
GLOBALIZATION AND WATER RESOURCES MANAGEMENT: THE CHANGING VALUE OF WATER

AUGUST 6-8 AWRA/IWLRI-UNIVERSITY OF DUNDEE INTERNATIONAL SPECIALTY CONFERENCE 2001

CONSENSUS OR COURT? EXAMINING AUSTRALIAN & US LEGAL WATER REGIMES

M. David Coffman¹

ABSTRACT: Legal regimes that control river basins vary depending on jurisdiction, policy, laws, social and environmental needs. Examined will be two river basins: the Murray-Darling River Basin in Australia, and the Colorado River Basin of the United States and Mexico. Both basins run through multiple legal jurisdictions, with different mechanisms controlling their operation. This presentation would highlight the similarities and differences, and present the different approaches that have been taken from a legal perspective at the national, state and local levels. While Australia has shied away from court action, using a consensus decision-making model as a primary means of obtaining outcomes, the U.S. has relied much more on black letter law, and the courts as a guide as to how different parties may operate.

KEY TERMS: international water law, legal jurisdictions, intergovernmental relationships, market allocation systems

INTRODUCTION

The Colorado River and the Murray Darling River system of Australia are two systems on different continents that have many similarities with regard to geography and use, but the legal regimes imposed upon them have very different tactics that have been sought over the past 150 years. While both systems are the chief supply for major agricultural areas, and run through relatively arid regions, the pressures upon both rivers have reached a critical mass.

This paper compares some of the history and application of the legal regimes involved, as well as looking at what respective governments are planning for the future.

The Rivers

The Colorado River system runs from Wyoming to Mexico, having basin wide effect across 7 states as well as Mexico. While primarily drawn upon for irrigation and agriculture, domestic use, as well as reserved purposes for Native Americans allocate significant resources from the river from one year to the next. Its basin area is 651,100 km² and length is approximately 2,200 km. On the upper end of the basin, there is a significant transbasin transfer of water out of the basin into other basins for agricultural support.

The Murray-Darling River Complex begins in south-eastern Queensland, and runs through the states of New South Wales and Victoria before discharging into the sea in South Australia. Its basin covers large areas of New South Wales, Victoria and South Australia, and is the longest running river system on the continent. Its primary use at this time is for agricultural and irrigation purposes, with increasing pressures coming. There is some

¹ B.A. (Fort Lewis), J.D. (Oregon), LL.M (Washington), Cert. Acc'y (Washington). Ph. D Cand. (University of Wollongong). Part Time Lecturer, University of Wollongong. Faculty of Law, Wollongong University NSW 2522 Australia. Phone: 61-2 4221 4866, Fax 61-2 4221 3188. Email: davec@uow.edu.au

limited extra-basin transfer, primarily in the southern NSW/northern Victoria region. This transfer is primarily for power generation in the Snowy Mountains.

The Geography

Both river basins offer prime examples to be compared due to several factors they have in common. First, both rivers are approximately the same size in length, although the Murray-Darling system has a much larger flow and discharge during the year. Second, the rivers involved flow through very arid areas, and support large amounts of irrigable agriculture. Third, the populations of the areas within and just outside the river basins include large cities along the coasts, with their domestic and industrial use demands, while within the basins themselves the population density tends to be low (with the exceptions being the Phoenix and Las Vegas metropolitan areas within the Colorado R. basin). Fourth, both rivers are suffering from dynamic environmental pressure due to the current application of water both in and out of river. Finally, salinity is a pressing issue in both basins, albeit because of different mechanisms.

Legal Structure

The river systems themselves are governed quite differently, and in each instance the laws involved have had major impacts on what direction legal regimes are moving. While case law has effect in both countries, its impact is significantly higher in the US than Australia.

Australia.

In Australia, the Murray-Darling river system is run through a mechanism which involves similar participation from both the state and federal level. At the federal level, a commission has been established in which each of the states, the commonwealth and the Australian Capital Territory (which is part of the basin, but in actuality has little influence upon decision making) all sit as equal partners in making decisions about the basin. Decision at this level is by consensus- that is all parties must agree on any major decisions that happen within the basin. Individual states

In general, water is not held as a property right, but is allocated in a permitting process which allows for efficient distribution of water. These permits are allocated on terms ranging from 1-20 years, depending upon the application of the water use (with town domestic and energy uses being allocated the longest term permits, and "excess" water in the system potentially being allocated annually. Ministers allocate permits, with some input from community and environmental groups, as well as from appropriate governmental departments.

