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North Dakota Water Law: A Constitutional Comparison

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NOTE

NORTH DAKOTA WATER LAW: A CONSTITUTIONAL COMPARISON

The riparian system and the appropriation system of water law have long been recognized as the two major systems of water law in this country. The basic tenet of the riparian system is that the landholder has certain vested legal rights in waters appurtenant to his land. On the other hand, the appropriation system provides that a prior appropriator of water has the better right to the water even if a subsequent riparian tries to appropriate this same water which is appurtenant to his land. While keeping this over-simplified distinction of the two systems in mind, it is proposed that a recently enacted statute dealing with the regulation and use of water in the state of North Dakota may present an important consitutional question in the near future.

The underlying problem has arisen from the legislative policy which has determined that the common law riparian system of water law is no longer suitable to the conditions now existing in North Dakota. The legislature has attempted, by means of a series of statutory enactments, to change the riparian system as it was recognized to have existed and in its place set up an appropriation system of water law.[1]

North Dakota is not the first state to deal with the problem of change in its basic water law. It is proposed that an examination of this state's present statutory and case law in comparison with the Kansas and South Dakota experience with this problem will be of substantial benefit in determining the resolution of problems that will, in all probability, be encountered in the application of the present North Dakota statutes.

The basic problem which is to be dealt with herein is whether or not the present North Dakota statutes provide adequate protection of existing property rights as they have been recognized to exist by past statutory and case law.

The riparian system was codified in North Dakota by the statu-

1. See Larsen, *The Development of Water Rights and Suggested Improvements in the Water Law of North Dakota,* 38 N.D.L. Rev. 243 (1962).

tory provisions adopted by the Territorial Legislature in 1866. These provisions established the riparian's right to use water running in a natural watercourse.[2] An 1881 statute which was later included in the North Dakota Constitution, further limited any "ownership" which a riparian may have believed he had in waters running in a natural watercourse appurtenant to his land. It provided that "all flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes."[3]

A major change in North Dakota's water laws took place in 1905. These statues, as amended, remain in force today. One statute declares all waters within the state from virtually all sources of supply belong to the public and are subject to appropriation for beneficial use.[4] This declaration of public ownership of waters is an important concept in establishing an appropriation system.

The present statutes itemize a system of priorities and declare that as between appropriators for the same use, priority in time shall give the better right.[5] Prior appropriation for beneficial use gives such an appropriator the better right to the use of the water.[6] Eminent domain is available when necessary for the application of water to beneficial uses which constitute a public purpose.[7] A failure to use water for purposes for which it was appropriated for a period of three years, results in a reversion of the water to the public and it may again be appropriated. The administration of the loss of water rights is placed in the hands of the state engineer.[8]

It can thus far be recognized that the above statutory presentation goes far to establish the basic premises of an appropriation system of water law. It is equally apparent that thus far no mention has been made as to how present owners of water rights are to be treated. Section 61-04-22 purports to deal with these rights.[9] It provides that anyone beneficially appropriating water twenty years prior to July 1, 1963, has two years from that date to register an application to protect this right. Failure to apply for a permit results in abandonment and forfeiture of the prescriptive right. It should be noted that this section does not deal with water users who may have begun their appropriation within the tweny year period. This section was enacted in 1963 and at the same time the statute providing the basis for the riparian's right to use water

2. TERR. DAK. CIV. CODE § 255 (1866).
3. N.D. CONST. art. 17, § 210.
4. N.D. CENT. CODE § 61-01-01 (1960) specifically excludes "privately owned waters, in areas determined by the state engineer to be noncontributing drainage areas," and "difused surface waters."
5. N.D. CENT. CODE § 61-01-01.1 (1960).
6. N.D. CENT. CODE § 61-01-02 (1960).
7. N.D. CENT. CODE § 61-01-04 (1960).
8. N.D. CENT. CODE § 61-04-23 (1960).
9. N.D. CENT. CODE § 61-04-22 (1960).

was repealed.[10] It is important to note that Section 61-04-22 recognizes only those existing water rights which are prescriptive in nature. Nowhere do the statutes mention prior vested rights nor in any way do they purport to recognize or protect them.

An early case[11] recognized the reasonable use doctrine of riparian rights and the vesting of legally protected water rights in the riparian landowner. The court stated that once the government no longer owns a tract of land, the right of the subsequent riparian owner attaches, and cannot thereafter be invaded. It would seem then, that the United States Supreme Court recognized that it was possible to acquire a vested right in water under the riparian system which would be protected by the due process clause of the fourteenth amendment to the United States Constitution. It might be argued that Section 61-04-22 has the effect of divesting these previously recognized vested water rights which a riparian may have had should he fail to apply for a permit within the two year statutory period.

