

Reflections on Western Water Law

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I started teaching water law in 1962, my first year of teaching. I had never studied water law in law school. It wasn't taught in any of the eastern schools, and I knew nothing about it, so I started to try to educate myself before I had to face the students. I began by looking at the constitutional and water code provisions in places like California and Colorado. I was astonished by what I saw: the notion that water belongs to people of the state and can never be owned; that it must be used in a reasonable and beneficial way; that it may not be wasted, and so forth.

This was completely at odds with everything I had learned about the nature of property. To be sure, at a very basic level, I understood that, because of the physical nature of water, you could not own the corpus of a flowing river in a way that you own an acre of land. But these other notions—beneficial use, nonwaste, preferences for certain kinds of uses, prohibition of speculation, and the provision in California law that you can't sell water at a profit—just stunned me. I thought I would be entering an entirely unfamiliar legal universe.

I soon discovered that things were not so different after all. At that time one could work in the water law field without giving significant attention to any of these distinctive property concepts. In practice water was dealt with just about like every other commodity. It was bought and sold, leased and loaned, and generally treated as ordinary property. The distinctive rules I just mentioned had little operative consequence. Beneficial use—rarely did anyone have their water taken away from them because their uses weren't beneficial. Waste—there was plenty of waste, but there was very little regulation of waste. If you wanted to invest in water in the expectation that it would become more and more valuable—what they called speculation—it was easy enough to do, though it required a bit of indirection. And prepare to stand back if you

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told an agricultural irrigator that the water he had been using for many years belonged to the people of the state.

Certainly there were some special things about water. There was the federal navigation servitude.¹ We knew that in seventeenth-century New England there were the great pond ordinances that made these lakes accessible to the public,² and that in most places the public could use the surface of lakes and streams for recreation even when the bottomlands were privately owned.³ And, yes, there was an occasional lawsuit about waste.⁴ But for many years prior to 1983, what I've just described to you was pretty much the way things were, and all these unique water law concepts, the purpose of which was to assure that water was used in ways that were consistent with public goals and values, were of great academic interest and of very little practical import.

Then in 1983 we got the Mono Lake decision.⁵ For the first time the public trust doctrine, which had traditionally been used to deal primarily with disposition of tidelands,⁶ was actually applied to the diversion of water from a river for off-stream use. With that opinion, water law was fundamentally reconstituted. It really brought the public aspect of water law to life, and it raised more generally the question how society was to deal with natural resources generally at a time when the societal agenda about land and water, wildlife and habitat, was changing dramatically.

Mono Lake's legal history had begun some four decades earlier. Los Angeles went up to get this water in the 1930s, and it did everything correctly, by the rules as then understood, to acquire the right to use that water. In fact, Los Angeles used the power of eminent domain to acquire the right to lower the level of the water in Mono Lake as against the riparian property owners along the shore of the lake. One of the issues in that eminent domain case was what Los Angeles had to pay for taking the right of lake level maintenance. Los Angeles argued that this water was so saline and lacking in potability that the value that was lost was next to nothing. It effectively asserted that the lake's environmental values were a non-issue.⁷ The notion of beneficial use meant putting the water to use for the people who lived in Los Angeles who needed water for municipal purposes. What could be a more beneficial use than that? In those days leaving water in the river was seen as wasteful.

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1. See, e.g., *United States v. Willow River Power Co.*, 324 U.S. 499 (1945).
 2. See Lincoln Smith, *The Great Pond Ordinance—Collectivism in Northern New England*, 30 B.U. L. REV. 178 (1950).
 3. See, e.g., *Moore v. Sanborn*, 2 Mich. 519 (1853).
 4. E.g., *Doherty v. Pratt*, 124 P. 574 (Nev. 1912).
 5. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (1983), *cert. denied*, 464 U.S. 977 (1983).
 6. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).
 7. *City of Los Angeles v. Aitken*, 52 P.2d 585 (Cal. Ct. App. 1935).

That view was dramatically illustrated by another celebrated recent controversy, the San Joaquin River case, dealing with the Friant Dam. It was widely reported in the autumn of 2006 that the judge just approved a settlement of a longstanding lawsuit to re-water the upper San Joaquin River to restore the salmon fishery.⁸ When the Friant Dam project was being developed in 1959, the Bureau of Reclamation went to the water board to appropriate water to stop up the San Joaquin River at Friant Dam so they could divert the water and distribute it to agricultural irrigators. In that proceeding, the State Department of Fish and Game urged that some substantial flows in the river be maintained in order to preserve the salmon fishery.⁹ The Board's response was that it would be at odds with the public interest to leave water in the river to protect the fish when there is a demand for the water for irrigation.¹⁰ That's the way water was dealt with back then.

