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Idaho - The Constitutionality of a Mandatory Permit System and Denial of a Water Use in the Public Interest

William T. Corbett

COMMENTS

IDAHO--THE CONSTITUTIONALITY OF A MANDATORY PERMIT SYSTEM AND DENIAL OF A WATER USE IN THE PUBLIC INTEREST

There is not enough water in the West for all present and foreseeable future demands in Western streams and other sources of supply.[1] In view of this fact the water resources of the Western states must be utilized so as to attain a maximization of benefits. Unlike many of the Western states, the present system for the appropriation of surface water in Idaho does not facilitate the maximization of water use.

There have been writers who have contended that the maximization of the surface waters of Idaho can not be attained because of the Constitutional provisions relating to the appropriation of water.[2] It is the purpose of this paper to analyze the development and the present status of Idaho's water appropriation system, to consider the constitutional obstacles, and propose a constitutional plan for the maximization of the state's presently unappropriated water.

I. Development and Present Status of Idaho's Appropriation System

Article 15, section 3 of Idaho's Constitution provides that the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied, except that the state may regulate and limit the use of water for power purposes. In light of this constitutional provision and earlier territorial legislation a water appropriation could be made by anyone who diverted water and applied it to a beneficial use. In 1903 the state enacted a comprehensive statute which repealed the earlier provisions relating to posting and recording notices of appropriation, and provided for appropriating water by first applying to the state engineer for a permit to do so.[3] The 1903 act is still in existence and is part of the present water law in Idaho.[4]

1. Trelease, *Desirable Revision Of Western Water Law*, Papers of the Western Resource Conference, 203 (1959).
2. Harvey, *A Mandatory Permit System For The Acquisition of Water Rights In Idaho*, 2 Idaho L. Rev. 42 (1965).
3. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 8 (1968).
4. Idaho Code §§ 42-201 to 225 (1948).

Even though the 1903 statute seemed to require a mandatory permit,[5] and gave the state engineer power to deny a permit if certain procedures were not complied with in filing, the Idaho Court held that the statutory method of appropriation was not the exclusive method of receiving the right to use water.[6] In 1913 the Court clearly stated the effect of an earlier opinion:

> Under the laws of this State there are two methods of acquiring water rights: One is to follow the statutory procedure and file an application for water with the state engineer, . . . the other is to divert unappropriated water and apply it to a beneficial use without making application to the state engineer. . . .[7]

The only legal difference between the two methods of appropriation is that the priority of the appropriation dates from the issuance of the permit under the "statutory method" where as under the "diversion to beneficial use" method the priority dates from the application of the water to a beneficial use.[8]

In 1963 Idaho enacted a comprehensive ground water code.[9] The code, which includes all water under the surface of the ground,[10] provides that the only way ground water may be appropriated is by application for a permit.[11] Thus the act establishes a mandatory permit system for appropriation of ground water, putting an end to the common law method of diversion and application to a beneficial use.

The state engineer under the code, has the power, "to control the appropriation and use of ground water . . . and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy."[12]

Thus, with regard to ground water Idaho has the ability to maximize the utilization of the state's water resources.

5. IDAHO CODE §§ 42-201, 42-202 (1948).
6. Nielson v. Parker, 19 Idaho 727, 115 P. 488 (1911).
7. Crane Falls Power and Irrigation Co. v. Snake River Irrigation Co., 24 Idaho 63, 133 P. 655 (1913).
8. *Id.* at 661.
9. IDAHO CODE §§ 42-226 to 239 (Supp. 1967).
10. IDAHO CODE § 42-230 (Supp. 1967).
11. IDAHO CODE § 42-229 (Supp. 1967).
12. IDAHO CODE § 42-231 (Supp. 1967).

Because the state requires a permit to use ground water, and the permit may be denied to protect the public interest the state can authorize only those uses which will tend to maximize the state's water resources. The Idaho court has recently upheld the ground water code in a case where the state engineer denied a permit in the public interest.[13]

However, the state presently does not maximize the use of its surface water because there is no mandatory permit system, and the state engineer does not have the power to deny a use of water to protect the public interest.

II. The Need For, and The Constitutionality of A Mandatory Permit System For Surface Water

A. The Need For a Mandatory Permit System

The Idaho permit system requires the applicant to set forth in his request for a permit, his name, address, source of water supply, nature of the proposed use, location of the diversion, the amount of water to be diverted, etc.[14] The state engineer under a mandatory permit system, would have this information on every appropriation in the state. With such information the engineer could quickly determine the priority of any use, the amount of water allowed to be diverted, etc.

