

Water Law classnotes, Fall 2005. Barbara Cosens.

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Wednesday, August 24

Course introduction

What water law is

- The function of water law is to allocate a scarce resource (and one that's growing scarcer).
- In water law, there are elements of property (western water law) and torts (eastern water law), plus environmental law.
- The *practice* of water law is about more than just law: it's also about science, policy, and politics.

Water itself

- Sometimes you've got a lot, sometimes too little—and water law must handle this. The “average year” doesn't actually exist.
- Climate change also has to be handled.
- Water rights aren't (exactly) property rights—because water *flows* (and across boundaries). Water rights are rights to *use*—not to occupy or possess.
- Measuring water (n.b. the table in the casebook appendix):
 - A family of four in the suburbs uses about one af/yr.
 - Crops use about two to six af/yr *per acre*.
- Western state boundaries mostly do *not* follow divides—so, we have water problems.
- Water uses:
 - Irrigation
 - Requires 80-90% of our water supply.
 - Idaho agriculture is about a \$4b industry, n.b.
 - Drinking water
 - Hydropower
 - In the west, two-thirds of energy comes from hydropower (in Idaho nearly 100% does).
 - Transportation (including for fish)
 - Recreation
- Politics
 - State/federal tension in water law—the states want control.
 - In the west, states do *not* have total control. Development of water is mostly done by the federal government (see, e.g., the Reclamation Act).
 - Also, environmental laws are mostly federal (see, e.g., the Clean Water Act and the Endangered Species Act).

An example: the Walker River

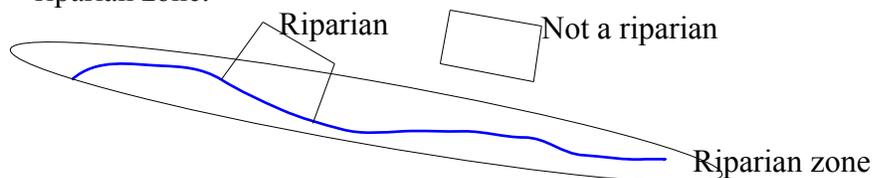
- With a basin crossing state boundaries, the forum for adjudication will be federal court.
 - There was a federal district court decree in 1930. It didn't address all interests.
 - The federal government petitioned to reopen the decree.
- The public trust doctrine: usually used to require a state to hold beds and banks of rivers in the public interest.
 - Only one state (California), has applied the public trust doctrine to actual *water* rights.
- Endangered species are in this basin.
- The Clean Water Act: a use is designated for a water body and then standards are set to maintain that use.
 - Here, the lake is designated as a sport fishery.
- Interstate agreements: here, there's an agreement between California and Nevada.

So, this illustrates the complexity of water law—how much can be involved.

Thursday, August 25

Riparian rights

- It's mainly the eastern states that follow riparian doctrine. But some western states do, too—although usually in a hybrid system (such as California). These western riparian states are: California, Oregon, Washington, and Nebraska.
- Riparian law is mostly similar to tort law, but with some aspects of property law.
- Becoming a riparian
 - You must be abutting a watercourse or water body. That is, you must be in the “riparian zone.”

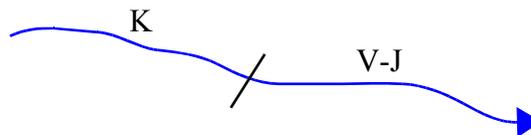


- N.b.: either the high-water or the low-water mark may determine the boundaries of the riparian zone—check the jurisdiction.
- Also, in some jurisdictions, only the title owner is a riparian (not, e.g., a lessee).
- “Unity of title”: as long as the same owner owns all contiguous abutting land, all that land is riparian. (Casebook: “Any tracts contiguous to the abutting tract are riparian if all of them are held under single ownership regardless of the times when the various tracts were acquired.”)

- This supports a policy of growing water uses—and this works where there's abundant water.
- Also, unity of title promotes ease of water rights administration, because you don't have to trace title back.
- “Source of title”: only the immediately abutting parcel is riparian. (Casebook: “Water may be used only on land which has been held as a single tract throughout its chain of title.”)
 - Thus, under source of title, riparian land can't be expanded. And, if it's subdivided, the riparian land will shrink.
 - This is most compatible with scarce water.

Kundel Farms (Iowa 1991) (p115)

- Facts:
 - Two adjoining landowners on a creek: K is upstream of V-J.
 - K decides to dam the water to make a wetland for hunters.



- V-J wants the water for stock watering and domestic uses.
- To dam the water, K removes a large culvert and replaces it with two smaller and higher-up culverts—causing a dry stream (for V-J) at times.
- The court does *not* say that making a wetland is okay; because it's not per se illegal.
 - However, the wetland is an *artificial* use, the court says, as opposed to V-J's *natural* uses. (Note how these terms don't bring to mind exactly what they mean.)
 - So, the court has recognized a hierarchy.
 - See Roscoe Pound's remarks on “natural” and “artificial” uses (p116x), which are helpful and accurate (to the law):
 - “Natural”: small quantities, natural flow.
 - “Artificial”: large quantities, interfering with the natural flow.
 - Note also the:
 - “English rule”: no interference with the natural flow permitted.
 - “American rule”: (see *Mason v. Hoyle*, next... (hint: it's “reasonable use”)).

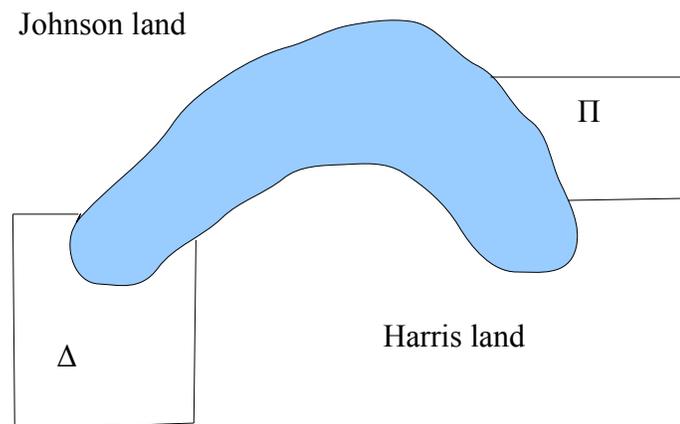
Mason v. Hoyle (Conn. 1888) (p117)

- Facts:
 - M has a mill (mills are often instream uses).
 - H, another millowner, is upstream from M.

- H is storing water so that he can run his mill all year (when the river goes down, with the season). This stops the flow to downstream users.
- The court crafts a “reasonable use” requirement. This is the “American rule.”
 - This idea comes from tort law (e.g., the “reasonable man” idea).
 - What's “reasonable” is a question of fact (mostly, at least).
 - But the court does consider some *factors*:
 - Whether the use is equal in comparison to other users' uses;
 - Whether the use is “adapted to the character and capacity of the stream”;
 - Whether the use permits the usual flow;
 - Also, the court mentions:
 - Beneficial use
 - Recurring drought
 - Custom
 - Benefit to user versus injury to other users

Harris v. Brooks (Ark. 1955) (p125)

- Facts: a resort (Π) complains about a rice farm (Δ) that's depleting the level of water in a lake.



