

OTHER INNOVATIONS IN WESTERN WATER LAW

Arizona's response to problems associated with the groundwater overdraft signals significant development in western water law. The allocation and use of groundwater is now governed by Arizona's Ground Water Code, which was adopted in 1980 and has been amended as necessary *384 since.¹⁷⁸ The allocation of the state's groundwater differs from area to area within the state. The groundwater code designates certain areas as Irrigation Non-Expansion Areas (INAs) or Active Management Areas (AMAs). In areas not so designated, a person may appropriate groundwater for reasonable and beneficial use, generally without restriction. Within INAs and AMAs, special use restrictions apply. In INAs or AMAs acres that were not irrigated at any time during a five year period before the designation of the INA or AMA may not be irrigated. In AMAs the groundwater code establishes four types of groundwater rights: grandfathered rights; service area rights; withdrawal permit rights; and exempt withdrawals. A person may not withdraw groundwater for use within an AMA without obtaining one of these rights.

In addition to the restrictions on groundwater use and withdrawal, the Director of the Department of Water Resources is required to adopt a management plan for each AMA for each of five management periods between 1980 and 2025. The management plans are intended to achieve goals established by statute. The goal for the three urban AMAs (Phoenix, Tucson, and Prescott) is safe-yield no later than the year 2025. This means that by 2025, groundwater withdrawals may not exceed the amount of natural and artificial groundwater recharge. In the Penal AMA, which has a primarily agricultural economy, the goal is to preserve that economy as long as feasible consistent with the need to preserve water supplies for future non-agricultural uses. The statutory goals are to be achieved by a combination of mandatory conservation programs, augmentation, and, if necessary, purchase and retirement of grandfathered rights.

Another major management tool is the prohibition of new residential developments in AMAs in areas without an assured water supply. Before anyone may offer land in an AMA for sale or lease for residential development, the offeror must show that the land has an assured water supply. "Assured supply" is defined as a continuously and legally available supply of sufficient quantity and quality to meet the needs of the development for 100 years. Additionally, the proposed water use must be consistent with the management plan for the AMA in which the development is located, and with the achievement of the AMA goals. The recognition of artificial groundwater recharge as a beneficial use of surface water is another recent development in Arizona groundwater law.¹⁷⁹

California has enacted legislation allowing it to respond to infrequent emergency situations involving water use.¹⁸⁰ It authorizes the issuance of temporary water permits to divert and use water under urgent circumstances.¹⁸¹ *385 The state has also enacted legislation to encourage voluntary transfer of water rights, including statutes suspending operation of forfeiture laws where water is conserved by implementing water conservation measures or substituting use of reclaimed water.¹⁸² California has also acted to expand statutory area-of-origin protections.¹⁸³

Colorado has expanded the state role in administration of appropriative water rights, with an increased recognition of the state engineer's discretion to make rules and administer water. Instead of being guided solely by the strict priority system, the state engineer can make rules to maximize the use of water.¹⁸⁴ This principle has been expanded and clarified to indicate that “maximum utilization” does not require “a single-minded endeavor to squeeze every drop of water” from a water source, but rather to make “optimum use” of the resource.¹⁸⁵ The Colorado Supreme Court further stated that “(o)ptimum use can only be achieved with proper regard for all significant factors, including environmental and economic concerns.”¹⁸⁶ The state engineer has adopted only a few regulations so far. However, the Supreme Court has invited the state engineer to make more extensive regulations in the public interest.¹⁸⁷

Another important development in Colorado is stricter enforcement of due diligence requirements on conditional water right holders. Conditional rights, rights established by declaring one's intent to divert water without making a diversion, have sometimes been maintained for many years with only minimal physical effort or investment. Courts are now beginning to impose stricter requirements of due diligence on conditional right holders¹⁸⁸ and are scrutinizing such rights to ensure that there is a genuine intent to appropriate, not merely to speculate.¹⁸⁹ Additionally, Colorado law¹⁹⁰ now requires proof that the project will be completed with diligence before a decree for a conditional right can be issued.¹⁹¹ Imposing stricter requirements on conditional rights makes more water available for current demands where there is present economic use, or need for water to remain perpetually in the stream for public benefit.

A SURVEY OF THE EVOLUTION OF WESTERN WATER LAW IN RESPONSE TO CHANGING ECONOMIC AND PUBLIC INTEREST DEMANDS, 29 NRJ 347Norman K. Johnson , Charles T. DuMars Natural Resources Journal

Clodfelter v. Reynolds, Supreme Court of New Mexico .January 4, 196168 N.M. 61358 P.2d 6261961 -NMSC- 003Mr.