Each state has a set of water laws, most of which have been reviewed substantially within the past decade. New South Wales, the most major upstream state of the Murray-Darling, implemented in 2000 a mechanism which allows for a water market for transfer of water that is considered to be excess.

There is a prioritisation system in most states, with domestic use taking top priority. Generally, a hybrid of the English riparian system and the permitting system is used, with environmental uses of water taking a relatively high priority. Township uses are also allocated a relatively high level of priority. To date, the commonwealth has not really exercised its power with regard to overriding environmental concerns (i.e. federal environmental legislation, treaties, etc) but in the last several years action at the federal level has been on an upward swing. With case law lacking, movement by the federal government to provide overarching

At the federal level, the Australian Constitution makes reference for waterways to be preserved for navigable purposes. Section 100 of the Australian constitution has not been tested extensively with case law, however, and it is not known as to the real extent of Federal power. Given the structure of Australian jurisprudence, courts are generally loathe to grant powers to the federal government that are not explicitly laid out.

There has not been any significant case law of disputes between states involving water. Instead, the commission has been used to get states to come to the table and act in a consensual manner with regards to how water has been allocated. Until about 50 years ago, this system was sufficient, but recent agricultural progress,

particularly in NSW and Victoria has led to water scarcity and has caused degradation in water quality. More recently, actions in Queensland have worsened the problem due to large-scale land clearing. South Australia is most affected in the long haul not due to the lack of water, but because water quality in meeting the domestic supply needs of the state (particularly Adelaide, the largest city) has been degrading steadily, with water standards for salinity expected to exceed UN standards within the next 20-50 years.

Very few cases are brought by private entities or individuals due to the “loser pays” system used within the Australian legal system. This lack of case law allows for some more flexibility on some ways, but in other ways can be regarded as a hindrance simply because it is an unknown as to how courts would react over a major water dispute, particularly involving interstate disputes. Instead these are expected to be resolved by the council, but as noted above council operates in a consensus fashion, resulting in an extremely slow or non-existent resolution of issues that are considered to be politically and legally hard to resolve.

Finally, it would be wrong to talk about the legal system without noting the social implications of how legal regimes operate in Australia. Society tends to operate by consensus, with many small councils and governments making local decisions that impact on the system as a whole. While there is some centralised planning, this has been disfavoured over the past several years with more local activity taking place. The federal government has funded problem solving by and large at the local level, making small block grants to agencies, governments and local entities that tend to create very local solutions. Other than at the basin council, actions have tended to be very localised in nature. On a broad nature, the two primary areas considered by the basin council have been the implementation of a cap on the quantity of water used by each state, and the resultant salinity problems that have occurred because of land clearing in large areas of NSW and Queensland.

The United States and Mexico

The Colorado River begins in Wyoming, and runs through Colorado, Utah, Nevada, Arizona and California before entering Mexico and running to the Gulf of California. Within the United States, the Colorado River is covered a compact system, which allows individual states to make agreements that have the same force of law as on the federal level. The Colorado River Compact was agreed to in the early 1920's, with adjustments made over time, as well as other minor compacts agreed to on intrabasin rivers that affect the Colorado.

The Colorado River within the US is broken for legal purposes into an upper and lower basin, with amounts of water allocated to each basin. Water is also allocated to flow into Mexico, with whom the United States has treaty obligations with regard to both quantity and quality. Of some dispute is whether the quantity allocated is correct, since the amount was determined during some of the wetter years seen within the basin.

Quantity of water has always been an issue, and extra-basin transfers have been substantial, particularly in Colorado for the upper basin, and California for the lower. Extensive legal regimes exist in each state for water transfer, with particular effect in California where much water is syphoned off and transferred for agricultural purposes as well as domestic use (particularly in the Los Angeles area).