The state engineer could, with permit records, determine the amount of water appropriated from any source of supply. With information on the total amount of water of the source he could determine the amount available for appropriation. "In Idaho today it is impossible for the state engineer to estimate satisfactorily the amount of water left for appropriation."[15] Without accurate information on unappropriated water the state does not know whether it is maximizing the use of the water. Nor will investment in large projects be encouraged if there is not accurate information on available water. Also under a permissive system rather than a mandatory one, the protection of an appropriator's rights may require needless expensive litigation to establish his priority.[16]

13. State *ex rel.* Tappan v. Smith, 92 Idaho 451, 444 P.2d 412, 417 (1968).
14. IDAHO CODE § 42-202 (1948).
15. Harvey, *A Mandatory Permit System For The Acquisition Of Water Rights In Idaho, supra* note 2.
16. *Id.* at 44.

B. The Constitutionality of a Mandatory Permit System

The first Idaho decision which directly concerned itself with the seemingly mandatory permit language of the 1903 statute[17] was Nielson v. Parker.[18] The Court did state: "We should not lose sight of the provisions of section 3 article 15, of the Constitution, which prescribes that: 'The right to divert and appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied.' "[19] However, the Court in holding that the 1903 statute did not establish a mandatory permit system based their conclusion on the legislative intent rather than on Article 15, section 3 of the Idaho Constitution. The Court held: "It has never been the intention, so far as we are advised, of the *legislature* to cut off the right of an appropriator and user of water may acquire by actual diversion of the water and its application to beneficial use."[20]

It is Harvey's[21] contention based on cases prior and subsequent to Nielson:

> That Idaho can legally have a mandatory permit system of appropriation. The decisions holding that the Idaho system is permissive rather than exclusive or mandatory rests upon statutory construction. Thus the Constitutional obstacles previously thought to be standing in the way of adoption by Idaho of a mandatory system are illusionary and based on an inaccurate reading of the case law.[22]

A mandatory permit system in and of itself, is not a method of denying the right to divert water. The purpose of such a system is to provide information to the state engineer so that the state has records of all appropriations.

17. IDAHO CODE § 42-202 provides that ". . . any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, or lakes or other public waters in the state of Idaho, shall, before commencing the construction, enlargement or extension or change in the point of diversion of the ditch, canal, or other distributing works, or performing and work in connection with said construction or proposed appropriation of the diversion of any waters into a natural channel, make application to the department of reclamation for a permit to make such appropriation."
18. Nielson v. Parker, *supra* note 6.
19. *Id.* at 489.
20. *Id.* at 490.
21. Harvey, *A Mandatory Permit System For The Acquisition Of Water Rights In Idaho, supra* note 2.
22. *Id.* at 56.

Thus it would appear that the Idaho court in holding that the 1903 statute did not establish a mandatory permit system based their decision on the legislative intent rather than on constitutional grounds. Secondly, such a constitutional objection would not be made to new legislation creating a mandatory permit system. Thus if the legislature acts, some of the problem under the present system of surface water appropriation system will be eliminated.

III. PUBLIC INTEREST AND MAXIMIZATION

A second problem with Idaho water law, even assuming that a mandatory permit system is constitutional and is adopted, is that the state can still not get maximum utilization from their water resources if the engineer is required to give a permit to everyone. Thus the state engineer should have the authority to deny a permit if the water will not be used in the public interest and promote the public welfare.

A. The Need for Maximization in the Public Interest

If we start out with the assumption that there is plenty of water, then the question of maximum utilization is not quite so serious. It would be at best an academic exercise spending much time considering the maximization of a resource with an unlimited supply. However, because "there is not enough water in the West for all present and foreseeable future demands in the Western streams and other sources of supply,"[23] we are dealing with public resource of limited supply and maximum utilization becomes vitally important.

The first prerequisite of a model state system of water law is that it should encourage, or at least not deter, maximum development of the state's water resources.[24] Under Idaho's present surface water system, the state does not meet the first prerequisite of a model system. As long as the state allows anyone who can put water to a use, which need only benefit the appropriator, the state does not necessarily receive a maximum development of its water resources.

23. Trelease, *Desirable Revision Of Western Water Law, supra* note 1.
24. Trelease, *A Model State Water Code For River Basin Development*, 22, LAW & CONTEMP. PROB. 301, 303 (1957).

