The Fundamentals Underlying Conjunctive Administration

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RIPARIAN DOCTRINE VS. PRIOR APPROPRIATION DOCTRINE
What is the Riparian Doctrine?

- A system of allocating water among those who possess land surrounding the water source.
- If you own land next to or above the water source, you have a right to use the water.
- Developed and used Primarily in Eastern United States.

Prior Appropriation Doctrine

- The first person to use a quantity of water from a water source for a beneficial use has the right to continue to use that quantity of water for that purpose.
Prior Appropriation Doctrine

- Subsequent users can use the remaining water for their own beneficial purposes provided that they do not impinge on the rights of previous users.
- “First in time, first in right”
- Primarily in Western United States.

Application in Idaho

- Idaho is a prior appropriation state.
- In times of water shortage, the earlier (prior) use receives water first.
- Idaho does not recognize riparian water uses.
Add’l Basic Premises – Public Waters

- Idaho law declares all waters of the state, when flowing in their natural channels, including natural springs, lakes, and ground waters of the state to be public waters.

- A water right is the right to divert the public waters of the State of Idaho and place them to a beneficial use.

Public Waters Cont.

- When a right to the use of the public water is established by appropriation, the resulting water right is a real property right.

- The laws of the State of Idaho protect real property rights, including water rights.

- The real property right in water is secure so long as it is beneficially used.
How is a water right established in Idaho?

Constitutional Method

- a.k.a Grandfather Method or Beneficial Use Method.
- Two requirements:
  - Divert water.
  - Put water to beneficial use.
- No forms or recording
Permit Method

- Fill out an Application for Permit form and file with IDWR.
- Pay fee.
- Application is published.
- Hearing if protested.

Permit Method

- Once permit is approved, water user generally has 5 years to develop water system.
- Once water system is developed, they submit proof of diversion and beneficial use to IDWR.
- IDWR issues license confirming the use.
- Priority date is the date of the application for permit.
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Permit Method

- Permit process now mandatory
  - Permit process was optional for a long time.
  - A permit has been necessary to establish a water right since 1963 for ground water and since 1971 for surface water.
- Exception to mandatory permit requirement:
  - Domestic uses using ground water.
  - In-stream stockwatering

Point worth emphasizing

- Small domestics are exempt from license requirements:
  - Homes, Livestock, Camps
    - 13,000 gallons per day.
    - Max of ½ acre of irrigation.
  - Any other small use
    - 0.04 cubic feet per second.
    - 2500 gallons per day.
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Two ways to establish water rights in Idaho

1. Divert and Beneficially Use Water

2. File Application → Permit → License → Adjudication Process → Court Decree

Allocation in times of shortage

(Note: This technique is no longer available, except for small domestic and stockwater uses from ground water, or stockwater drinking from a stream.

March 25, 1963 — ground water
May 20, 1971 — surface water)
When Priority Principle will be invoked

- A senior water user who is not receiving enough water can invoke the priority principle to shut off an upstream junior water user.
  - "Make a Call"
- However, if shutting off the junior water user would be futile, the priority principal will not be invoked against the junior appropriator.
  - "Futile Call"

Burden of Proof

- When arguing a futile call, the burden of proof is on junior to show that its diversion is not interfering with a senior water user's right.
Preferences in Times of Shortage

- The Idaho Constitution sets forth the following preference scheme:
  - Domestic uses over all other.
  - Agricultural over manufacturing uses.
  - Mining and milling uses over manufacturing or agricultural uses.

Preference in Times of Shortage

- Preference means right to condemn
- Use preferences do not supersede the priority principle. A junior preferred use cannot simply take the water ahead of a senior non-preferred user.
- Thus, a 1970 priority domestic user can condemn a manufacturing right, but requires payment of compensation.
Adjudications

Why adjudicate water rights?

- Before you can manage water, you must first know who is using the water.
- Constitutional rights must be quantified.
- Changed water rights must be clarified.
- Unused water rights removed from the books.
- Federal and tribal water rights must be determined.
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Two ways to establish water rights in Idaho

1. Divert and Beneficially Use Water

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Note: This technique is no longer available, except for small domestic and stockwater uses from groundwater or stockwater drinking from a stream.

March 28, 1863 – ground water
May 20, 1971 – surface water

What is Conjunctive Administration?
The Legal Definition:

“The legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground supply.”

The Simplified Definition:

Determining how junior ground water rights impact senior surface water rights.
Hydraulic Connection Between Surface and Ground Water Rights

- Idaho law recognizes the connection between ground water rights and surface water rights.
- Idaho applies prior appropriation doctrine.
- Not the same in all states.

Didn’t the SRBA Answer the Issue of Administration?

- Adjudication and Administration are separate tracks.
- Adjudications establish the basic building blocks upon which administration rests.
Why is Conjunctive Administration So Difficult?

- Water law originally was developed to manage surface water.
- Effects are immediate, visible and down-stream only stream only.
- With ground-water, the effects exist but are more difficult to identify.
  - Effects are spatially distributed.
  - Effects are spread out over time.

Models Are Critical Tools In Conjunctive Administration

- Because of this difficulty, a ground water model is key.
- A model helps inform how ground water uses impact surface water uses.
Questions to keep in mind during CAMP process

- What are the drivers to administration?
- What role can/will modeling play? Can modeling information help better inform water users?
- How will the model used for administration be developed?
- Are there solutions short of a call for conjunctive administration or curtailment?