Let me give you a third example. On the island of Oahu a hundred years ago, a project was developed to take water from the windward side of the island and bring it through tunnels onto the leeward side of the island to irrigate sugar plantations. For nearly one hundred years that water was moved across the island. Recently, sugar production ended, and the appropriators greatly reduced their diversions, resulting in some restoration of the natural conditions on the windward side of the island. The question then arose as to whether the companies who had taken and diverted the water originally for irrigation could continue to have the use of all that water for future development, presumably for developments such as residential housing. In 2000, the Hawaii Supreme Court, in a case that echoed much of what was in the Mono Lake decision, required that a significant part of that water be left instream in its original state to maintain both riparian and shoreline habitat values, and to satisfy the needs of native peoples.¹¹

8. Harrison C. Dunning, *San Joaquin Settlement: Friant Dam Litigation*, 33 WATER REPORT 1 (Nov. 15, 2006). The decision that finally led to settlement negotiations was *Natural Resources Defense Council v. Patterson*, 333 F. Supp. 2d 906 (E.D. Cal. 2004).

9. See CAL. FISH & GAME CODE § 5937. The State Water Resources Control Board did not cite this section in its decision; instead it cited California Water Code sections 106 and 1254 which state "that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." Decision on Applications of United States of America, City of Fresno and Fresno Irrigation District to appropriate Water from San Joaquin River, State Water Resources Control Board, Decision D-935 (1959), at 37.

10. State Water Resources Control Board, Decision D-935, *supra* note 9, at 41 ("[T]he Board concludes that to require the United States to by-pass water down the channel of the San Joaquin River for the re-establishment and maintenance of the salmon fishery at this time is not in the public interest and accordingly, the protests of the Department of Fish and Game to the subject applications are dismissed.")

11. *In re* Water Use Permit Applications, 9 P.3d 409 (Haw. 2000) (dealing with applications concerning the Wai hole Ditch).

These are three dramatic instances where we have seen the operative understanding of beneficiality undergoing dramatic change over a period of a century, in accord with the fundamental principles of the law, but at odds with many decades of practice. One result is that water law is turning out to be a new central battlefield for the definition of property rights. This is perhaps the preeminent area in which you see the law responding through doctrinal reinterpretation to changes in the social agenda. When Friant Dam was built, when the Mono Lake diversion was made, and when Oahu's water tunnels were built, society wanted to use water for commercial or municipal purposes. Water was put to work to advance the goals of an industrial society that saw the destructive transformation of natural systems as necessary and acceptable.

What we've seen in these three instances, and also in the decisions that you're going to hear about later in this conference—the *Klamath* case,¹² the *Tulare Lake* case,¹³ the *Allegretti* case¹⁴—is a profound reorientation of the society's view about the importance of what may be called the economy of nature.¹⁵ We are seeing the implications of a postindustrial societal agenda. Our notion of what water is good for has changed.

The doctrinal situation in water, with conceptions like beneficiality, public ownership, and public trust, has given us a tool to deal with that change—a tool we don't have easily at hand in other areas. Similar changes are of course also occurring with land use as we have come to appreciate the importance of habitat, but we don't have the same legal doctrines in land law that undergird water law. The question presented, however, is essentially the same one. When the social agenda changes in some very significant way, what happens to property owners, and what happens to property rights? While the legal rules may vary, in regard to this underlying issue, the fact is that there isn't anything really unique about water. There is no reason that the basic rules for water, in this respect, should be any different than the basic rules for land or for any other significant resources. Society needs the governance of these resources to be yoked to its ultimate goals.

The fundamental question is how we transition workably from one agenda to another. I have just cited three examples of legal transitioning in the water field. But there are other historic examples of such changes, perhaps the most familiar being the Industrial Revolution, when the perception of the most beneficial use of resources was also being

12. *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005).

13. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001).

14. *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122 (2006), *cert. denied*, 127 S. Ct. 960 (2007).

15. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

reconceived. In those days, the change was away from a more traditional, dominantly rural, and unmechanized society to the urbanization and mechanization that define the world we have known for the last two centuries.

