

December 2019

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### Recommended Citation

William J. Burke, *Western Water Law*, 10 Wyo. L.J. 180 (1956)

Available at: <https://scholarship.law.uwyo.edu/wlj/vol10/iss3/2>

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## WESTERN WATER LAW

WILLIAM J. BURKE\*

Western water law is the consequence of a legal revolution in the last half of the eighteenth century that was caused by the impact of the new conditions that were encountered in the settlement and development of the West. It is a legal system of its own kind, developed without precedents and with only shadowy analogies to draw upon. It is a combination of substantive law and of administrative law, yet its administrative aspect is not rooted so firmly in the police power of sovereignty as is the general field of administrative law because a high system of water administration existed in Utah as early as 1852, while modern American administrative law, based on the concept of police power, was not footed firmly until 1876 when the Supreme Court of the United States gave its decision in the famous case of *Munn v. Illinois*.<sup>1</sup>

It was as early as 1879 that Colorado, because of the chaos that was developing in that state under the strongly individualistic theory of priority of appropriation with its rule that "first in time is first in right" (sometimes called the law of the barbershop), enacted statute law that was the forerunner of an administrative system that was to spread throughout the West to affect intimately and seriously the lives of the citizens of the states of Colorado, Montana, Wyoming, Idaho, Nevada, Utah, New Mexico, Arizona, Nebraska, Kansas, South Dakota, North Dakota, Texas, Oklahoma, Oregon, Washington, and California.

If the police power of sovereignty be not the basis of Western water law, particularly its administrative aspect, what then was the basis? It has been suggested that it was the "brooding omnipresence in the sky," but whether such is the basis or whether its basis is the adage that "necessity is the mother of invention" is of little significance for Western water law does exist as a unique legal system, and in the last half of the nineteenth century it is being studied for adoption and adaptation to man's needs in modern society by many of the states to the Eastward and by nations of the free world.

You will be interested in a generalized statement of the history and trends of Western water law. Modern Western irrigation was started by the Mormons in July 1847 when they diverted the streams on the land of the Salt Lake Valley, but perhaps of more importance, as event shaping

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1. *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1876).

legal history, was the discovery of gold in California in 1849 and in Colorado in the next decade. The miners organized voluntary mining districts and prescribed rules and regulations for the diversion and use of water in their mining operations. While the customs of the gold miners were satisfactory for their purpose because the gold was limited in quantity and, once recovered, there was little need for the water, such customs were not satisfactory to solve the problem that faced the settlers in the West. This problem was that of building a lasting economy by applying a limited quantity of available water to an unlimited quantity of available land to obtain the full benefit of the land and water resources to the people and to the community. Because of the nature of the problem one would expect that water would be considered as public property and that the right to use it would be under public supervision and, indeed, this was actually the conception of the early settlers in Wyoming and Utah.

In Utah as early as 1851 water and watercourses were considered property, not of the public, but of the State. This is evidenced by private acts granting streams to private persons, either absolutely, or upon terms, or by granting to private persons the right to control streams for all purposes. By a statute enacted in 1852, part of the power exercised by the Utah Legislature was delegated to the Judges of the County Courts. Under this Act, a Judge could grant a right to the use of a stream and could appoint commissioners to enforce such right, but before allowing a right, the Judge might inquire into the advisability of doing so, and he had the power to refuse if the facts justified.

Wyoming's first water law was enacted on December 10, 1875. Under this Act, the County Commissioners were empowered to appoint three commissioners who had the duty to apportion justly and equitably an amount of water to the different localities "as they may in their judgment think best for the interest of all parties concerned." The theory of this Act in determining the relative right of user was not priority of use but the best interest of all concerned, as determined in the discretionary power of an administrative body which had the power to enforce its decision. A similar statute was passed in Colorado in 1861 and, though it was never repealed expressly, it was not recognized by the Courts of Colorado.

The movement away from State ownership and control of water that was developing in Wyoming and Utah was first pointed by the Colorado territorial court in 1872, and it was in full sway when the Colorado Constitution was approved in 1876 by the adoption of pure prior appropriation. It remained, however, for the Supreme Court of Colorado, in 1882, to announce that the doctrine of pure prior appropriation existed as the exclusive positive law of the State even before the State Constitution. Because of its prestige as the senior irrigating state, the Colorado system spread over the arid West with the consequence that the system that was developing in Utah and Wyoming was retarded. Thus, for the time being, the Colorado law became the common law of the arid West, but for the

time being only, because the pure prior appropriation theory was workable so long as diversions and ditches were small and by individuals for the irrigation of bottom lands only.

In 1870, the promoters of the Greeley Colony in Colorado constructed a canal to water the bench lands at some distance from the Cache La Poudre River. This development led to an era of corporate canal building, and the sale by a corporation of water rights to the owners of lands under the canal. Such activity, coupled with the drouth in the summer of 1874, exposed the faults of the pure prior appropriation theory. Conflicts, both personal and legal, ensued. These resulted in a demand of the Colorado irrigators for legislation for public determination and establishment of rights of appropriation of water and for state superintendence of the distribution of water in accordance with the settled titles. Such legislation was enacted in 1879. Thus it is seen that, while the conception of the early settlers in Utah and Wyoming of water, as the property of the State with the right to control the streams exercised under public supervision, gave way for a time to the mining doctrine of pure prior appropriation, adopted in Colorado, the Utah-Wyoming conception, in the wake of progress, was to become the basis of the present system of Western water law.

