Water Law Primer

General
- Water is legally and historically a public resource.
- Water’s importance: sustenance, health, environmental, aesthetics
- Water conflicts arise due to its irregular distribution in time, space and quality.
- Most water (supply) law deals with property concepts, vs. contracts, liability
- Water law has Common law origins, ie. case law vs. legislative enactments

Types of water
- Surface water – renewable, competing diversions
- Ground water - non-renewable, competing wells, contamination
  - Conjunctive use
  - Subject to appropriation (based on prior and reasonable use)
- Diffused surface water

Basic Water Rights Hierarchy
- International - Sovereign Power; Treaty, ex. Louisiana Purchase
- Interstate - Interstate commerce must not be restricted.
  - Adjudication (litigation), Compacts (agreement), Legislative allocation (apportionment)
- Federal - Commerce (Navigation, flood control, hydro power, Ag develop.)
  - Federal Reserved rights - defense, environmental, Indian
  - Federal Supremacy - constitutionally-based public need; Imminent domain
  - Date of creation is date of priority regardless of use
- State and local – obligation: prolong life/health of resource vs. promote full and efficient usage.
  - Riparian (property rights)
    - Natural flow rule - right to flow, undiminished in quantity or quality
    - Reasonable use test - related to other users
    - Landowners may initiate new uses at any time
    - When conflicts arise, all must reduce usage of water in proportion to their water rights (which is usually related to the amount of waterfront property owned)
  - Prior Appropriation (prior use)
    - First in time, first in right
    - Transferable
    - Requires: intent, diversion, beneficial use (reasonable use and time), continuous use, permit
  - Hybrid

Basic problem areas
- Water transfers – Is water an intrinsic property right, or can it be separable?
  - Riparian
  - Prior appropriation
- Ground water – How should groundwater be allocated?
- Federal reserved uses – what rights should the government have to appropriate water for military bases, parks, Indian reservations and conservation?
- In-stream uses – how can natural, non-economic uses compete with societal needs?
- Diffused waters – who is responsible for or can take advantage of natural runoff and flood waters?
- Stored water – who owns and controls stored waters?

Sources of Federal and State Power
- Supremacy clause (1776) – constitution
  - This constitution and the laws of the US … shall be the supreme law of the land; and the judges (and laws) in every state shall be bound thereby …
- Commerce clause (1791) – traffic, trade and transportation
  - Extended in 1959, “…may be exercised to achieve socially desirable objectives.”
  - Limits: Federal gov’t has no general police power => administered by States
**Historical Developments**

**Historical developments in appropriation rights**
- California Gold Rush (1848) - generally public lands
- Mining Act of 1866 - retroactively applied to prior mining claims
- Desert Land Act (1877) - non-navigable surface water is available for appropriation for irrigation, mining and manufacturing, subject to existing rights. Applies to all western states (1935)

**Historical developments in environmental regulations**
- Rivers and Harbors Act (1899) – intent: prevent impediments to navigation
  - Sec. 10 – requires permits to excavate and fill
  - Sec. 13 – “Refuse Act”, prohibits dumping/discharge of “… any refuse matter of any kind or description”.
  - 1971 – Sec. 13 permits must consider NEPA regs.
- National Environmental Policy Act (1969) => EIS

**Allocation of Colorado River – interstate compact**
- Colorado River Compact (1922)
  - Split CR into upper & lower basin states with equal and proportionate shares of the rivers 10 year average flow, approximately 7.5 Maf each per year
  - Finally ratified by AZ (1944), CAP proposed in 1946; blocked by CA
- Boulder Canyon Project Act (1928)
  - Held up by AZ until CA limited its right to 4.4 Maf + half surplus
- International Water Treaty (1945)
  - reserved 1.5 Maf for Mexico
  - Modified in 1965 to divert Welton-Mohawk drain to Gulf of Calif.
  - Modified in 1985 to provide average flows of less than 500 ppm salinity
  - Yuma desalination plant operational (1992)
- Upper Colorado River Basin Compact (1948)
  - Allocation: CO=52%, UT=23%, WY=14%, NM=11%, AZ=50 kaf
- Colorado River Storage Project Act (1956)
- Arizona v. California (1963)
  - Allocation: CA=4.4 Maf, AZ=2.8 Maf, NV=0.3 Maf

**Special Situations**

**Indian Water Rights - Federal Reserved Water Rights**
- Winters v. United States (S.Ct.1908) - established federal reserved rights for Indians on reservations
  - Establishment - date of reservation
  - Quantity - practicably irrigable acreage; economic self-sufficiency; set by adjudication
  - Location - bordering, traversing, underneath, proximate (depends on purpose and practicality)
  - Transferability - leaseable, allowed for economic self-sufficiency
  - Case: Ft. Belknap Reservation, MT, Milk River

**Groundwater allocations in Arizona**
- Groundwater Management Act (1980)
- Types of water rights
  - Grandfathered groundwater right

**Efficient markets require:**
- buyers and sellers bear the full costs and benefits of transfers
- well-defined, transferable property rights

**References**