- So, under the natural flow theory (the “English rule”), the resort would prevail.
- But the court here adopts the reasonable use theory (“American rule”). But, yet, it sets up a hierarchy, making this a mixed law/fact question:
 - First priority uses are domestic uses—these are always reasonable.
 - Second are artificial uses.
 - These are per se unreasonable if they result in complete destruction of other uses.
 - Otherwise, the court will apply a reasonable use balancing (which is factual).
- Applying this doctrine, the court orders the Δ that the lake must be maintained at its normal level.

- Note how:
 - The court crafts a new rule that it didn't really need to reach the result.
 - The court crafts a new rule but doesn't remand.

Hoover v. Crane (Mich. 1960) (p131)

- Δ says it's only pumping a quarter-inch. The dispute is ultimately over causation, and so that court orders Δ to pump only a quarter-inch. This leaves an opportunity for Π to come back to the court and prove that Δ is pumping more.

Wednesday, August 31

Prior appropriation

[missed class]

Thursday, September 1

Crowley (Mont. 1939) (p185)

- Facts:
 - Juniors put a dam in, releasing enough *water* (by quantity) to satisfy C's water right.
 - But it's not enough water for C to get that water where he wants it, using the wing dam and ditch that he's got.
- So, the question is whether C has a right to have his diversion method protected.
 - The juniors argue that C can just put pumps in.
- The court says yes—a senior user has a right to use his method of diversion.
 - One idea that's behind this is that juniors take the river as they find it—so here they could have seen C's diversion.
- The remedy here is damages—enough for C to do what he needs to do.

Schodde (Idaho 1912) (pp187x, 188x)

- Facts: a water wheel becomes useless after a dam is put in.
- The court says that the water wheel was unreasonable in light of the relative worth of the water wheel—serving one guy's 400-acre crops—versus the dam—serving 300K acres.
- In *Crowley*, the Montana court distinguishes *Schodde*, saying that it was about *force* (of water), not diversion method.
 - But this is a poor distinction. But, in any case, it shows that Montana and Idaho water law are different—Montana doesn't employ reasonableness in diversion-method-protection cases, Idaho does.

- Note that one of the reasons for a permit system is so that questions like those in *Crowley* and *Schodde* get decided before something gets changed (e.g., the dam gets built).

Grimes (Wash. 1993) (p190)

- Facts:
 - 1906: Grimes gets his water right.
 - 1917: Washington Water Code adopted, which says that you must divert water and apply it to a beneficial use.
 - 1971: the modern Washington Water Code is adopted, which includes a whole list of factors for determining water rights.
- The court here is deciding what law to apply—1906, 1917, or 1971. The court says it will apply 1906 law, but notes that reasonable use was required even then. But there are some things that are now required that the court won't require for this 1906 right.
- Note:
 - Approaches:
 - Historic use (Montana)
 - Reasonable use (Washington)
 - “Water duty”: the amount of water needed to irrigate one acre of a particular crop.
 - Rate of diversion: the court etc. looks at reasonableness (i.e., *not* historic use; and not only at local custom).

A-B Cattle (Colo. 1978) (p199)

- Facts:
 - After a dam is built, users on an irrigation get clear water, where they used to get silty water.
 - The ditch users liked the silty water because it prevented leaks in the ditch.
- Silt is an attribute of water quality, so the ditch users argue that water quality is part of their water right.
- The court says that silt is *not* part of the water right.
 - However, it does so by ducking is-water-quality-part-of-water-right question. Rather, the court goes back to “reasonableness”; i.e., a leaky ditch is an unreasonable diversion method, and so won't be protected.
 - Also, the policy of maximum utilization is important to some degree, etc.
- Hypo: what if the change in quality had been that the water now contained arsenic
 - Then the court would probably have had to address the is-water-quality-part-of-water-right issue.
 - Also, then the case could have been brought as a tort suit.

Articles on prior appropriation (p203ff)

- Efficiency and irrigation: how much is applied over how much is consumed.
 - In the west, irrigation efficiency is about 50%. It can be as low as 25%.
 - However, keep return flow in mind.
 - Also, keep in mind that more efficient irrigation may increase consumption, meaning there could be no net gain in water supply (and/or a decrease in return flow).

New Escalante (Utah 1992) (p208)

- Facts: Δ did not *expand* their irrigation—they just used their existing water more efficiently.
- The court says that Π can't insist on an inefficient use (even though it's a historic one).
 - Note the conflict, then, with the “you take the river as you find it” idea—the river has changed, here!
- Different states have gone different ways on whether efficiency savings can be applied to new crops.
 - Montana lets you; Oregon lets you use half; California encourages marketing of water.

Fulton Irrigating Ditch (Colo. 1972) (p215)

- Facts:
 - FID gets its water from Denver's sewage.
 - Denver wants to successively use its effluent (namely, to sell it to Coors).
- The court says that Denver did *not* abandon its water by sending it to taps.
- To change use, you must show *no injury*. Even if you're a senior user.
 - Here, despite the injury to FID, the court thinks its important that Denver *paid* to import all of the water at issue.

Shelton Farms (Colo. 1974) (p219)

- Phreatophyte removal—you don't get to keep what you save, etc. says.

Wednesday, September 7

Change in use

- This is especially important because most sources in the west are fully appropriated. And so the only way to satisfy growing cities is through changes in use.
- Changes taxonomy:
 - Point of diversion (POD)
 - Place of use (POU)
 - Type of use

- Period of use
- The process for change: each state has something different. E.g., in Idaho you submit an application to the department of water.
- Note the no injury rule—which even applies to senior users.

Green (Colo. 1962) (p233)

- (N.b. that Colorado still doesn't have an administrative water system. Just water courts.)
- Facts: M&H want to sell 8 cfs to Ft. Collins. *Itc.* is about exactly how much M&H really have to give away. Its decree says 16 cfs, but paper doesn't always equal actual.
- Here, despite M&H's 16 cfs decree, juniors who object claim that M&H only were ever using 8 cfs. The court agrees.
 - What about constructive notice (from the paper decree)? No injury trumps.
 - So, M&H thought that it had sold only half of its decree, but it had actually sold all of its decree.
- Doesn't this incentivize waste? Well, yes, but this incentive is tempered by the no waste / beneficial use doctrine.
 - Could M&H have just developed the entire 16 cfs just before transferring? Probably not, because of the due diligence requirement.
- How did the court reach the 8 cfs figure?
 - Water duty
 - Consumption (versus return flow)
- *Itc.*:
 - Water duty = 1.25 af x 72 acres = 90 af
 + (conveyance loss =) 5 af
 = 95 af (= consumptive use)
 at 50% efficiency (so 50% returned), so
 x 2 = 190 af
 - And, because the use is changing from agriculture to municipal, the use is capped at a *rate* (because the use will be year-long now, not seasonal).