Interestingly, at that time there was little or no compensation to those who were displaced by the massive dislocations industrialization caused. Legal rules were dramatically redefined. For example, tort law developed the fellow-servant rule, negligence rules, and rules that required one to tolerate noise from machinery and sparks from railroad engines, because those were the kind of arrangements that were seen to fit the industrial agenda. The transition to industrialization was achieved harshly, certainly much too harshly in many instances. But the underlying point is indisputable. When society's agenda changes, legal conceptions must somehow change with it. Resource use (including human resource use) must somehow be brought into harmony with that agenda.

It is interesting that the fundamental rules of water law seem uniquely to anticipate change by building societal goals into their definition—with concepts like public ownership, beneficiality, public servitudes, and the like. Yet they do not explain why we should impose these transitional costs on people who through no fault of their own are caught up in societal transitions such as those we have seen at Mono Lake or Friant or in Oahu, or in the *Klamath* or *Tulare Lake* cases.

I've spent many years thinking about that question, and I don't have a profound answer, but I do have some thoughts about it that may be helpful in trying to understand the transitional era in which we find ourselves.

First, in a society that wants to facilitate change, a legal system that requires compensation for every innocent displacement would impose an unacceptable drag on such change. Change comes about in many different forms. Science discovers that some products are unhealthy, their sale is banned, and many businesses are adversely affected. That's one sort of change. Urbanization creates health and safety problems that call for limits on previously allowable activities. Zoning is invented and property use is restricted. Sometimes social values change. Married women's property acts adversely impact men's property rights. Child labor laws and wage and hour laws put some people out of business. Not all the new laws are desirable. Sometimes bad ideas take charge; prohibition laws in the old cases made the sale of spirituous beverages illegal. Many similar kinds of losses are imposed when there's no governmental involvement. People eat less sugar and turn to chemical substitutes. The automobile is invented; so much for horses and buggies; so much for blacksmiths. Personal computers make typewriters obsolete. The telegram disappears in favor of other means of communications. If we want to be able to make these transformations, we've got to lift the

anchors imposed by a claim to compensation by every victim of change, however innocent. Imagine what would have happened if we had to compensate everybody whose property interests were adversely affected by the Industrial Revolution, and by the legal changes it engendered. There wouldn't have been an Industrial Revolution. That's the first point.

The second reason is that such changes usually don't happen suddenly. You don't just wake up one morning and find that the Renaissance has begun or that pollution is a problem. Therefore it's important to provide the right kind of signals to people—to owners and investors—about the process of transition. Take a single example of something that continues to be controversial today: laws discouraging development in wetlands. Such laws began to appear in New England state statutes in the 1960s, forty-plus years ago.¹⁶ Such laws were one of the early signals of what you might call an environmental or postindustrial shift in terms of our notion about how we ought to use our land resources. They were a signal to discourage new investment in wetlands for uses that required filling. But if full development compensation was required, precisely the opposite incentive would exist. The earlier the new values and the new messages provide disinvestment signals to people, the greater the likelihood, when the time comes for restrictive rules, that existing owners would not be those who had recently paid high development-value prices. Such signals help avoid disappointment of honorable expectations.

Finally, and perhaps most importantly, is a recognition that one of the most important human attributes is adaptability. People are very adaptive animals. We're very good at accommodating change. As Congress was debating the first Clean Air Act—this goes back more than thirty-five years—auto companies said emission controls were beyond their technical or economic capacity. Making businesses handicapped accessible was often said to be too costly to be practicable. But in fact we're wonderfully inventive in accommodating to such new legal requirements, and at learning how to deal with risk. We invented insurance. We package mortgages. We know how profitably to invest and to disinvest profitably in high-risk property. Water shortages lead to metering, and we have new techniques that have sharply reduced the cost of desalination and will reduce it more and make it more important as a water source in the coming decades.

It turns out that necessity *is* the mother of invention.

Those are the underlying reasons that have led to the way we have dealt traditionally with the transformations that societies always experience, and why I think some of the contemporary arguments for

16. See, e.g., MASS. GEN. LAWS ch. 130, § 105 (2007) (enacted 1965); CONN. GEN. STAT. § 22a-28 (2007) (enacted 1958).

treating all innocent dislocations as compensable really ought to be rejected. This is not to say that there are no concerns about fairness and that people ought not in appropriate circumstances to be given some compensation in the name of fairness, as opposed to compensation seen as a fundamental entitlement.

Let me finish by quoting something you've all probably heard a hundred times but says it as well as I think it's ever been said by anybody. The quote is from Justice [George] Sutherland's opinion in the *Euclid* case:

Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they're now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those that justify traffic regulations, which, before the advent of automobiles and rapid transit street railways would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.¹⁷

17. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