Justice Phillips, a distinguished member of the New Mexico Bar, who later became Chief Judge of the Tenth United States Circuit Court of Appeals, speaking for the Tenth Circuit Court, after setting out that New Mexico and Colorado have the same basic water laws, construed our Sections 151–101 to 151–1788 N.M.S.A., 1929 Comp., in *Lindsey v. McClure*, 10 Cir., 1943, 136 F.2d 65, 69, and stated:

‘In 1907, New Mexico adopted a comprehensive statute on the law of waters. Ch. 49, N.M.S.L.1907, §§ 151–101 to 151–178, N.M.S.A.1929. The statute codifies the Colorado doctrine, prescribes the procedure for effecting appropriations through applications for permits made to and granted by the state engineer, and provides for the issuance by the state enineer, upon the completion of the physical works and the application of the water to beneficial use, of a license to appropriate water.

‘Section 45 of ch. 49, supra, as amended by § 18, ch. 126, N.M.S. L.1941, provides that an appropriator of water may, with the approval of the state engineer, change the place of diversion, storage, or use where such changes can be made without detriment to existing rights.’

The court then stated the principle as follows:

‘However, a water right is a property right and inherent therein is the right to change the place of diversion, storage, or use of the water if the rights of other water users will not be injured thereby. Hence, the statutes above referred to are a recognition rather than a grant of the right **630 to make such changes and they merely lay down a procedure whereby it may be determined whether such changes can be effected without injuriously affecting the rights of other users.’

{16} In Colorado, through a long line of decisions, it is definitely established that the right to change the point of diversion, or place of use, of water which has been obtained as a result of an appropriation, is one of the incidents of ownership, and existed and was exercised in Colorado long before any remedial statute was enacted. *Lower Latham Ditch Co. v. Bijou Irr. Co.*, 41 Colo. 212, 93 P. 483, 484.

{17} We hold against appellants under their point I.

JURISDICTION:

New Mexico Products Co. v. New Mexico Power Co., 42 N.M. 31177 P.2d 634, 1937-NMSC-048 (Commenting that the jurisdiction of the state engineer did not extend to “pueblo rights” existing prior to the enactment of the Water Code); Compare to State ex rel. Martinez v. City of Las Vegas, 135 N.M. 37589 P.3d 472004-NMSC-009 (New Mexico has protected water rights in existence at the time of the Treaty of Guadalupe and before the enactment of a comprehensive water code in 1907. However, this protection has always been circumscribed by the principle of beneficial use).

COLO:

Allen v. State, Supreme Court of Colorado. January 22, 2019, 433 P.3d 581, 2019 CO 6.
Actions to determine the use of water belong exclusively in the water courts (include

applications for initial decrees and for decrees approving augmentation plans, applications for changes of decreed water rights, and matters concerning the scope of previously decreed water rights and the abandonment, laches, and adverse possession of water rights.) ... Actions to determine legal ownership of a water right fall within the general jurisdiction of district courts (include quiet title proceedings, real estate matters, dissolution proceedings, and other civil actions in the district courts.).

Water courts have exclusive jurisdiction over “water matters” within their respective divisions. § 37-92-203(1), C.R.S. (2018). what constitutes a water matter turns on the distinction between the legal right to use of water (acquired by appropriation), and the ownership of a water right.” *Humphrey v. Sw. Dev. Co.*, 734 P.2d 637, 640 (Colo. 1987).

The water court process involves a division engineer's consultation report, a referee's investigation, discovery, and a trial regarding contested issues of fact involving claimed water use rights. Abandonment, laches, and adverse possession of water rights claims are within the jurisdiction of the water court, as they involve issues of the right to use the public's water resource. In *re Tonko*, Supreme Court of Colorado, En Banc, March 19, 2007, 154 P.3d 397. [that’s not what this case stands for]. See *Archuleta v. Gomez*, Colorado Court of Appeals, Div. II. May 4, 2006, 140 P.3d 281 (with regard to defendant's claim that plaintiff abandoned his water rights, that he should be estopped from enforcing them, and that the water rights should be granted to defendant based on adverse possession, the case involved both the enforcement of a water right and an assertion that the right to use the water should be terminated and awarded to another based on beneficial use of the water, and as a result, the case was within the exclusive jurisdiction of the water court). resolution of defendant owner's adverse possession claims, were ancillary to the use of his associated water rights, and therefore the ancillary issue was within the exclusive jurisdiction of the water court. The water court has exclusive jurisdiction to determine abandonment of water rights. ... The water court also has jurisdiction over ancillary issues that directly impact water rights, such as private contractual agreements affecting the use of water rights, *reversed on other grounds*, *Archuleta v. Gomez*, Supreme Court of Colorado, En Banc. January 20, 2009, 200 P.3d 333.