Orr (Colo. 1988) (p240)

- The change *itc.* is from a ditch to wells.
- The court says you can only transfer the historic use.
- Note how the analysis is more rigorous when the change is of *type of use*, and especially when from irrigation to municipal (as in *Green*), rather than point of diversion (as in *itc.*).

Metro Denver (Colo. 1972) (p247)

- The change *itc.* is in point of return (from above objector to below it).
- And the same rules don't apply (!!).

- Why?? Does itc. just apply to a large municipality that imports its own water? Or is this a true loosening of the no-injury rule?

Boulder & Left Hand (Colo. 1976) (p249)

- The change itc. is the Left Hand is using more than it used to—it's using some of Farmer's rights (with permission). But Farmer's ditch is in another watershed.
- So, does *Metro Denver* apply?
 - No. The court distinguishes it by narrowing it to apply only to “waste water” (treated sewage) and not to return (irrigation) flow.
 - Also, here, unlike in *Metro Denver*, the problem is a change in point of return *and place of use*, not just point of return.

National Research Council article (p253): discussing modern problems with transfers.

Jenkins (Idaho 1982) (p254)

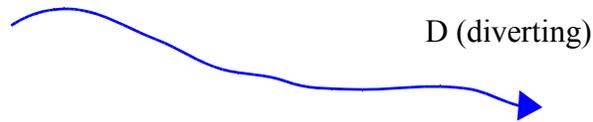
- (Because water rights are usufructuary, and water is a public resource, there are different rules for loss than for real property.)
- J argues that because Cottonwood Creek water flowed into Ching Creek, he should be allowed to divert 5.6 cfs from Ching Creek.
- The court, however, finds that J never diverted from Cottonwood Creek, and because Cottonwood Creek doesn't flow into Ching Creek anymore, J can't divert from Ching Creek.
- Forfeiture versus abandonment
 - Forfeiture:
 - Statutory
 - No intent required—only a period of nonuse
 - Defenses/excuses:
 - Good cause
 - Wrongful interference
 - Resumed during the five-year period
 - Abandonment:
 - A common law notion:
 - Haven't been using and
 - Intended to abandon
 - There's very limited enforcement of this.

Thursday, September 8

Prior appropriation in Idaho

Drake (Idaho 1890) (p2:1p)

E (on stream)



- Facts: D has a right to 600 in. The stream only has 150 in. in it.
- (Recall that with a property sale, the priority date is passed on.)
- What can E argue?
 - Riparian rights (because Idaho hadn't adopted a system yet). This would mean that:
 - E is on the stream and so has a right to share in the water.
 - D can't divert (because he's not a riparian).
 - Historic use (of D, which is less than his paper right).
 - Waste.
- The court says that first in time is first in right. It adopts this.

Idaho Const. art. XV

- § 1: public use.
 - This means that the state can regulate water use.
 - Other states actually say that waters are *owned* by the state.
- § 3: recognizes prior appropriation as the law in Idaho.

State v. United States (Idaho 2000) (p2:4p)

- This case covers:
 - “Diversion” and “beneficial use”
 - The process of determining water rights in Idaho
- Facts: the U.S. wants water for a wildlife refuge. There would be no diversion—it would be an instream use.
- Methods for acquiring a water right in Idaho:
 - Permit
 - Idaho was an early adopter of permits for water.
 - See IC § 42-103: water rights can be acquired only by permit (added in 1971—no more “constitutional method” after that; there used to be a notice method, too (notice and record)).
 - Constitutional method: diversion + beneficial use
 - Diversion requirement—why? Notice.
 - Exceptions:
 - Stock (there's notice here because others can see the stock).
 - So, etc., why should wildlife be different than stock?
 - Economic contribution.
 - Wildlife aren't domestic—stock are countable and belong to someone.
 - (The U.S. *could* argue that the

establishment of a refuge, by law,
is notice.)

- Instream uses: the current law in Idaho is that only the state can hold water for instream uses.

Glen Dale Ranches (Idaho 1972) (p2:8p)

- Facts: S has an inefficient ditch—he doesn't need the water he's arguing for for his field, but rather to push the rest of the water through his leaky ditch.
- Beneficial use:
 - Two components for analysis:
 - Type of use
 - Reasonable use (no waste)
- The court says:
 - That there's conflicting evidence on S's historical use...
 - ...but that that doesn't matter, because the case can be decided based on waste (the leaky ditch).
- What can S do, then? Buy a more efficient ditch.

Beus (Idaho 1940) (p2:11p)

- Facts:
 - Municipality's rights:
 - 1885: 100 in.
 - 1892: 125 in.
 - 1898: 87.5 in.
 - B's rights:
 - 1895: 100 in.
- B wants to chip away at the municipality's 1885 and 1892 rights:
 - B argues that the municipality is only using 80 in., and that by statute there's forfeiture after five years.
- But the court says the *municipalities are special*.
 - Why?
 - Water is a precursor to economic development for any western city. So this is a policy in favor of city growth.
 - To avoid speculation on water, and hoarding—and, the court says, municipalities won't do that (Cosens doesn't buy this argument (see the film *Chinatown*)).

Hagerman Water Right Owners (Idaho 1997) (p4:10p)

- N.b.: “basin-wide issue determination”: this allows for interlocutory-type appeals.
- Partial forfeiture:
 - See IC § 42-222(2), which the court says is ambiguous as to whether there can be partial forfeiture or not.
 - So, the court looks to governing precedent, but finds none.
 - So, the court looks at agency practice to see what people have been

- relying on.
- And, it looks at policy.
- And determines that IC § 42-222(2) *does* allow for partial forfeiture.

Wednesday, September 21

Reserved water rights

- Water rights will be implied if the purpose of the act would fail without water.
- *Winters* established this (and later courts expanded it to non-Indian water rights.)
- However, this area of water law isn't all that clear:
 - Because of what courts have said.
 - Because people are reluctant to litigate in this area—most reserved water rights claims are settled.
- Appropriative versus reserved water rights
 - Appropriative:
 - Quantity: beneficial use.
 - Drought: allocation in priority.
 - Future needs: new water rights required (and will be junior) (except in some states, where there are special future needs rules for municipalities).
 - Reserved:
 - Quantity: the amount necessary for the purpose of the reservation.
 - E.g., with Indian reservations, the “practically irrigable acreage” standard is used (except in Arizona, where the “homeland” purpose is recognized—which is broader).
 - Drought: allocation in priority—but the priority date is the date of reservation (thus Indian reservations are senior to all).
 - Future needs: *included*.
- Example: the Nez Perce Settlement
 - Nez Perce component:
 - Not based on PIA
 - \$90m for development of water rights
 - Salmon/Clearwater component:
 - Off-reservation hunting and fishing rights—translated into instream flow rights to maintain habitat (but this is a fairly weak protection; the instream flow rights are held by the state).
 - Snake River flow component:
 - Provides money to purchase flows to maintain the salmon habitat—an ESA issue.

