notion that natural values must be protected, and some minimum stream flow must be maintained.
=CA relies on low flow controls

Denial of private parties holding instream flow rights; stops environmental groups from buying water to improve “natural” flow.

CA Public Trust Doctrine

Any resource owned by a state or local entity must be used to benefit all citizens of CA; not just those in the jurisdiction. E.g., LA and Mono Lake.
Independent of water rights!

“Salvaged” water- slowed down by interpretation of “excessive use”.
Only 3 of 17 states have changed; fortunately, CA is one of them.

Interstate stream flow- subject to interstate compacts. Must be between states, and approved by Congress.
-prohibition of export of a state’s water is violation of Commerce Clause

Federal “ownership”- excess flow in stream is captured by a dam is broad theory; it is not more specifically defined.
-same is true for State of CA dams and water supply system
-interestingly, both federal and state ownership dumps appropriative; instead, drought causes all users to be scaled back.

Federal ownership subject to State appropriation requirements; technically the rule, but ignored until 1978

-USSC supported CA in New Melones; 25 requirements, including no impoundment until user found

Remains the rule, but dividing line between trade and state ownership is largely unexplored legal ground

Each dam is a separate statute; they may include provisions that interfere with the general rule.

Native American water rights- potential to explode in future

-not subject to state law; “grandfathering” to time reservation established; not subject to “use it or lose it”