The real question is whether the 1963 statute adequately protects prior vested water rights. Stated another way, the question is whether or not a statute which provides that those who have prior vested water rights must affirmatively protect those rights by obtaining a permit under the new statutory system and declaring those who fail to do so as having abandoned and forfeited any right they may have had, adequately satisfied the due process requirement as a constitutional application of the state's police power.

Kansas has recently enacted an appropriation system as opposed to its prior recognition of the riparian system. These statues have successfully endured the constitutional test. An inspection of the Kansas appropriation statutes readily reveals that there was great concern over the protection of prior vested water rights. The statutes define vested rights as the right to continue the use of water which had actually been applied to a beneficial use at the time of the passage of the statute or within three years prior thereto.[12] It is clearly stated that any appropriation made under the provision of the statutes is subject to vested rights.[13] At the same time all water within the state is dedicated to the use of the people of the state.[14]

The most important aspect of the Kansas appropriation statutes in comparing them with the procedure set out by the North Dakota statutes is that the burden is on the Kansas chief engineer to gather data in order to determine which vested rights were in existence

10. N.D. CENT. CODE § 47-01-13, repealed by N.D. Sess. Laws 1963, ch. 419, § 7.
11. Sturr v. Beck, 133 U.S. 541 (1890). See also Bigelow v. Draper, 6 N.D. 152, 69 N.W. 570 (1896).
12. KAN. GEN. STAT. ANN. § 82a-701 (Supp. 1961).
13. KAN. GEN. STAT. ANN. § 82a-703 (1949).
14. KAN. GEN. STAT. ANN. § 82a-702 (1949).

at the time the statute was enacted.[15] Once the determination is made, all such water users must be notified of the findings and they have the right to appeal such findings if they disagree with them.[16] The Kansas statutes do not require the holders of prior vested rights to act in any way to protect those rights, but it is provided that such holders may have a right of action should their rights be invaded.[17] Before any water rights can be declared abandoned, the holder of such rights must be notified and given a chance to show cause why his right should not be forfeited.[18]

The Supreme Court of Kansas[19] was quick to recognize that the correct approach to water rights must be based upon the best interests of the people of the state, but also emphasized the fact that the individual's right to use water must not be disregarded. The court also stated that prior decisions recognizing certain rights of riparians are no longer to be considered as precedent. This would seem to mean that a new riparian user of water could not claim that riparian rights were still in force based upon old case law which recognized such rights. But this is not to say that riparian rights which had vested prior to the enactment of the new statutes are now null and void.

The leading case[20] upholding the constitutionality of the Kansas statutes stated that the state legislature did indeed have the power to implement a new system of water law which would be better suited to the conditions of the state. This power is based upon the principle that an adequate water supply is necessary for the public welfare.[21] The court made it clear, however, that such a system must adequately recognize valid existing vested rights. Such rights were held to apply only to waters which had been put to a beneficial use and not to unused waters. A later case reaffirmed these principles and again stated that recognized rights under the common law riparian system must be protected against subsequent appropriators under the appropriation statutes.[22]

The South Dakota appropriation statutes provide that the vested rights of riparian owners to continue the use of waters actually put to a beneficial use at the time of the passage of the statutes must be protected.[23] The statutes follow the Kansas scheme by providing that the public has a paramount interest in the water.[24] The South Dakota water commission is empowered to require reports

15. KAN. GEN. STAT. ANN. § 82a-704 (Supp. 1961).
16. *Ibid.*
17. KAN. GEN. STAT. ANN. § 82a-716 (Supp. 1961).
18. KAN. GEN. STAT. ANN. § 82a-718 (Supp. 1961).
19. Emery v. Knapp, 167 Kan. 546, 207 P.2d 440 (1949).
20. Baumann v. Smrha, 145 F. Supp. 617 (1956), *aff'd*, 352 U.S. 863 (1956).
21. *Ibid.*
22. Williams v. City of Wichita, 190 Kan. 317, 374 P.2d 578 (1962).
23. S.D. CODE § 61.0102 (Supp. 1960).
24. S.D. CODE § 61.0101 (Supp. 1960).

or other information from claimants of water rights.[25] This seems to imply that some request for such information from the claimant must be made by the commission. As is true with the Kansas statutes, South Dakota has made extensive provisions for the protection of vested rights.[26] Before an appropriator under the statutes may acquire any right to use water, he must give notice in the area that he plans to take the water.[27] Provisions are available for a hearing so that all interested parties may have adequate opportunity to show that granting the appropriator's application would be an invasion of their existing water rights.[28]

