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Water Appropriation -- Constitutionality of Water Appropriation Statute Imposed on a Riparian Statute in North Dakota - Baeth v. Hoisveen

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CASE NOTES

WATER APPROPRIATION—Constitutionality of Water Appropriation Statute Imposed upon a Riparian Statute in North Datkota. Baeth v. Hoisveen, 157 N.W.2d 728 (1968).

In an attempt to utilize the water underlying his land, the plaintiff, Baeth, in 1961, expended in excess of $10,000 for a well and irrigation equipment to withdraw the water. Later, in that same year, plaintiff was notified by the State Engineer that the water did not belong to him but rather was owned by the State of North Dakota, and that plaintiff could not use the water for irrigation until he obtained a permit from the water commission. On December 1, 1961, plaintiff filed for a permit to appropriate 960 acre-feet annually but at the hearing for the issuance of said permit, the State Engineer found that one Adams, a neighbor of the plaintiff, had filed a permit on June 15, 1961, to appropriate the same water. As a result of this hearing, Adams, the senior appropriator, was given a permit for the full amount requested for beneficial use, and the plaintiff was given a diminutive permit for the beneficial use of approximately 1/3 of the amount he requested. Thereon, plaintiff brought this action to test the constitutionality of the water appropriation statute.

From its territorial days until 1963, the State of North Dakota had a statutory riparian doctrine[1] which stated in part that the owner of land overlying subterranean water not forming a definite stream was entitled to the use of that water. The state legislature, however, in 1955, enacted a water appropriations statute[2] with proper administrative controls,[3] which dedicated all waters of the state, including subterranean streams, to the public generally and subject to appropriation for beneficial use. It was alleged by the plaintiff that prior to the enactment of the water appropriations statute, he had acquired a "vested right"[4] in this water by virtue of the recently repealed riparian statute and that any attempt to deprive him of this right would violate the fourteenth amendment of the United States Constitution. The court did not accept this contention and held as follows: 1) That the riparian

1. N.D. CENT. CODE § 47-01-13 (1961) (repealed 1963).
2. N.D. CENT. CODE § 61-01-01 (1961).
3. N.D. CENT. CODE ch. 61-04 (1961).
4. Baeth v. Hoisveen, 157 N.W.2d 728 (N.D. 1968).

statute did not vest any rights in a landowner in the subterranean waters under his land, unless he had applied them to a beneficial use prior to the enactment of the water appropriations statute; 2) That the dedication of all waters in the state to the public was a valid exercise of the police power so long as it did not expropriate vested rights.[5]

The holding in *Baeth* represents the majority rule on the constitutionality of a water appropriation statute imposed upon a previously-riparian statute governing the ground water of a state.[6] The *Baeth* court cited these cases with approval.[7]

Notwithstanding its decision, the *Baeth* court, by way of a very strange and perplexing dicta, indicates its adamant disapproval of the application of statutory water appropriation law by the State Engineer; even though, as will be shown, the State Engineer correctly applied the law:

> In upholding the constitutionality of Section 61-01-01, North Dakota Century Code, we do not approve the procedure followed by the State Water Commission in the instant case, which resulted in granting to one of two landowners, who owned adjacent land and who made application at approximately the same time for beneficial use of water, the use of so much water that the other was in effect denied use of any water. The failure on the part of the State Water Commission to determine the actual amount of water available before granting the first neighbor's application resulted in a very disproportionate granting of water rights.[8]

The paradoxical effect of the dicta upon the decision becomes manifest, in the first instance, when analyzed in light of the certified question to the court, which asks whether 61-01-01 is constitutional *as applied* to require compliance to Chapter 61-04.[9] A brief examination of North Dakota law should make clear the fact that the State Engineer acted within the legislative mandates.

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5. *Id.*
6. Knight v. Grimes, 80 S.D. 517, 127 N.W.2d 708 (1964); Baumann v. Smrha, 145 F. Supp. 617 (D. Kan. 1956), *aff'd* 352 U.S. 863 (1956); Williams v. City of Wichita, 190 Kan. 317, 374 P.2d 578 (1962), *appeal dismissed*, 375 U.S. 7.
7. Baeth v. Hoisveen, 157 N.W.2d 728, 732 (N.D. 1968).
8. *Id.* at 733, 734.
9. *Id.* at 729.