When we speak of maximum development it should be kept in mind that "what is to be maximized is welfare from water use, not water use in itself."[25] If the state concerns itself with trying to solely maximize water use, welfare as well as development would be stifled. No matter how beneficial a project might be to the public welfare, there could always be a use suggested that could come closer to maximizing water use itself. What the state should be concerned with is that between alternative projects, or uses, the project selected will be the one that most nearly maximizes public welfare, rather than concerning itself with whether there has been a maximum utilization of the water:

> An ideal system of water law should give protection to two types of public interests—the interest in the protection against exploitation and waste of water resources including the interest in obtaining optimum development and seeing that water is put to the best possible use; as well as the interest held collectively by members of the public in such uses of water as navigation, fishing, and recreation.[26]

Thus in determining the maximization of utilization of water the state must not only consider whether water is being fully utilized, and whether the economic benefits flowing from the utilization are "maximized"; but also the state must consider whether the water resources benefit the public with regard to non-economic demands. A balance between the two will be the optimum level, thus insuring public interest.

The concept of public interest in water resource development is not a new concept. The earliest system requiring a beneficial use was probably the first attempt to regulate the public's water to see that it was put to a use which would at least not waste the resource. As early as 1903 Elwood Mead[27] was contending that under a system of unregulated prior appropriation the public, the real owner of the resource, was not receiving any benefits.[28]

25. Trelease, *Policies For Water Law: Property Rights, Economic Forces and Public Regulation*, 5 NATURAL RESOURCES J. 1, 4 (1965).
26. *Id.* at 39.
27. E. MEAD, IRRIGATION INSTITUTIONS, (N.Y.: MacMillan, 1903).
28. *Id.*

Mead could see that the system of unregulated appropriation, which was divorced from the public interest, necessarily would lead to increased control exercised by the public authorities.[29] It was his contention that public supervision was manifest in the arid states and it seemed only a question of time when the doctrine of prior appropriation would give way to complete public supervision.[30]

Today the movement toward more public supervision is apparent in the suggestion that "[State] Agencies representing all classes of water users should take over the power to issue permits and make effective use of it by issuing permits only for those projects which will fit into the master plan for optimum beneficial use of the water, and reserve water from projects that do not accord with the master plan."[31]

To some greater or lesser extent many Western states[32] have statutes that allow the state engineer to deny permits if the proposed use is not consistent with public interest.

B. Can Idaho by Legislation Give the State Engineer Such Power

Article 15, section 3 provides "the right to divert and appropriate the unappropriated waters of any natural stream to beneficial use, shall never be denied," except for power purposes. If the state engineer is given the authority to deny permits in the public interest, it would appear that such authority would be a violation of Article 15, section 3. However, the state engineer has such authority with regard to ground water.[33] It would appear that if the state engineer has such authority with respect to ground water he could have like authority regarding surface water.

The key provision in Article 15, section 3 is "Natural Stream." In most western states surface and underground streams are subject to the same law on methods of appro-

29. *Id.* at 142.
30. *Id.*
31. Trelease, *Desirable Revision Of Western Water Law, supra* note 1, at 214.
32. *For example, see,* NEV. REV. STAT. § 533.370 (1961); N.M. STAT. ANN. § 75-5-6 (1953); UTAH CODE ANN. §§ 73-3-1, 73-3-8 (1953); WYO. STAT. § 41-203 (1957).
33. IDAHO CODE § 42-231 (Supp. 1967).

priation.[34] Early Idaho cases make a distinction between underground streams and percolating waters, holding that underground streams are subject to the same means of appropriation as surface streams.[35] But in a later decision the court held all ground waters are percolating,[36] and all ground waters are subject to appropriation the same as surface water.[37]

Therefore the Idaho court has ruled that there are *no* underground streams. The court stated that it would seem impossible to establish one rule for ground water in relatively stable condition and another rule for ground water in decided motion.[38] With such a holding it is quite apparent why the ground water code need not comply with Article 15, section 3, because the constitutional provision applies only to "Natural Streams."

The Idaho court feels that Article 15, section 3 does pose a definite limitation on the authority of the state engineer as to the appropriation of surface water. In a 1964 case the court applied Article 15, section 3 to the effect that a person desiring to appropriate surface water could never be denied, so long as there is unappropriated water and the appropriator applies it to a beneficial use.[39]

It appears that in holding the ground water code constitutional the court did not need concern itself with Article 15, section 3.[40] Where as a surface water system which allows the state engineer to deny a permit in the public interest would not only come within the constitutional provision but would be in conflict with it. It is Harvey's contention that the Constitution:

> Does seem to contain limitations as to the grounds for which the state engineer can be empowered to deny permits. Permits can constitutionally be denied where there is no unappropriated water or where the proposed use is not beneficial. However, an

34. *For example, see,* Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1936); Verdugo Canyon Water Co. v. Verdugo, 152 Cal. 655, 93 P. 1021 (1908); Pima Farms Co. v. Proctor, 30 Ariz. 96, 245 P. 369 (1926).
35. Public Util. Comm'n. v. Natatorium Co., 36 Idaho 287, 211 P. 533 (1922).
36. Hinton v. Little, 50 Idaho 371, 296 P. 582, 583 (1931).
37. Silkey v. Tiegs, 51 Idaho 344, 5 P.2d 1049 (1931).
38. Hinton v. Little, *supra* note 37.
39. Cantlin v. Carter, 88 Idaho 179, 397 P.2d 761 (1964).
40. State *ex rel.* Tappan v. Smith, *supra* note 12.