The Supreme Court of South Dakota upheld the statutes as being constitutional even though it recognized that there was some invasion of pre-existing rights, but this applied only to rights in water not then being put to beneficial use.[29] It is probable that this would not be a problem in North Dakota since this state has already recognized the doctrine of beneficial use.[30] The South Dakota Supreme Court used substantially the same language as did the Kansas Courts in meeting the constitutional question. It held that it was not shown that the statutes were unreasonable or arbitrary.[31]

At this point it should be clear that Kansas and South Dakota have taken a somewhat different approach in setting up their respective appropriation systems than has North Dakota. The theme of the Kansas and South Dakota statutes seems to be an apparent desire to define and protect prior existing vested rights, while the North Dakota statutes almost completely ignore the very existence of such rights. The North Dakota Legislature has made an attempt to superimpose an appropriation system upon the state's former riparian system while taking little cognizance of the effect of such an act upon rights acquired under the riparian system. The only provision for the protection of prior rights is the reference to prescriptive rights and these rights do not seem to be recognized as becoming vested until a permit has been obtained. And further, any prescriptive right not registered by July 1, 1965, will be deemed to have been abandoned and forfeited.[32]

Even if the statutes do not recognize prior water rights as being vested, it seems to be evident that the purpose of the statutes, especially Section 61-04-22, is to regulate the use and enjoyment of a property right for the public benefit. This is an employment of the state's police power.[33] It cannot be denied that the use

25. S.D. CODE § 61.0104 (Supp. 1960).
26. S.D. CODE §§ 61.0106, 61.0137, 61.0401, 61.0403 (Supp. 1960).
27. S.D. CODE § 61.0112 (Supp. 1960).
28. S.D. CODE § 61.0113 (Supp. 1960).
29. Knight v. Grimes, 127 N.W.2d 708 (S.D. 1964).
30. Sturr v. Beck, 133 U.S. 541 (1890). See also note 1, *supra*.
31. Knight v. Grimes, *supra* note 29.
32. N.D. CENT. CODE § 61-04-22 (1960).
33. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933).

of the police power by a state for such a purpose is proper.[34]

The weight of authority is that a state may use its police power to regulate property rights as long as such a use of the police power is not repugnant to some constitutional guarantee.[35] The real question concerning the constitutionality of the North Dakota statutes as affecting this particular area is whether or not the state has properly used its police power. In applying the accepted qualifications to the proper use of the police power, the question is further narrowed to one of reasonableness.[36]

If it is conceded that the courts have no right to interfere with the legislative determination of a policy which provides that all waters of the state must be conserved, then it follows that a prospective claimant of prior vested water rights must argue that the legislature has not properly exercised its police power in seeking to carry out its policy. This argument is in effect one that the present statutes will unreasonably deprive owners of their prior vested riparian water rights without due process of law.

The lesson to be learned from the South Dakota and Kansas experience in this area is that there exists an alternative method to North Dakota's two year registration requirement. Since this alternative method goes further to protect prior vested rights, it could be argued that the present North Dakota statute must give way to it. It is likely that if the burden was put upon the state engineer to determine the prior rights existing at the time of the passage of the statute, this would offer much more protection to owners of prior vested rights than does the present statute which summarily declares all prescriptive water rights to be abandoned and forfeited after July 1, 1965, if no permit has been obtained by that time. Also, it might be argued that the present statute's attempt to imply an intent to abandon prior water rights is unreasonable.

It is proposed that since there does not seem to be a pressing water shortage at the present time and since this seems to point to the conclusion that the regulatory effects of the North Dakota statutes are directed towards the future conservation of water, there is little need to effect a statutory system which may have the harsh results of divesting existing water users of their rights to use the water in the manner in which they have in the past as long as such use is not wasteful.

It is admitted that everyone is presumed to know the law and

34. Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908); Baumann v. Smrha, *supra* note 20; Knight v. Grimes, *supra* note 29; State v. Finney, 65 Idaho 630, 150 P.2d 130 (1944).

35. Reinman v. City of Little Rock, 237 U.S. 171 (1915); City of Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 184 N.W. 823 (1921); State v. Klein, 63 N.D. 514, 249 N.W. 118 (1933); City of Bismarck v. Hughes, 53 N.D. 838, 208 N.W. 711 (1926).

36. *Cf.* State v. Cromwell, 72 N.D. 565, 9 N.W.2d 914 (1943).

that ignorance and passiveness are no excuse for non-compliance. But it is arguable that the present statutory scheme places an unreasonable burden upon owners of prior rights. In the last instance, while it is probable that Section 61-04-22 of the North Dakota Century Code is unconstitutional if the tests which the Kansas and South Dakota Courts have set forth are applied, it is possible that the North Dakota Courts may uphold the statute. If this should happen, one may ponder to what extent the police power may be used and to what extent the historic sense of property rights has become subject to legislative prerogative.

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