So it came about that the water codes of the Western States cover these heads:

1. A system for official ascertainment, determination, and recordation of the past rights of all the claimants to the waters of a stream.
2. State supervision and distribution of waters to those whose titles are established.
3. The acquisition of new rights and their recordation.
4. The loss of old rights.

Obviously, the sap center of the water code for the Western States is the state control of the water. What then, you may ask properly, is the justification of state control? Since Wyoming and Colorado were the states that took the lead in developing the legal system of Western law, it will be helpful to your understanding of the system if its evolution be sketched through the Constitution, the statutes, and the decisions of the Courts of those states.

At the Colorado Constitutional Convention, which was held in 1875 and 1876, the water question was among the most, if not the most important matters considered by the delegates. The first proposal on irrigation offered to the Convention was a resolution to the effect that the primary right of ownership of all the waters in the state at all times shall be in the State, that statute law should be enacted to secure a just and equitable distribution of the water for mining, irrigation, and manufacturing purposes, and that such statute law should have as its objective the promotion of the greatest good to the greatest number of the citizens of the state with proper

protection of all persons in their individual rights. The Convention's Committee on Irrigation and Agriculture, however, reported as follows:

Water . . . is declared to be the property of the people of the State, and the same is dedicated to their use.

The Committee report was changed by the Committee of the Whole so that the Constitutional provision adopted reads:

Waters of every natural stream, not heretofore appropriated, within the State of Colorado, are hereby declared to be the property of the public and the same are dedicated to the use of the people of the State, subject to appropriation, as hereafter provided.

Seemingly, the Colorado Constitution asserted State control over waters perhaps as a negation of the right of control of the Federal Government, which was the then California view, but limited the State in its control by prohibiting the denial of the use of the waters by the people.

The Wyoming Constitution was adopted in 1889. As we have seen, Wyoming, as a territory, in 1886 adopted the Colorado system, but Wyoming was to repudiate the Colorado system in its Constitution by the unequivocal declaration that "the water of all natural streams . . . within the boundaries of the State are hereby declared to be property of the State." Thus under the Wyoming Constitution the State is not only sovereign but it is proprietor. That such a result was intended is established clearly in the journals and debates of the Wyoming Convention.

Constitutional provisions are not always self-executing. They must be implemented by statute law, and the Constitutional provisions and the implementing statute law must be interpreted by the courts.

In the early period of their statehood, the legislators and the courts of Wyoming and Colorado seemed to be going in opposite directions. The legislators were thinking in terms of the State's interests, while the courts seemed to be more concerned with the individual's interest, but in the early 1900's the courts, particularly the Colorado courts, changed their attitude, due, no doubt, to the controversies over interstate waters in which Colorado became involved. Accordingly, in 1912 the Colorado Supreme Court, in a case that involved the constitutionality of a State statute appointing a committee from the Legislature to investigate alleged infringements by the agencies of the Federal Government on the right of the State to control the waters within its boundaries, said:

The state has never relinquished its right of ownership and claim to the waters of our natural streams, though it has granted to its citizens, upon prescribed conditions, the right to the use of such waters for beneficial purposes and within its own boundaries. The property right, however, in the natural streams, and the waters flowing therein, has never been renounced or relinquished by the state, and it has at all times asserted not only its right of ownership, but the unrestrained right, within its own boundaries, to distribute its water to those who have, under its authority, acquired, by perfected appropriations, the right to their use.

In 1927, the Colorado Supreme Court made the significant declaration that:

. . . title or right to the use of water . . . in . . . Colorado did not come from the U. S. but from the State of Colorado, which is the owner in its sovereign capacity of the water, of all its natural streams, and it is only the right to the use of the water it permits appropriators to acquire; the ownership of the water itself . . . still is in the state. . . . In case of a loss or abandonment thereof by the appropriator, they [water rights] became a part of the unappropriated waters . . . subject to a new and distinct appropriation by a citizen who might *file* upon them.

The attitude of the Wyoming courts is illustrated in a case decided in 1899. In this case the declaration of the State Constitution of State ownership of the water was attacked directly as being null. In upholding the constitutional declaration, the Court said:

Under the doctrine of prior-appropriation, . . . it would seem essential that the property in waters . . . should reside in the public, rather than constitute an incident of the ownership of the adjacent lands. . . . It is therefore doubtful whether an express constitutional or statutory declaration is required in the first place to render them public. . . . *But*, however this may be, we entertain no doubt of the power of the people in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters . . . to be the property of the public or of the state. The appropriation is made in the first place upon the basis of public ownership of the water.