> amendment of the Idaho Constitution seems required if the legislature wants to broaden the state engineer's discretion and enable him to deny permits where an appropriation would be against the public interest.[41]

C. Beneficial Use—A Constitutional Method to Provide for Public Welfare

One area in which it does seem possible to expand the state engineer's power in denying permits is by construing an undesirable proposed use as a non-beneficial use.

Under both the constitutional[42] and the statutory methods[43] of appropriating water, the appropriator must apply the water to a beneficial use. A key question is what is a beneficial use, and who is to determine whether a use is beneficial?

The most common definition of beneficial use is that it is a question of fact to be decided upon considering the facts of each case.[44] In early water law when water was plentiful, a beneficial use was any use that would benefit an appropriator.

> As competition for water grew fiercer and as the realization grew upon the courts and legislatures that the allocation of water involved a problem in the conservation of natural resources, new concepts evolved, that each use must not only be beneficial in the abstract sense, but must also be a reasonable and economic use in the light of other demands for the little remaining to be allocated.[45]

Thus a use must not only be embraced within the general class of uses held to be beneficial, i.e., only of benefit to the appropriator; but it must also be a reasonable and economic use of the water supply.[46]

In an early decision the Idaho court stated: "A prior-appropriator is only entitled to the water to the extent that

41. Harvey, *A Mandatory Permit System For The Acquisition Of Water Rights In Idaho, supra* note 2, at 56.
42. Diversion and application to a beneficial use method.
43. Permit Method.
44. Denver v. Sheriff, 15 Colo. 193, 96 P.2d 836 (1939).
45. Trelease, *The Concept Of Reasonable Beneficial Use In The Law Of Surface Streams*, 12 WYO. L. REV. 1, 16 (1957).
46. *Id.*

he has use for it when economically and reasonably used."[47] In another early case the Idaho court stated that what "constitutes a reasonable use of water is a question of fact, . . . and depends upon the circumstances of each case, such as the size of the stream, the number of consumers, the character of the soil, the nature of the crops, and other like considerations."[48] The size of the stream, and the number of consumers taken together will show how much water there is, and the amount of water appropriated thus giving the amount of water available to appropriate. In effect the court is saying that reasonableness depends at least in part on how much water there is available for appropriation; and secondly whether the proposed use is economically sound in light of other uses, i.e., the character of the soil, and the nature of the crops. Thus if there is little water available and an appropriator plans to use it on poor soil to raise crops that are not needed, in light of other uses, the use may not be beneficial.

Under such a definition of beneficial use the Idaho court has moved a long way from simply saying that any case which is beneficial to the appropriator is considered a beneficial use in the law. The Idaho Court is not just considering the interest of the appropriator, but is concerned with acquiring the most benefit from available water supplies. It can't be assumed that the Court has provided an optimum development of the state's available supplies; however, through the concept of beneficial use the Court has taken a step in that direction. If the Court is willing to expand its concept of beneficial use, under a mandatory permit system for surface waters, the state engineer could exercise the same degree of discretion that he would have if he could deny permits in the public interest.

The determination of a beneficial use, in light of alternative uses can be aptly illustrated by *Tanner v. Bacon*,[49] a 1943 Utah case, which has been described as the "sleeping beauty of Western water law."[50] An application for a permit

47. Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073, 1079 (1915).
48. Beasley v. Engstrom, 31 Idaho 496, 168 P. 1145, 1146 (1917).
49. 103 Utah 494, 136 P.2d 957.
50. Trelease, *Desirable Revision Of Western Water Law*, *supra* note 1, at 213.

was made for 100 second-feet of water to be used for the generation of hydroelectric power. The project was feasible from an engineering standpoint, and clearly would provide some benefits. The Utah Water Storage Commission and the Bureau of Reclamation had plans for a large multi-purpose project, and even though they applied for a permit after the power project, they were given priority.

The court was holding that the multi-purpose project was a more beneficial use of the available water, promoting the public welfare, and movement toward the maximization of the states water resources.

In determining which project is a beneficial use the court must not only consider the gross benefits, but must consider the project cost, social costs, and opportunity costs or foregone benefits.