Jurisdiction to determine reserved rights

Eagle County (1971) (p851)

- Colorado wants to adjudicate all rights, but it needs to show a waiver of sovereign immunity—and the courts are pretty strict in reading such waivers by Congress.
- Here, though, Colorado has the McCarran Amendment (43 U.S.C. § 666(a)).
 - The U.S. argues that “under state law” means that immunity isn't waived etc. because the U.S. is not claiming water rights under state law. That is, the U.S. argues that the McCarran Amendment only applies to reclamation-based water rights.
 - But the Court disagrees, and so this becomes a landmark case.

Dugan (1963) (n1p853): the McCarran Amendment only applies to general adjudications—not private ones.

Indian water rights:

- *Eagle County* doesn't say anything about Indian water rights—Indian tribes are sovereign, too.
- But see n3p854: the McCarran Amendment does cover Indians, because Indian reserved water rights are held in trust by the U.S. (*Colorado River*).

Higginson (Idaho 1988) (p1:10p)

- (N.b. the background on the SRBA, included etc.)
- The question here is whether certain tributaries should be included in the SRBA.
 - § 42-1406A(3)(b) leaves it to the director to figure out who and what needs to be included.
 - The court first considers what “consent” in the statute requires—consent now, in the instant case, or generally, in the McCarran Amendment?
 - It then considers the *Dugan* general/specific adjudication stuff—and says that to be general, all tributaries must be included.

Intent to reserve

New Mexico (1978) (p856)

- The reservation at issue etc. is a national forest (so—not an Indian reservation).
 - *Arizona v. California* establishes the U.S.'s power to reserve water for non-Indian land.
- The national forest as established under the Organic Administrative Act in 1897. So, these rights will be pretty senior, if they exist.
 - The purposes of the OAA were:
 - To conserve water flows.

- To furnish a continuous supply of timber.
- These purposes don't demonstrate an intent to reserve beyond that necessary to preserve timber—otherwise the U.S. must get water in the same way as any other appropriator.
- Then, in 1960, the Multiple-Use Sustained-Yield Act: but the Court says that MUSYA doesn't reserve any more water.

Thursday, September 22

State v. U.S. (Idaho 2000) (h/o)

Potlatch v. U.S. (Idaho 2000) (12 P.3d 1256) (h/o)

- These are self-explanatory, Cosens says.

Potlatch Corp. v. U.S. (Idaho 2000) (h/o) and *SRBA 39576* (Idaho 2000) (h/o)

- Wilderness areas
 - Congress targeted land within existing federal land (not changing the management—although most of the land was within national forests).
 - Wilderness areas could be established in two ways:
 - Management agencies could recommend an area, and then Congress could pass a specific act, which could be vetoed by the state.
 - The state could come in with a package and Congress could act on it.
 - If there's any water reservation at all, it will be for instream flows.
 - Often, there aren't any upstream users with wilderness areas. But with these areas in Idaho, there are. Plus, etc. there's the potential for future needs.
- The original, Silak, opinion:
 - Yes, water rights were implied.
 - (Compare the Wild and Scenic Rivers Act, where the reservation is express.)
 - And the rights are to *all* of the water.

Both of these holdings were highly controversial.

- The final, Schroeder, opinion:
 - No implied water rights.
 - Sources for determining whether there are implied rights:
 - The plain language of the act.
 - The court looks for language in the act about water and finds none—so, does the majority think there can ever be an implied reservation??

(There are arguments on both sides.)

- The legislative history.
- Note the analogy of the Wilderness Act to MUSYA (recall *New Mexico*): MUSYA just changes the administration of the area, not reserving any additional water rights.
- Also not the “sensitivity doctrine” (from the dissent in *New Mexico*): implied-reservation doctrine should be applied with sensitivity to the impact it will have on those who have already obtained water rights under state law.
- What about forfeiture?
 - Why wouldn't you apply forfeiture to the government?
 - Well, it's claiming an instream use—so it's still being used, for one.
 - Analogy to no-adverse-possession-against-the-state rule.

Permitting in Idaho

- At common law, you got a water right through diversion and notice.
- This became a problem, though, because:
 - There was no central recording.
 - It was hard to plan.
- So, states created permit systems.
- Permit systems have caused appropriation and riparian systems to merge, a little (see the articles in the casebook).

Nielson (Idaho 1911) (p3:1p)

- Facts:
 - N: files notice in 1901, diverts in 1908.
 - P: Gets permits in 1908 and later.
 - Idaho adopts a permit system in 1903.
- Dual system:
 - Before 1903, you could acquire a water right by either:
 - Posting notice, or
 - Diverting and putting to beneficial use (the “constitutional method” (art. XV, § 3))
 - (So, how do we have an exclusive permit system??)
- Priority date
 - Permit: relates back to the application date.
 - Diversion + beneficial use: date of application to a beneficial use.
- N.b.: one reason for SRBA and its complexity is the lack of an exclusive permit system until 1973).

Washington State Sugar (Idaho 1915) (p3:3p)

- Due diligence requirement

- Permits require construction timelines, with interim deadlines.
 - Itc., the permittee met the final deadline, but not the interim deadlines.
 - This is a policy against hoarding and speculation.
- Idaho courts have required strict compliance with all permit conditions—note the difference between a water “right” and a mere water “claim.”
- There's a statutory period in which you must perfect your permit—five years.

Hardy (Idaho 1993) (p3:5p)

- “Inchoate” water right.
 - The II wants an extension on the statutory permit perfection period, arguing that he needs to complete a federal process.
- Public interest inquiry
 - This is required as part of the initial permit process.
 - And, itc., the court says it's required for change of use, too (even though it's not in the change-of-use statute!!).

Wednesday, September 28

Adjudication

Private adjudication

- IC § 42-1404
- *Nettleson* (Idaho 1977) (p3:7p)
 - What happens when there are a bunch of unrecorded water rights?
 - See IC § 42-607 “shall be held to have a water right subsequent...” language: despite an earlier appropriation date, you'll be treated as a junior.
 - Why have this policy? For consistency in administration. It would be a significant confusion for the watermaster otherwise; and different watermasters would make different determinations.
 - However, note that this goes against the you-take-the-river-as-you-find-it policy.
 - Also, due process, equal protection, and takings claims here.
 - Procedural due process claim:
 - The court says that water rights *are* property interests for procedural due process purposes, and so notice and hearing are usually required.
 - But here, notice and hearing are not required because there are “extraordinary circumstances” under *Fuentes*.

- The court is walking a fine line with this—some states might require notice and hearing, Cosens thinks.
- The court also points out that II could have had his water rights adjudicated beforehand.
- Equal protection claim: the court applies a rational basis test and finds no problem.
- Takings claim: doesn't work because a water right isn't an unconditional guarantee of water in times of shortage—you just get allocated in priority.
 - Could the state use its authority to hold and administer all water in the public interest to abolish the prior appropriation system?
 - This is an open question, Cosens says. (Montana has done some interesting things, though, such as “controlled groundwater.”)