Section 61-01-01[10] states, in part, that all underground waters of the state, "belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use shall be pursuant to the provisions of 61-04." When Chapter 61-04[11] is examined, it is found that "any person . . . intending to acquire the right to the beneficial use of any waters, before commencing any construction for such purpose, or before taking the same from any constructed works, *shall make an application to the State Engineer for a permit.*"[12] "[T]he application . . . upon being accepted, shall take priority as of the date of its original filing,"[13] and "priority in time shall give the better right."[14] Applying this law to the stipulated facts, it is readily found that the State Engineer correctly *applied* the law by giving Adams, who filed his application 6 months before Baeth, the priority date for the beneficial use of the water. To this point, then, the State Engineer has correctly applied the water law of North Dakota.

The dicta further manifests the *Baeth* court's disapproval of the State Engineer's actions because he failed to drill a test well "to determine the actual amount of water available before granting the first neighbor's application which resulted in a very *disproportionate* granting of water rights."[15] This same sort of discontent is further manifested in both the concurring opinion of Justice Knudsen and that of Chief Justice Teigen. The Chief Justice states that the actions of the State Engineer might well be declared unconstitutional, "because of a fixed and continuous policy of *unjust* and *discriminatory application* by the officials in charge of its *administration.*"[16] In analyzing the North Dakota law of water appropriation, it is difficult to see what possible bearing the omission of a test well for the Adams permit could have had upon the issuance of the Baeth permit. The measure of the water right is not equality; it is beneficial use.[17] All to which Baeth, the junior appropriator, would be entitled is the excess of water

10. N.D. CENT. CODE § 61-01-01 (1961).
11. N.D. CENT. CODE ch. 61-04 (1961).
12. N.D. CENT. CODE § 61-04-02 (1961).
13. N.D. CENT. CODE § 61-04-04 (1961).
14. N.D. CENT. CODE § 61-01-02 (1961).
15. Baeth v. Hoisveen, 157 N.W.2d 728, 734 (1968).
16. *Id.* at 734.
17. N.D. CENT. CODE § 61-01-02 (1961).

which Adams, the senior appropriator, did not appropriate to a beneficial use. The law of North Dakota does not guarantee an indiscriminate share of water to each applicant. The State Engineer is to determine, "whether there is unappropriated water available for the benefit of the applicant," after considering all the evidence in the case.[18] This statute makes it clear that the State Engineer could not proportion Adams' right for the sake of equality because Baeth's right began at the limit of the beneficial use of Adams' appropriation.

Ostensibly, the criticism of the court is of the course of action employed by the State Engineer, but a closer scrutiny will show that it is actually an attack upon the very essence of the water appropriation law; that is, that the first in time is also the first in right. The attack is not upon the action of the State Engineer, but rather upon the substance of the law of water appropriation in North Dakota.

The inevitable conclusion to be drawn from this incredibly inconsistent dicta is that the court either disapproves of the law of water appropriations or they just do not understand it. The one thing which the dicta does tend to indicate is the court's desire to adopt, contrary to the statute,[19] and to the holding in *Baeth,* the Correlative Rights Docrine of subterranean waters: "If the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole."[20]

When this statement of that doctrine is compared to the statements of the *Baeth* court's dicta, it appears that this doctrine is much more in accord with the court's sense of justice. However, when the policy behind water appropriation law is made manifest, it becomes quite questionable that there is anything unjust in its substantive content and application.