This decision, while squinting more to the Colorado theory than the declaration of State ownership in the Wyoming Constitution, is more a denial of private ownership in the water than it is a denial of State proprietorship, because the real issue of the case was the statute law vesting powers in the constitutionally created State Board of Control over the appropriation, distribution, and diversion of water.

Again in 1903 the Wyoming Supreme Court seemed to favor the Colorado concept rather than the concept in the Wyoming Constitution when it said:

The Constitutional declaration [of state ownership] seems rather to declare and confirm a principle already existing than to announce a new one, for the reason that the rule permitting acquisition of rights by prior-appropriation, water becomes perforce *publici juris*. The public ownership is rather that of sovereign than of proprietor. The meaning of the expression "the water is the property of the public" is that it is the property of the people as a whole. Whatever title, therefore, is held in and to such water resides in the sovereign as representative of the people. . . . That ownership . . . however, is subject to a particular trust or use.

But here, again, it must be recognized that the issue in the case was the validity of an interstate diversion and the decision, in effect, is simply that nothing in State ownership of the water prevented such an interstate diversion.

As in Colorado, the involvement of Wyoming in controversies over interstate waters caused the Wyoming court to change its attitude from that of the benefit of the individual to that of the benefit of the State, as evidenced by a case decided in 1925. In this decision, the Wyoming Court, after quoting most approvingly the debates in the Wyoming Constitutional Convention advocating the State ownership of waters, declared that:

If state ownership is to be anything but a delusion, if it is to be more than nominal, there must be the same authority and control over streams and over the diversion of water as is now exercised by the general government over the occupation and settlement of public lands.

Commencing with Nebraska in 1895, the Western States have followed Colorado and Wyoming with constitutional or legislative declarations of public or State ownership, or State control of waters within the States. The only exception is Montana, but in 1900 the Supreme Court of Montana went the whole way in asserting State ownership of the waters within that state. The following is quoted from the decision of the Montana Court:

A water right can . . . be acquired only by grant, express or implied, of the owner of the land and water. . . . The State of Montana has by necessary implication assumed to itself the ownership, *sub modo*, of the rivers and streams of this state, and by section 1880 *et seq.* of the civil code, has expressly granted the right to appropriate the waters of such streams, which right if properly exercised in compliance with the requirements of the statute, vests in the appropriator full legal title to the use of such waters *by virtue of the grant made by this state as owner of the water.*

It can be said that today Western water law has completed the transition of the idea of sovereignty to sovereignty plus ownership. There is no doubt but that this transition was largely influenced by the interstate conflicts over water.

This discussion has given you an acquaintance with the genesis of the legal system that is commonly called Western water law. If time permitted, it would be interesting to show you the system at work in solving the problem of the determination of past rights, the problem of distribution of water, the problem of the acquisition of new rights, and the problem of the loss of old rights, and the problem that occupies such an important place in the national life of today, that of the administration of interstate waters. But it is sufficient to the present discussion for you to know that these problems not only arose but, with the possible exception of the problem of interstate administration of water, they were solved by the principles and rules of Western water law, and solved to the benefit not only of the individuals but of the states. That this tribute to the system of Western water law in action is merited is deducible readily from the following summation of the features of the system:

No one is entitled to divert water for any purpose unless a right to appropriate has been recognized by the State, through its executive officials, and placed upon record.

Rights which are claimed to have accrued in the past are determined by executive officials; the amount of water allowed to be taken is based not on claim but on user and benefit, as well to the State as to the individual; the date and priority are still based on priority of appropriation.

A right to accrue presently or in the future may be acquired only by grant of executive officials, who grant it on terms and conditions in which the State's interest plays as great a part as the individual's.

A right may be lost by executive revocation or declaration on violation of the conditions of the grant.

After the right is recognized, the water is not taken by the user, but is doled out to him by executive officials of the state, who govern their conduct not only by the terms of the grant but also by various considerations of policy on the part of the state.

The State is conceived to be proprietor of the water as well as sovereign, and strong grounds exist for believing the conception true.

Two general observations can be made with respect to the legal system of Western water law.

1. It is a demonstration of the fundamental of American civil government that where private rights are dealt with each of the States in the American Union is a legal, not a political, unit and, as a consequence, State law is territorial, having actual existence, and is the only law of the American legal system that can create and enforce private rights.
2. The system of Western water law illustrates well the evolutionary process of a legal right. When the first settlers of the West refused to recognize the doctrine of riparian rights as controlling their use of water, first for mining and then for agriculture, they relied upon might, or their ability to use physical force or influence in furthering their desire to use the water. Then came acquiescence or approval of public opinion of the practice of the settlers of diverting the water to non-riparian uses; so a moral right was established. But, experience was to teach them that they could not rely upon either might or moral right to assure them their uses of the water, so they turned to the legislative branch of their government for the enactment of statute law that would put the force of the State behind the protection of the enjoyment of their right to use the water and, thus, such right became a legal right.

These general observations point to the conclusion that the legal system of Western water law is one of the great legal systems of the modern world because it is a demonstration of the ability of man, in both a new and a changing environment, to assume his political responsibilities.



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