General adjudication

- General adjudication, compared to private adjudication, is more of an in rem proceeding—everyone's bound, regardless of their participation.
- The result is usually a decree, listing and defining the parameters of everyone's water rights in the system.
- Once the decree is made, the Division of Water Resources administers it. the Director selects watermasters who actually do this work. See IC § 42-602.
 - The watermaster cannot adjudicate water claims. All he can do is what § 42-602 says—distribute water based on prior appropriation.
- The need for general adjudication can be seen as a failure to administer and record water rights in the past.
- “The Swan Falls Case” (*Idaho Power v. State* (Idaho 1983) (p1:1p)
 - Itc. provides a history, including the historical reasons, for the SRBA:
 - The first hydropower application in the basin was in 1901 (a fairly early priority date) for 8400 cfs.
 - This means, for upstream users, that if the flow drops below 8400, upstream juniors have no use.
 - So, there was a push for “subordination” or dams' water rights.
 - But, this caused power rates to go up.
 - And so itc. is where ratepayers sued claiming that Idaho Power didn't protect its water rights.
 - In response, Idaho Power sues to protect its water rights.
 - The court ultimately says that Swan Falls dam's water rights will *not* be subordinated (although maybe other dams' rights will be).
 - So, Idaho was faced with this earthshaking ruling and sought a political

solution—and thus there was an agreement that the state would adjudicate the water rights.

- IC § 42-1406A: authorized SRBA.
- IC § 42-1411: important, Cosens says.
 - The director's report. This report is prima facie evidence of what the water rights are. Owners disputing the report have the burden of proving it wrong.
- *Walker v. Big Lost River* (Idaho 1993) (p3:10p)
 - Why would water users want a separate, private proceeding, outside of SRBA? Well, it would be quicker, for one thing.
 - But the court says that you can't do this. You have to go to SRBA.

Thursday, September 29

- *Fremont-Madison Irrigation Dist.* (Idaho 1996) (p3:22p)
 - N.b. “water spreading”: with technological improvements, you can irrigate more land with the same diversion rate. But the law considers this an expansion of use.
 - Are the amnesty statutes constitutional?
 - IC § 42-1425: no enlargement of water rights—no increase in either diversion rate or acreage.
 - So, no water spreading, e.g.
 - IC § 42-1426: if there's a finding of injury as a result of enlargement, you can still keep your water right by mitigating. Otherwise, you lose your seniority and take a new right (for the amount you changed) one day junior to whoever you injured.

Because of the no-injury rule, the court says that these are okay.

- Remember, the burden of proof is on whoever is disagreeing with IDWR's report. (So, who has the burden will depend on what IDWR has said.)
- Practice exercise on adjudication (h/o)
 - F: the Indian reservation
 - How much, though? PIA is endorsed by the Supreme Court. But even then—do you look at the economics of the past, or of now?
 - E:
 - Note the no waste rule. So—20 or 100 cfs? Probably not 100. Whether it will go all the way down to 20 is not clear.
 - C:
 - 5 of 10 cfs? 5, because the rest was never developed.
 - B:

- Expansion of cfs.
- A:
 - Expansion.
 - 1930 right: 40 acres, 10 cfs.
 - 1950 right: 40 acres, 10 cfs.
- G:
 - Note the date of passage of the forfeiture statute.
- H:
 - No right in Idaho for a wilderness area.
- J:
 - No instream flow rights in Idaho for private individuals.
- I:
 - Quantification: you're required to quantify in Idaho; not all the water.

Wednesday, October 5

Judge John Melanson

- Why SRBA?
 - Many years of constitutional *or* permit appropriation—so, lots of rights with no record.
 - Swan Falls case
 - Subordination of hydropower uses (became part of the constitution in 1929).
 - Idaho Power began building a coal power plant and ratepayers sued.
 - And the Idaho Supreme Court said that Idaho Power's rights were *not* subordinated.
 - Other reasons:
 - Illegal settlements
 - Illegal enlargements
 - No conjunctive management of ground and surface water
- SRBA
 - Began in 1987
 - 87% of the state included
 - How it works:
 1. Claimants must file claims (except de minimis domestic and stockwater claims)
 2. IDWR investigates the claim (can be formal, on-the-ground, but isn't always).
 3. IDWR issues a director's report. The director is the court's expert (see IRE 706).

4. Objection and response period (the director's report has prima facie weight).
 5. Special masters handle any subcases, concluding with a recommendation to the court.
 - These can be challenged: challenges are handled like an appeal. The presiding judge is bound by the master's finding of fact, but not the master's conclusions of law.
 - The objection rate is only 2% (!!).
- Federal claims
 - No IDWR investigation—these are reported as claimed.
 - There must be an evidentiary hearing for each federal claim—these are usually done by affidavit.
 - Status
 - The first basins started were the test basins. These are now nearly complete.
 - N.b. the Nez Perce settlement.

Wednesday, October 12

Groundwater

- Background
 - (See the book *Water Follies*.)
 - Terminology and basic ideas
 - Slow movement of groundwater
 - So, it's harder to do prior appropriation.
 - Also, delay makes it hard to understand the connection between surface and ground water.
 - Groundwater provides the base flow for rivers.
 - Groundwater is found in cracks, not in pools or underground rivers.
 - “Porosity”: how much space there is in the cracks.
 - “Permeability”: how connected the cracks are.
 - “Head”: a measure of pressure.
 - “Recharge”: may or may not occur—mostly occurs along mountain fronts.
- Three legal approaches:
 1. English rule: absolute ownership, incident to land ownership.
 - This means you could build a huge well and extract from an entire aquifer.
 - There probably aren't many states that follow this rule.
 2. Reasonable use: analogous to riparian doctrine.
 - Reasonableness depends on:
 - Your use.

- What's going on around you.
 - Shortages are shared.
3. Prior appropriation
- Montana, Idaho, and Washington follow this. And require a permit.

And there's also conjunctive management, but states have been slow to do this.

Higday (Missouri 1971) (p550)

- N.b. “subirrigation”: where the water table is at root level. In most states, you can't get a water right for that.
- Facts:
 - The city has some wells and wants to take a substantial amount of water from the aquifer. This will lower the water table under II-farmers' land.
 - The farmers have a 6000 acre farm. The city has about 17 acres.
 - (N.b. that return flow from irrigation often returns to groundwater.)
- The city argues for absolute ownership (the English rule), based on an old, 1895 case.
- The court rejects this, adopting reasonable use (the American rule).
 - Why not follow precedent?
 - Because there's a much greater understanding of groundwater now than there was in 1895.
 - Also, the court recognizes the connection between surface and groundwater, and is thus applying a similar rule for both.
- Reasonable use: this will be a factual inquiry.
 - Factors:
 - Where used
 - What use
 - Impact on adjoining landowners
- Remedies
 - The city could provide water to the farmers.
 - The city could drill deeper wells for the farmers.
 - The city could condemn the farmers' land.
- “Correlative rights”: these are indistinguishable from reasonable use rights (for the purposes of this course, at least).