The justice behind water appropriation law is not to be found in some sense of beneficent equality, but rather in its own necessity. The greatest part of the western United States

18. N.D. CENT. CODE § 61-04-06 (1961).
19. N.D. CENT. CODE § 61-01-01 (1961). This section states: "All waters within the limits of the state . . . belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use, shall be acquired pursuant to the provisions of chapter 61-04."
20. Olson v. City of Wahoo, 124 Neb. 802, 248 N.W. 304, 308 (1933).

is dry and arid; consequently, the water must be brought to the land of the intended use if any kind of productivity is to be realized.[21] It was upon this necessity that the inhabitants adopted the doctrine of prior appropriation and "by their customs, usages, and regulations, had recognized the inherent justice of this principle."[22] It was just because any person who was industrious enough to apply this water to otherwise useless land was entitled to all the water he could use without waste.

> The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common law riparian doctrine . . . they . . . established as the only rule suitable to their situation that of prior appropriation.[23]

The early settlers found the common law doctrine unacceptable because it denied the non-riparian lands, which constituted the greater part of the West and upon which the welfare of the country depended, the use of any water and thus condemned them to a perpetual void of productivity.[24] The Western land would surely have remained a desert, "for a man owning 10 acres of land on a stream of water capable of irrigating a thousand acres of land or more, near its mouth, could prevent the settlement of all the land above him."[25] Instead of a desert, the doctrine gave to those industrious enough to settle the land a vested property right in the water apart from any ownership of land.[26] As such, it provided an incentive for those people because it assured them that the amount of water which they appropriated could not be diminished by subsequent users.

The appropriations system provides a definite priority and quantity of water which guarantees a legally stable water right. It is this security which lends itself as an impetus to the economic growth of water uses. It is the lack of security

21. Willey v. Decker, 11 Wyo. 496, 73 P. 210 (1903); Stowell v. Johnson, 7 Utah 215, 26 P. 290 (1891); Baumann v. Smrha, 145 F. Supp. 617 (D. Kan. 1956), *aff'd* 352 U.S. 863 (1956); Baeth v. Hoisveen, 157 N.W. 2d 728 (N.D. 1968); Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1881).
22. Drake v. Earhart, 2 Idaho 716, 23 P. 541, 543 (1890).
23. *Id.*, 23 P. at 542.
24. Willey v. Decker, 11 Wyo. 496, 73 P. 210, 216 (1903).
25. Stowell v. Johnson, 7 Utah 215, 26 P. 290, 291 (1891).
26. Wyoming v. Colorado, 298 U.S. 573 (1936); Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1881).

under the correlative rights doctrine or under a riparian system which could destroy economic growth of the area. A riparian landowner would be reluctant to expend thousands of dollars for a project along a source of water when he knows that another riparian owner adjacent to the same source mgiht later decide to use the water and demand his equal or reasonable shares of the water. This would result in reducing the first user's supply to the point where he might well have to cease all operations and abandon his project. The supply of water in the western United States is much too valuable for such wasteful procedure.[27] "In the West it was early seen that an equal share of water that was insufficient for all would lead to parceling out the waters in shares that were insufficient for none."[28]

In conclusion, the court has ostensibly upheld the water appropriation law of North Dakota, but in fact, it has, by attacking the correct application of that law by the State Engineer, strongly indicated that the law cannot stand. It apparently bases its discontent with the results of appropriation law upon the premise that it works discriminatorily, unjustly, and inequitably on subsequent appropriators. Not only in this discontent unfounded in relation to the climate of the western United States, it is clearly contrary to both the decision that the *Baeth* court itself reached,[29] and the decisions reached in the modern cases which have considered the same question.[30] The only safe projection that can be made in light of this opinion is that the constitutionality of the water appropriations law in North Dakota, at least so far as concerns ground water, is, at best, still undecided.

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27. Trelease, *Law, Water and People: The Role of Water Law in Conserving and Developing Natural Resources in the West.* 18 WYO. L.J. 3 (1963).
28. *Id.* at 9.
29. Baeth v. Hoisveen, 157 N.W.2d 728 (N.D. 1968).
30. Knight v. Grimes, 80 S.D. 517, 127 N.W.2d 708 (1964); Baumann v. Smrha, 145 F. Supp. 617 (D. Kan. 1956), *aff'd* 352 U.S. 863; Williams v. City of Wichita, 190 Kan. 317, 374 P.2d 578 (1962), *appeal dismissed,* 375 U.S. 7 (1963).