

Groundwater Law and Administration: From Conflict to Reform

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Groundwater Rights Generally

- Groundwater is not subject to a single common legal doctrine in West like prior appropriation
- Rights to groundwater may be based on:
 - overlying land ownership
 - established prior uses
 - concept of water as shared public resource
- Common law and legislation usually reflect more than a single theory of rights

Groundwater Legal Regimes

- Land ownership
 - Absolute ownership – unlimited right to pump under land owned
 - Correlative rights – reasonable share of total supply based on acreage
- Prior use / balancing of interests
 - Protect senior users
 - But allow new economic uses
 - Encourage efficiency
 - Assure sustained supply
- Public resource subject to management through state permit systems
 - Well permits
 - Water right permits

Conjunctive Management of Groundwater and Surface Water

- Defined as joint use or management of groundwater and surface water sources, i.e., a single resource
- States are increasingly managing connected groundwater and surface water as a single system
- State administrators have duty to enforce priorities, and deny groundwater permit if interference with vested surface rights
- But administrative rules may still require efficient use, consistent with beneficial use doctrine

Recent Developments in ID & CO: Conflict, Administration, Litigation, Legislation and Policy

- Two states grappling with development and implementation of conjunctive management are Idaho and Colorado
- On major river systems in these states, conflict between groundwater and surface water users has led to development, refinement and reform of conjunctive management principles through:
 - Administration of water rights
 - Litigation between users and with state
 - Legislation
 - Policy formulation

Idaho: Conjunctive Management of the Snake River & Eastern Snake Plain Aquifer (ESPA)

- Conjunctive management dictated by physical setting and historic development in Snake River Basin
 - Acknowledgement that Snake River and ESPA are interconnected
 - Prior development of surface water in lower basin / subsequent use of groundwater in upper basin
 - Thousand Springs hydrology, and the “zero flow” or “two rivers” policy
- Litigation compels conjunctive use & administration
 - Musser case found State duty to administer conjunctively
 - State developed conjunctive management rules (CMRs)
 - American Falls case found CMRs facially constitutional
 - But litigation continues over CMRs as applied, including issues such as:
 - Limiting seniors to proven beneficial use, which could be less than decree
 - Limiting senior storage entitlement to “reasonable carryover storage”

Swan Falls Litigation Between Idaho Power Co. (IPC) & State of Idaho

- Historical development
 - Idaho Power Co. (IPC) established rights to surface water on mainstem lower Snake River in early 1900s
 - Groundwater development upstream occurred later
 - But allegations that IPC subordinated to upstream uses
- Litigation led to Swan Falls Agreement, establishing minimum flows while subordinating to other uses
- SRBA renewed litigation over interpretation of Agreement, and relation to conjunctive management

Swan Falls Litigation (cont'd)

- The Role of Recharge
 - Improves water levels in both aquifer and river
 - Statutory authorization of recharge water rights, with protection of existing uses
 - Litigation re whether Swan Falls Agreement subordinated hydropower to recharge
- Settlement between State & IPC (statutory component)
 - Consolidates existing state authority re recharge
 - Clarifies SF Agreement doesn't preclude recharge
 - IWRB approval of recharge beyond 10,000 afa, and opportunity for input of effects of recharge

Idaho Adoption of Comprehensive Aquifer Management Plan (CAMP)

- Continuing conflicts between groundwater and surface water users led to development of CAMP by the Idaho Water Resource Board, and recent adoption by statute
- CAMP establishes a long-term program for managing water supply and demand in the ESPA
- Goal is to incrementally achieve net ESPA water budget change of 600,000 afa by 2030 through:
 - Aquifer recharge
 - Ground to surface water conversions
 - Demand reduction strategies
- Actions designed to stabilize and improve spring flows, aquifer levels and river reaches, i.e., conjunctive management policy

Colorado: Conjunctive Management of Groundwater Produced by Coalbed Methane Development

- Coalbed methane wells and water
 - About 5,000 coalbed methane wells operate in Colorado
 - Coalbed methane capture made possible by presence and controlled extraction of groundwater
 - San Juan Basin wells remove nearly a billion gallons of water per year
- Colorado conjunctively manages tributary groundwater with surface water under its prior appropriation doctrine
- Rancher relying on seeps and springs for irrigation sued State Engineer claiming failure to regulate wells under state water law
- Sought determination that withdrawal of groundwater during CBM process constitutes a “beneficial use” giving rise to appropriative water rights subject to administration and permitting by State Engineer

Vance v. Wolfe

(Colo. Sup. Ct. 07SA293)

- WD7 water court had held that CBM production constitutes an appropriation for a “beneficial use”
 - State Engineer could not allow out-of-priority diversions for CBM production without a well permit
 - Augmentation plan also necessary to replace out-of-priority depletions
- Supreme Court affirmed, finding a water permit was necessary for CBM gas drilling

Vance v. Wolfe

- 1969 Act in CRS 37-92-103(4) defines “beneficial use” as “the *use* of that amount of water that is reasonable and appropriate under reasonably efficient practices to *accomplish* without waste the *purpose* for which the appropriation is lawfully made.”
- Extraction of water for CBM process is “beneficial use”
 - “uses” water (extracting it from ground and storing in tanks)
 - to “accomplish” a particular “purpose” (release of methane gas)
- Rejected argument that extraction of water is merely a “nuisance” rather than a “beneficial use”
 - Integral part of CBM process itself
 - That water may be a nuisance after extraction doesn’t change result

Legislation – House Bill 1303

- Gives State Engineer more authority to determine which oil and gas wells are “tributary” to nearby streams, and thus subject to conjunctive administration
 - Need not go to water court to get determination a well is tributary
- Delays requirements for oil and gas companies to get rulings and permits from State Engineer’s office until March 31, 2010
- For wells deemed “tributary,” companies have until 2013 to file an augmentation plan for replacement of water pumped from wells

Conclusions & Observations

- Growing understanding of interconnectedness of groundwater and surface water sources
- Unique physical situations lead to targeted solutions, and incremental development of conjunctive management legal principles and authorities
- Conflict between groundwater and surface water users has led to “reform” of conjunctive management principles through
 - Court decisions
 - Settlements
 - Legislation
 - Policy