Wayman (Utah 1969) (p558)

- Facts: conflicting uses:
 - Homeowners have shallow wells, that are just deep enough to draw water.
 - The city has a deep well.
 - Because of the “cone of depression,” its well pulls the water table down near the well.
 - Also, if the city pumps more than the recharge rate, the entire

water table will go down.

- Thus, the question etc. is whether the homeowners have a right to a particular pressure. (Or do they have to keep drilling deeper?)
- The court says that the city's use is reasonable in light of the shallow homeowners' wells.
 - A lot of western states, including Idaho, follow this rule. This is an economic policy decision in favor of growth.

Baker (Idaho 1973) (p571)

- Facts: well owners are mining the aquifer.
- Idaho's policy has conflicting ideas:
 - Senior has priority, but
 - Should maximize the use of the groundwater resource
- So, the court develops a reasonable pumping level to reconcile those.
 - IDWR makes the reasonableness determination.

Mathers (NM 1966) (p575)

- Facts: pumping from the Ogallal aquifer, which does not recharge.
- Texaco applies to use water from the aquifer to flood oil out of the ground. This is a beneficial use in NM.
- The court says it will let the resource be depleted over 40 years.
 - Why 40 years? Is this an analogy to capital asset depletion? I.e., is this simply an economic decision??

(N.b., the rest of the cases in this section are about designated groundwater areas.)

Thursday, October 13

Conjunctive management in Idaho

[missed class]

Wednesday, October 19

David Tuthill, IDWR Water Division Manager

- Ways to establish a water right in Idaho:
 1. Permit
 2. Beneficial use (constitutional method)
 - You can still do this for:
 - A home well
 - Stockwatering

- Elements of a water right:
 1. Diversion
 - But there's an exception for instream use—no diversion is required (but only the state can hold such a right).
 2. Beneficial use
 - Wildlife is a beneficial use, n.b. (if intended).
- Adjudication
 - Cons:
 - Cost
 - To users
 - Of legislative time
 - To government agencies
 - To the public
 - Dormant problems discovered
 - Pros:
 - Beneficial use rights determined
 - Unused rights culled
 - Basis for conjunctive administration
 - Federal and tribal rights are determined
 - Dormant problems are resolved
 - Better opportunity to resolve interstate issues without compacts
 - Knowledge is power
- Conjunctive administration, n.b.

Thursday, October 20

The Endangered Species Act

- Note that freshwater fish are the most endangered vertebrate group in the U.S.

Basics

- § 4 (16 USC § 1533): listing and critical habitat designation
 - Endangered/threatened
 - Threatened: likely to become endangered.
 - Factors:
 - Habitat curtailment and destruction
 - Overutilization for commercial, recreational, or educational purposes
 - Disease and predation
 - Inadequacy of existing recovery
 - Anything else (a catchall)
 - Requires designation of critical habitat

- Geographic area occupied
 - Areas outside of occupied area that are essential
- “Conservation”: try to delist all endangered/threatened species.
- Implementing agency:
 - Terrestrial species: Fish & Wildlife
 - Ocean and anadromous fish: NOAA Fisheries
- § 6: allows for a cooperative agreement between state and federal governments for the state to implement.
- § 7: no jeopardy.
 - Affects federal actions only.
 - Agencies must confer with Fish & Wildlife or NOAA.
 - The *agency* must prepare a biological assessment (BA).
 - Formal consultation
 - F&W/NOAA does a biological opinion (BiOp or BO).
 - If there's a problem, F&W/NOAA must come up with a “reasonable and prudent alternative” (RPA).
 - The agency has discretion to follow or not follow the RPA, but it ignores it at its peril.
- § 9: no take.
 - This affects everyone (private and public).
 - “Take”: includes significant habitat modification (!!).
- § 10: allows permits for incidental takes.
 - Such as for a housing development.
 - To invoke this, you must develop a habitat conservation plan (HCP).
 - This provision was added later on.

Defenders of Wildlife (DDC 2001) (h/o Goble p1238)

- Facts: the Sonoran pronghorn, listed.
- Federal agencies involved: Interior, FWS, DOD, INS, BLM
 - What do they have to do? § 7 consultation → BA (by each agency) → BiOp by FWS if there's a likely affect on a listed species (for each agency).
- Bases for challenge here:
 - Cumulative effects weren't considered
 - “Cumulative effects”: under the regulations (see fn5), these are *non-federal* (state and private) effects only.
 - The combined effect of all federal agencies wasn't considered
 - “Environmental baseline”: everything that's already taken place (state, private, and federal—and maybe even *future* federal acts).

Sierra Club (5th Cir. 2001) (h/o Goble p1243)

- Here, a species has been listed, but no habitat designated.
- The court says that mere survival is *not* recovery. And the ESA requires recovery.

- NMFS argues that preventing jeopardy will necessarily protect the habitat. But the court disagrees, and says that those are different things.

Riverside Irrigation District (10th Cir. 1985) (p683)

- Π sues the Corps of Engineers because it won't let Π use Π's CWA permit—a “nationwide permit.”
 - A “nationwide permit” is for certain similar activities. It is *not*, however, for unique activities. And here, the uniqueness is that there's an endangered species downstream.
 - So, ESA § 7 procedure is required—not because the construction of the dam itself will affect the listed species, but because the dam will diminish waterflow and in turn affect the listed species' habitat. (This is why itc. is a water law case.)
 - The court says that Congress wanted both direct and *indirect* effects to be considered.
 - How does itc. square with federalism?
 - General, specific, and statutory construction.

Tulare Lake (Ct. Cl. 2001) (p523)

- This is the first case to hold that water reallocation for endangered species is a taking.
 - And a physical taking (!!!).

Wednesday, October 26

Steve Katz, NOAA

- Salmon in western North America
 - Enormously important in social, economic, and ecological ways
 - Weird life history
 - Susceptible to lots of danger
 - Cross jurisdictions
- The three Hs, and some other impacts:
 - Hydropower
 - Hatcheries
 - What's the problem with these?
 - The dilute genetic diversity (entire populations are bred from one mother and father)
 - Hatchery fish outcompete wild fish
 - Hatchery fish are vectors for disease

However, experimental support for these assertions is thin.

- Habitat degradation

- Climate change
- Exotic species
- ESA
 1. Someone petitions the regulatory authority (RA) for listing
 2. RA makes a determination of the risk
 3. Recovery plan/BiOp
 4. If § 7 agencies are involved: remediation, remove risk, identify actions
 5. Recovery

But you never get to (4) or (5), because of litigation.

- The regulatory authority
 - Regional administration
 - Management staff
 - Science staff

Separated to keep scientists uninfluenced.

- But it actually operates like this:
 - Regional administration
 - Management staff
 - Science staff

Thus, the management staff acts as a filter on the science.

- The BiOps
 - 2000:
 - Admitted no guarantee of success.
 - Simply “trading Hs.”
 - 2004

Thursday, October 27

Interstate allocation

[missed class]

Wednesday, November 2

- The Supreme Court doctrine: equitable apportionment:
 - Will consider the law of each state, but also many other factors.
- Interstate compacts
- Congressional apportionments

After *Arizona v. California*, there isn't much of a practical difference between the last two anymore.