Maria E. Hohn, Colorado Water Court's Exclusive Jurisdiction For The Adverse Possession Of Water: *Archuleta v. Gomez*, 10 Univ. Den. Water L.Rev. 135 (2006).

In 1969 the General Assembly of Colorado adopted Senate Bill 81 amending C.R.S.1963, 148—21—1 Et seq. which consolidates the 70 water districts of the state into seven divisions, each of which embraces an entire river drainage *562 area within the state. *U. S. v. District Court In and For Eagle County*, Supreme Court of Colorado, En Banc. September 15, 1969, 169 Colo. 555, 458 P.2d 760

V Bar Ranch LLC v. Cotton, Supreme Court of Colorado, En Banc. June 21, 2010, 233 P.3d 1200. the Administrative Procedures Act (APA) serves as a gap-filler, and its provisions apply to agency actions unless they conflict with a specific provision of the agency's statute or another statutory provision preempts the provisions of the APA. ... APA) governed proceedings on petitions to revoke or modify water well permits before the State Engineer, though generally all disputes involving “water matters” were within the exclusive jurisdiction of the water court (the General Assembly in the Water Rights Determination and Adjudication Act delegated authority over certain “water matters” to the State Engineer, the State Engineer was specifically authorized to issue well permits if he or she found that there was unappropriated water available for withdrawal by the proposed well and that the vested water rights of others would not be materially injured, and such duty was broad enough to include the duty to investigate whether a well permit was improperly issued and should be revoked or modified.)

Southern Ute Indian Tribe v. King Consolidated Ditch Co., Supreme Court of Colorado, En Banc. March 14, 2011, 250 P.3d 1226

Justice Rice dissenting: Water Right Determination and Administration Act of 1969, *1241 §§ 37–92–101 to –602, C.R.S. (2010) (“WRDAA”), the General Assembly sought to create a workable mechanism for adjudicating water rights in Colorado by relaxing the Colorado Rules of Civil Procedure for a limited subset of water matters. [While the Colorado Rules of Civil Procedure generally apply to the water courts, the modified resume-notice procedure designed to alert all water users on the stream of the application's pendency while sparing the applicant the difficulty of identifying, joining, and serving everyone affected by the applied-for ruling, conflates the concepts of jurisdiction and procedural authority for proper due process].

Kobobel v. State, Dept. of Natural Resources, Colorado Court of Appeals, Div. I. March 19, 2009, 215 P.3d 1218 Water courts retain exclusive jurisdiction over all water matters.” In re Tonko, 154 P.3d 397, 404 (Colo.2007); see § 37–92–203(1), C.R.S.2008. “Water matters involve determinations regarding the right to use water, the qualification of a water right, or a change in a previously decreed water right.” Tonko, 154 P.3d at 404. “[R]esolution of what constitutes a water matter turns on the distinction between the legal right to use of water (acquired by appropriation), and the ownership of a water right.” , the ownership of the water rights is not in question. Plaintiffs' claim involves the right to use water, not the ownership of it, and is therefore a water matter. Cf. Humphrey, 734 P.2d at 641 (“The practice in this state has long been that district courts have power to adjudicate disputes over ownership of water rights.”).

CALIFORNIA:

Environmental Law Foundation v. State Water Resources Control Bd., Court of Appeal, Third District, California. August 29, 2018, 26 Cal.App.5th 844, 237 Cal.Rptr.3d 393, 18 Cal. Daily Op. Serv. 8793, 2018 Daily Journal D.A.R. 8805

[863] It is true that a cornerstone of SGMA [Sustainable Groundwater Management Act; (Wat. Code, § 10720 et seq.)] is a transfer of responsibility for groundwater management from the state to local jurisdictions when possible. The Legislature intended to “manage groundwater basins through the actions of local governmental agencies to the greatest extent feasible, while minimizing state intervention to only when necessary to ensure that local agencies manage groundwater in a sustainable manner.” (§ 10720.1, subd. (h).)