Extensive case law has been heard at the US Supreme Court level; Arizona v. California being the archetypical case in which two states sue one another under to resolve water issues. Under the US Constitution, the US Supreme Court has original jurisdiction to hear such cases; in most cases a master is appointed and many years are spent getting to the nuts and bolts of the case. Given the extent of case law, it is possible to draw conclusions in many matters as to how water law doctrine from a judicial level will take place.

Each state has its own method as to how water is allocated legally; nevertheless given the history and geography, the prior appropriate method has generally won out. Under this system, water is treated as property, to be bought and sold. There is no extinguishment of rights after a period of time, but instead rights can be lost if not put to a “beneficial use.” This term has somewhat different meanings in different states, and over time while some states have strictly adhered to the prior appropriation system (such as Colorado) others have hybrid that system with administrative permitting (i.e. Nevada) and even have some mix with riparianism (i.e. Oregon and California).

The federal government operates on several levels. While states control water within their boundaries, the US government “reserves” water rights in many instances- with the largest such instance being on behalf of Native American tribes. On the Colorado, several million ac/ft of water is reserved for such purposes. This overrides state law in its allocation and implementation, with tribes able to claim such water as is needed to irrigate all “practically irrigable acreage”. Particularly within the lower basin in Arizona, this reserves much water out of the system; over the past several years there have been suggestions that this system may no longer serve the over all needs of basin users. In any case, all of this has been established largely through case law and court battles, a significant difference from the Australian system.

Of importance to note as well is the use of courts in the state of Colorado. In that state, specialized water courts are established in each basin to allocate water locally. It is the only state in which such a system is used-effectively to gain a water right one must file an application through the courts where facts are determined and rights are granted. This individualistic system allows for efficient allocations to certain aspects of users, but in the process overriding societal needs (such as for the environment) can be and have been left out.

Quantity and quality have been an issue in water flowing down the Colorado from the US to Mexico. In dry years, the Colorado is siphoned off and does not reach the Gulf of California, with Mexico applying water from the river for agricultural needs close to the US border. Salinity, resulting from overuse and mineral leaching, is such a problem that cases have been argued over that issue resulting in desalination plants being installed on the US side in order to meet treaty obligations. In the US, such treaty obligations are considered from a legal level to be on the same level as federal law; as a result the federal government is responsible to ensure the states provide the necessary water for delivery to Mexico. As to other treaty obligations (such as environment, etc) the US has generally taken a non-chalant approach to asserting its authority under the constitution except when specifically pressed to do so.

Case law also comes much more easily since plaintiffs don’t necessarily suffer consequences under the “loser pays” doctrine adhered to in Australia. As a result, case law is significantly broader and more established in determining outcomes for the basin, both at state and federal levels.

The compact system used has resulted in a known, but expensive system to resolve interstate water disputes. Building upon stare decisis, courts are generally loathe to contravene prior precedent in order to have the flexibility to establish new systems.

CONCLUSION

Both the US and Australia have pressing problems in each of the basins discussed above. While Australia has developed a system of consensus to resolve water disputes, this process is slow at best, and indecisive in determining the needs of the system as a whole. On the other hand, the US systems allow for known outcomes through the use of case law and the courts, but over time enough law has been established as to not always allow for the kind of flexibility in decision-making that may be needed from time to time to allocate resources appropriately. While the US and its states have moved away from pure prior appropriation in most cases to allow for environmental and other applications that don’t fit within that system, Australia and certain states have actually moved closer to a market based system (within limits) in order to more efficiently use what water may be available. In both cases, the systems move relatively slow, and don’t fully address basin needs as a whole. Additionally, politics involved mean that while the US approach is a much more individually driven process, the Australian approaches generally require consensus and/or local council approvals in order to proceed.

In both cases, lack of case law and restrictions at the Federal government level mean that basins as a whole generally aren’t considered when examining jurisprudence. This lack of central planning has resulted in a slow moving, disjointed process within both river basins.

ACKNOWLEDGEMENTS

I wish to thank Prof. David Farrier, Andrew H.H. Kelly and David Jones at the University of Wollongong for their active support. I also thank the Institute of Conservation Biology and the Faculty of Law with the University of Wollongong for their financial support in allowing me to present this paper.