Interstate compacts

- With equitable apportionment, you can't plan ahead. But states can use compacts, authorized by Congress (see A1§10c3).
- *Dyer* (1951) (p949)
 - Facts:
 - A compact between many states re: the Ohio River and, specifically, its water quality (pre-CWA).
 - This wasn't very sophisticated, either (it was 1951). It was just for removal of 45% of suspended solids.
 - The compact set up an interstate commission:
 - A majority of members from a majority of states was required to enforce the agreement against a state or an individual violators. To enforce against an individual violator, a majority of members from the violator's state was also required.
 - The states adopted the compact and Congress approved it.
 - The problem here is that West Virginia's new administration won't pay for the interstate commission.
 - Thus, etc. will send a signal as to how reliable these interstate compacts are.
 - Two ends of a spectrum are argued here:
 - The U.S. argues that states can unilaterally pull out of compacts at any time.
 - Others argue that once Congress gives consent, a compact is federal law.
 - The Court takes a middle path:
 - The Court gets the final say—just as in *Marbury*.
 - Here, the Court gets to have final say on what West Virginia's state constitution says (!!!!!). (And it says that West Virginia, under its constitution, can't pull out.)
- Note that not everything agreed to between states rises to the level of a “compact.”
- *Intake Water Co.* (9th Cir. 1985) (p955)
 - Facts: a compact re: the Yellowstone River and coal slurry pipelines.
 - This is challenged under the dormant Commerce Clause.
 - But the Court avoids the Commerce Clause issue by saying that a consented compact is *federal law*.

The Colorado

- Arizona, New Mexico, Colorado, Utah, California, and Nevada.
 - There's only a small part in California, but California make the most use of it.
 - All of these states follow prior appropriation.
 - Upper basin:
 - Utah
 - Colorado
 - Arizona
 - New Mexico
 - Lower Basin
 - California
 - Nevada
 - Arizona
 - New Mexico
- Equitable apportionment?
 - If so, the states would be worried that California would get everything.
- The Colorado River Compact (p959)
 - “River system”: not just the mainstem—all the tributaries.
 - If it was just the mainstem, Arizona would get the Little Colorado and the Gila Rivers.
 - Mexico
 - Treaties to be satisfied by surplus.
 - If no surplus, treaties to be satisfied equally between supply in the upper and lower basins.
 - Arizona refused to ratify the compact, complaining about inclusion of the tributaries (it wanted the system defined as just the mainstem).
 - So, the compact failed. Until...
- Boulder Canyon Project Act (1928) (p967)
 - This act has many listed purposes.
 - Conditions on the act taking effect:
 - Approval of the Colorado River Compact, within six months, by *only six of the seven states*.
 - California had to agree to limit its use to 4.4 maf (a hard thing for California).
 - California was only recently ordered to actually meet this limit.
- *Arizona v. California* (1963) (p973)
 - (Recall that itc. set up the standard for quantifying Indian reserved water rights—practically irrigable acreage.)

Thursday, November 3

- Recall:

- Colorado River Compact:
 - Never ratified.
 - 7.5 maf to the upper basin, 7.5 maf to the lower basin.
 - Arizona wouldn't ratify because the river system included the mainstem and the tributaries.
- Boulder Canyon Act:
 - Required:
 - California legislature to agree to 4.4 maf and half the surplus only.
 - Arizona and Nevada must authorize agreement.
 - Arizona: 2.8 maf plus half the surplus (and tributaries).
 - Nevada: only 300K af.
- Special master:
 - Looks at the BCA, even though Arizona and Nevada never agreed.
 - Thus, Congress would be apportioning the water (a *new* way for allocating water interests).
 - BCA authorizes the secretary to make water contracts, and the BCA guides the secretary's decisions with respect to these contracts, the special master says.
- California objects:
 1. BCA isn't an apportionment.
 2. Arizona shouldn't get the tributaries.
 3. Shortages shouldn't be shared pro rata—there ought to be deference to prior appropriation.
- The Court:
 - Agree with the master that the BCA apportioned the water.
 - Arizona gets the tributaries, because “of and from the Colorado River” is what the act says, not “of and from the Colorado River system.”
 - As to shortages, the Court gives broad discretion to the secretary.
 - Why?
 - Because of the contracting authority.
 - Because of the purposes of the BCA—it's water not just for state use, but also for instream federal uses (like navigation, hydropower, and flood control).
- Central Arizona Project
 - To get money for this, Arizona ended up agreeing to have the entire project be junior to California.
- Salinity: about half is coming from human sources

Interstate allocation and the Commerce Clause

- *Sporhase* (1982) (p1002)
 - The Court must answer whether water is an article of commerce, and, in any case, what states can do. (Compare *Dyer*, where the Court avoided this question.)
 - Facts:
 - A private user in Nebraska with a well, located in Nebraska, is using his water in Colorado.
 - But a Nebraska law prevents use of water in other states without a permit. The user challenges this.
 - Is water an article of commerce?
 - Well, it's different:
 - It's usufructuary.
 - It's a necessity, and so this elevates the states' interest in conserving it.
 - But, yes, it is an article of commerce.
 - It's used to produce articles of commerce (through agricultural use, e.g.).
 - There's a national interest in water.
 - Dormant Commerce Clause analysis, then:
 - Nebraska's interest in conservation is a factor, here.
 - Test:
 - There must be a legitimate state interest in restricting groundwater use.
 - The burden imposed can't be excessive, compared to the benefits.
 - Here, Nebraska's reciprocity requirement is no good—the Court sees it only as a political restriction that's not tailored to accommodate other states' interest in conservation.
 - Thus, *itc.* makes it harder for states to limit out-of-state uses.
 - And so *itc.* incentivizes state to make agreements (compacts).

Wednesday, November 9

Public rights

[missed class]

Thursday, November 10

Water quality

- Note how the divide between water rights and water quality is artificial (O'Connor has even noted this in an opinion).
- Can quality be protected along with water rights?
 - Generally, no.
 - For reserved water rights, this is still an open question.
- So, what about other remedies?
 - State nuisance law and other state remedies
 - The problem with these is causation. For instance, St. Louis once sued Chicago for discharges but couldn't prove causation because of all the possible in-between sources.

So, you need to regulate the *source*.

- Original federal statutes left the states to do this on their own.
- Then, federal statutes added subsidies.
- Then, in the 1960s, public attention increased due to the Cuyahoga River fire and other things.
- And that led to federal statutes with teeth...

The Clean Water Act

- A series of acts, passed over time.
- Goals:
 - Safe water for almost everything, including swimming.
 - Eliminate all discharges.
- Federal-state relations:
 - State can do CWA implementation if they want—or else the federal government will. Implementation includes:
 - Setting standards.
 - Standards must be set based on the designated uses, which the states can designate (but the EPA reviews the designations and standards).
 - Generally, for use designation, the state just designates whatever uses exist under the existing water rights permits.
 - Issuing permits.
 - Anyone who discharges a “pollutant” must get a permit (but only if it's from a “point source”).
 - “Point source”: discrete points of discharge.
 - Not agricultural runoff.
 - Not urban runoff.
- Citizen suits: these have made the CWA point source program pretty successful.
- Holes in the CWA:
 - The agricultural and urban runoff exceptions.
 - Failure to regulate all other non-point source pollution.