Did the Legislature intend to occupy the entire field of groundwater management and thereby abolish all fiduciary duties to consider potential adverse impacts on the Scott River, a navigable waterway and public trust resource?

[866] We reject, therefore, the County’s position that because SGMA is comprehensive it occupies the field and supplants the common law. But even if the legislation was deemed comprehensive, National Audubon teaches the two systems can live in harmony. If the expansive and historically rooted appropriative rights system in California did not subsume or eliminate the public trust doctrine in the state, then certainly SGMA, a more narrowly tailored piece of legislation, can also accommodate the perpetuation of the public trust doctrine.

there was no incongruity between the legislation and the common law. ...The County makes a valiant effort to demonstrate that the public trust doctrine does not apply to groundwater under the common law and, even if it did, SGMA abolishes any fiduciary duties the Board or the County have to take the public trust interests into account when making decisions involving groundwater that will adversely impact navigable waterways. That effort fails.

[While the legislature may provide an agency with jurisdiction to act over water, the legislation will not supplant common law inherent in the State’s body of water law]

Northern California Water Assn. v. State Water Resources Control Bd., Court of Appeal, Third District, California. March 2, 2018, 20 Cal.App.5th 1204, 230 Cal.Rptr.3d 142, 18 Cal. Daily Op. Serv. 2207, 2018 Daily Journal D.A.R. 2111

For purposes of the rule that the Water Resources Control Board regulates all appropriative water rights acquired since 1914, an “appropriative right” is the right to take water from a watercourse that does not run adjacent to a landowner’s property; the Board does not have jurisdiction to regulate riparian, pueblo, and pre-1914 appropriative rights. Cal. Water Code § 1525.

[California grants extensive legislative jurisdiction to its water agencies for most post-1914 water rights, but the courts retain jurisdiction as to water law rights set by common law].

Central and West Basin Water Replenishment District v. Southern California Water Co., Court of Appeal, Second District, Division 8. June 12, 2003, 109 Cal.App.4th 891, 135 Cal.Rptr.2d 486

Courts regularly affirm the expansive retention of jurisdiction in cases involving water rights. ... “The retention of jurisdiction to meet future problems is regarded as an appropriate exercise of equitable jurisdiction in litigation over water rights, particularly when the adjustment of substantial public interests is involved.”

[This is especially true where future problems regarding water rights involve substantial public interests].

Hillside Memorial Park & Mortuary v. Golden State Water Co., Court of Appeal, Second District, Division 5, California. September 27, 2011, 205 Cal.App.4th 534, 131 Cal.Rptr.3d 146

A court has no power to act in the absence of subject matter jurisdiction. ... The 1961 judgment follows the established practice of expressly granting the trial court continuing jurisdiction to address future issues involving water rights.

El Dorado Irrigation Dist. v. State Water Resources Control Bd., Court of Appeal, Third District, California. September 8, 2006, 142 Cal.App.4th 937, 48 Cal.Rptr.3d 468 California's critical water problem is not a lack of water but uneven distribution of water resources. The state is endowed with flowing rivers, countless lakes and streams and abundant winter rains and snowfall. But while over 70 percent of the stream flow lies north of Sacramento, nearly 80 percent of the demand for water supplies originates in the southern regions of the state.” Citing to United States v. State Water Resources Control Bd. (1986) 182 Cal.App.3d 82, 98, 227 Cal.Rptr. 161.

“[I]n undertaking to allocate water rights, the Board performs an adjudicatory function.”

This leaves the trial court no limited trial de novo is authorized by law, ... the trial court in an essentially appellate function in that only errors of law appearing on the administrative record are subject to review. ... Of course, questions of law are subject to de novo review.

[the jurisdiction granted to the Water Board, extends to the authority granted to it under the legislative enactment of the Water Code]. the Legislature has passed a series of acts which presently comprise the Water Code. This code creates the Water Rights Board, and hence we

must look to it in order to determine the scope of the jurisdiction granted to the board. See for example, *Modesto Properties Co. v. State Water Rights Bd.*, District Court of Appeal, Third District, California. April 18, 1960, 179 Cal.App.2d 856, 4 Cal.Rptr. 226

NEW MEXICO:

New Mexico being in the arid region, the early settlements were established along the banks of perennial rivers, or in the mountain valleys where water from springs and creeks was reasonably certain to be available for irrigation at the needed times. *Snow v. Abalos*, Supreme Court of New Mexico. April 20, 1914, 18 N.M. 681, 140 P. 1044, 1914-NMSC-022.