For example, in the Tanner case, considering the benefits from the power project as being 10 and benefits from the multi-purpose project as being 15, the project cost as 7 and 10 respectively, there will be adjusted gross benefits of 3 from the power project and 5 from the multi-purpose project. However, considering the benefits foregone as a cost, (i.e., if the state allows one project they can't allow the other, thus the adjusted gross benefits of the project not allowed become a cost of the one accepted) the adjusted gross benefit of the power project 3, becomes a cost of the multi-purpose project leaving a net benefit of 2 (5 minus 3); and the adjusted gross benefit of the multi-purpose project, 5 becomes a cost of the power project leaving a net benefit of -2, (3 minus 5).

Thus the power project is not a beneficial project and should not be allowed a permit. But, if the power project was the only proposed appropriator then there would be no alternative cost, and the project would be allowed a permit because it would be beneficial.

All courts have said that the wasting of waters can never be a beneficial use. If an appropriator diverts waters and wastes it there will be no beneficial use, thus no right to use. The Idaho court has stated, "the policy of the law

of this state is to secure the maximum use and benefit, and the least wasteful use of it's water resources."[51] The question is, then, what is a wasteful use.

In the Oregon case of *In re Deschutes River*[52] the court stated that "an extravagant and wasteful application of water even though a useful project, or the employment of water in a non-beneficial enterprise, is not included in the term "use", as contemplated by the law of waters.[53]

The Oregon court felt that there is a waste of water when it is applied in an extravagant manner even to a useful project, or a use of water to a non-beneficial enterprise. The Oregon court denied the use of forty second-feet of water during the irrigation season to clean debris from a reservoir and keep it out of electric turbines, although the benefit of such a use to the appropriator was admitted. The court pointed out that the quantity of water could otherwise be used to irrigate 1600 acres of land.[54] The court looked at alternative uses and felt that the water could be better used elsewhere, and declared the proposed plan as being wasteful in light of the alternatives.

The Oregon court felt that the difference between a waste of water and its economical use is only a matter of degree.[55] By considering the proposed uses in relation to alternative uses the court or the state engineer can determine whether the proposed use is wasteful. If the use is wasteful then the right to use the water of the state can be denied, as not being a beneficial use.

As can be seen the state, through its engineer, can control the use of water to a large extent by the concept of beneficial use. This is just another means of allocating water resources in the public interest. The principle that is being applied is beneficial use but the outcome is a move toward a more optimum development of the states' water resources.

51. Poole v. Olaveson, 82 Idaho 496, 356 P.2d 61, 65 (1960).
52. *In re* Water Rights of Deschutes River and Tributaries, 124 Ore. 623, 286 P. 563 (1930).
53. *Id.* at 577.
54. Trelease, *The Concept Of Reasonable Beneficial Use In The Law Of Surface Streams*, *supra* note 45.
55. *In re* Water Rights of Deschutes River and Tributaries, *supra* note 52, 577.

If the state engineer can use this system of determining whether a use is beneficial, then he will be in effect allowed to deny permits if he can show they are not an optimum use of the available water resources. The engineer could have this power without a constitutional amendment, because he would be simply applying the Constitutional language of beneficial use. His decision in this area would be subject to judicial review, under the present permit system, and would probably be so, even under a new mandatory system. However if the court will back up the state engineer in his liberal application of the beneficial use concept, the public welfare will be served.

IV. SUMMARY AND CONCLUSION

There are two basic problems with the dual system of appropriating surface water in Idaho. First, the common law method does not facilitate the recording of appropriations. The lack of adequate records does not provide a workable method for the state engineer to adequately administer the waters of the state, and requires needless court suits among appropriators for the determination of the validity, nature, extent, and priority of their appropriations. The second problem caused by the present system is that the state can not regulate its water resources to provide for the maximization of public welfare.

These two problems could be remedied by legislation providing for the establishment of a mandatory permit system, and by allowing the state engineer to deny permits in the public interest. The question with regard to this solution is whether it is constitutional.

It appears that a mandatory permit system is constitutional, and with the proper interpretation of "beneficial use," the Idaho court could allow the state engineer to deny permits in situations where there is not an optimum utilization of water resources, or where the use would not provide for the public interest. With such an interpretation of "beneficial use" legislation providing the state engineer with such powers could be declared constitutional. The concept of "beneficial use" can be the key, opening a new era in maximization of water resources in Idaho. The Idaho Court has

taken some preliminary steps in expanding their definition of "beneficial use" and a legislative directive in this area may be the catalysis which enables Idaho to join many of her sister states in providing water resource allocation in the public interest.

WILLIAM L. CORBETT