- This is hard because these sources have to do, often, with land use, which is hard to mitigate because it usually covers a broad area (e.g., logging).

Idaho Sportsmen's (W.D. Wash. 1996) (p10:2p)

- Idaho DEQ designates uses and regulates point sources, but still there are water quality problems.
- So, now the state must move to WQLSs (Water Quality Limited Segments), and TMDLs (Total Maximum Daily Loads) for each.
 - This took everybody a long time.
 - Partly because it's hard (daily and seasonal changes have to be accounted for, and there's a huge amount of data needed).
 - Partly because there are regulatory implications, and so you're going to be sued by one side or the other no matter what you do.
 - TMDLs are used to focus regulation.
 - E.g., TMDLs can lead to permit alternation.
 - Otherwise, the state must develop a plan.
 - Idaho originally develops 36 WQLSs. But then the EPA finds 962.
 - The EPA had to be ordered to step in. (EPA is usually reluctant to step in because of the politics involved with interfering with state regulation.)
 - The court recognizes that WQLSs will change over time.
 - Deadlines: the original deadline for WQLSs and TMDLs was 1979. But no state met this.
 - Even so, the CWA does provide for this—it has “margin of safety” language.
 - This is an example of the “precautionary principle” for dealing with scientific uncertainty.
- What remedy?
 - The court finds noncompliance and orders EPA to work with Idaho to develop a new schedule.
 - Note the reluctance of the court, even, to interfere too much.
 - The Idaho DEQ website contains information about the TMDL program.

Wetlands regulation

- Note the changing role of the Corps of Engineers.
- We now understand that wetlands are natural filters that improve water quality.
- CWA § 404 requires a Corps permit for any activity that deposits fill into

navigable waters.

Riverside Bayview Homes (1985) (p663)

- II developer wants to develop land by filling a wetland without a permit.
- The Court says the under the regulation, II needs a permit—so the only question is whether the regulation is valid under the CWA.
 - The Court says the regulation is fine, considering the broad purpose of the CWA.
 - But note that this broad reading has been challenged (see *SWANCC* (2001) (p668x)).

Wednesday, November 16

Groundwater quality

Thomas Solvent (Mich. 1985) (p651)

- CERCLA: a liability statute
- But itc. is brought under state nuisance law.
 - Why?
 - Maybe because the state felt that EPA is too slow. It often is (CERCLA liability is so high that companies usually fight it viciously; also, the federal government isn't funding CERCLA).
- The state must show an imminent threat—and it succeeds.
- Δ argues for preemption—and loses. The court says that CERCLA expressly allows a response by other entities besides the federal government. So, state nuisance law survives CERCLA.

Kennecott Corp. (D. Utah 1992) (p654)

- Important CERCLA terms:
 - “Removal”: an immediate response, often temporary.
 - “Remediation”: a long-term solution, intended as permanent.
 - NRDs: natural resource damages.
- Itc., the Salt Lake Water District intervenes to oppose the consent decree. Its interest is in future development (which could be harmed by this contamination).

The Federal Power Act

- Note NEPA, which requires impact statements.
- Also note EPA itself, under a recent amendment, requires review of environmental impact before any licensing.
 - FERC also has the ability to revisit licenses. It can revoke or—more often—

require mitigation.

National Wildlife Federation (9th Cir. 1986) (p670)

- The permit here is challenged because FERC didn't have a comprehensive plan, on the grounds that without a comprehensive plan it can't detect incremental and cumulative impacts.
 - The court says that even though a comprehensive plan may not be necessary, FERC must at least collect *some* information or build a record that shows why it didn't.
 - Also note the Northwest Power Act issue etc.
- State certification
 - *PUD #1* (1994) (p674)
 - Setting a minimum flow, as part of state certification under CWA, is okay, etc. says.
 - Why? Because the state can set water quality standards, including those regulating:
 - Criteria
 - Use—minimum flows can fit under this.

Also, the state can regulate water quantity as part of regulating water quality (see ¶5p679).

The Reclamation Act

- History
 - Powell Report: recommended federal subsidies for irrigation.
 - Eventually the Reclamation Act was enacted and the Bureau of Reclamation was established.
 - Over 500 dams have been built under the Act.
 - In 1939, the Reclamation Act was amended to include purposes beyond just irrigation.
 - Recently, the Act's subsidies have come under fire as being too generous—the revolving fund was never actualized.

California (1978) (p804)

- This is about cooperative federalism:
 - The federal government goes to the state, pursuant to § 8 of the Act (¶1p805).
 - And the state attaches *conditions*:
 - No impoundment until irrigation contracts are acquired.
 - Minimum flows.
- The Court distinguishes (or abandons) precedent as involving a direct inconsistency between federal and state law, whereas here there is no direct conflict. And where there is no direct conflict, the Court says, state law

trumps.

Thursday, November 17

International water law

- Figures:
 - 1.1b people worldwide doesn't have access to safe drinking water.
 - 20% of American Indian homes lack potable water.
 - 2m tons of human waste is disposed of in freshwater every day.
- Hot spots
 - Nile River
 - Tributaries: White Nile and Blue Nile
 - Aswan Dam: 1902, enlarged in 1970.
 - The big conflict is over upper basin development (poor countries), which is being sacrificed for the lower basin (more powerful countries).
 - Palestine/Israel
 - 30% less per capita water allocation to Palestinian settlers than WHO recommends.
 - 200% more per capita to Israelis than WHO recommends.
 - Water is a *major* sticking point here.
 - Aral Sea
 - In 1994, the sea was half its former size, from diversions.
 - Colorado River
 - Mekong River
 - 1995 treaty: China refused to join.
 - Danube River
 - Cyanide spill from Romania in 2000.
- How do we deal with these things?
 - International law is voluntary
 - Sources of international law
 - Treaty
 - Custom
 - E.g., a country may not use its territory in a way that significantly harms another country's (this comes from the Trail Smelter Arbitration).
 - E.g., a country must provide notice of impending harm (e.g., in the Danube River cyanide spill) (this comes from Chernobyl).
 - A country can *opt out* of customary law (just by saying so).
 - With international water law, you find the same arguments that we saw in the equitable apportionment cases:
 - Upstream users argue for absolute sovereignty.

- Downstream users argue for “absolute territorial integrity”: the right to natural flow (i.e. riparian doctrine).
- Some argue for prior appropriation.
- The leading approach is “limited territorial sovereignty,” or equitable apportionment.
- An emerging approach is sustainable development, where there is concern for future use incorporated into the equity analysis (this comes from a separate opinion in *Hung*).
- Lac Lanoux Arbitration (p1030x): note that if Spain could object, Spain would have a kind of sovereignty over France.