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1995

6-14-1995

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Citation Information

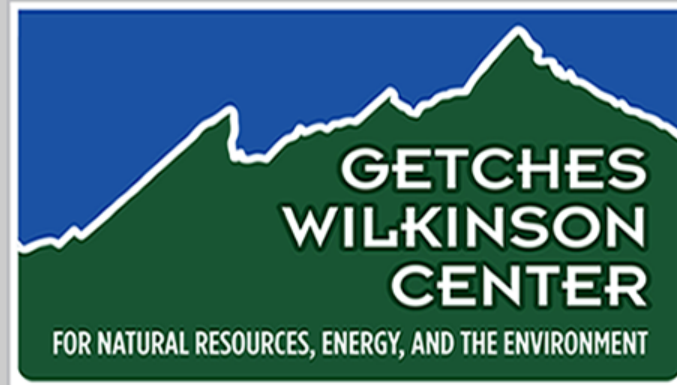
Somach, Stuart L., "The Debate: Are Water Rights and Sustainable Water Use Compatible?" (1995). *Sustainable Use of the West's Water (Summer Conference, June 12-14)*. <https://scholar.law.colorado.edu/sustainable-use-of-west-water/21>

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Stuart L. Somach, *The Debate: Are Water Rights and Sustainable Water Use Compatible?*, in *SUSTAINABLE USE OF THE WEST'S WATER* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1995).

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**THE DEBATE: ARE WATER RIGHTS AND
SUSTAINABLE WATER USE COMPATIBLE?**

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**Sustainable Use of the West's Water
Natural Resources Law Center
University of Colorado School of Law
June 12-14, 1995**

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Water Rights and Sustainable Water Use Are Compatible

Stuart L. Somach

I. Introduction

A. Summary

There should be no real question about whether the water rights system that developed, and is still developing, in the West is compatible with sustainable water use.* It is. Indeed, the water rights system itself is premised on the need to sustain water use over time. It is a system which, by its very nature, flexibly allocates, at any given time, the available resource in order to insure that water will continue to be available, on a reliable basis, for uses needed to maintain economic and social stability.

As I understand the counterpoint to this view, water rights stand as an obstacle to a proper allocation (or reallocation) of water from existing uses to new, so-called, more important purposes. The obstacle is created by the private property nature of the water right and the dilemma "society" faces when it wants to "take" this right (without compensation) so that the water can be put to a so-called higher use. Society, it is asserted, believes, for example, that agricultural use is no longer an appropriate use of water and that society is better served with the use of this water for environmental

* It should be noted that I have here focused upon the predominant system of water rights law that exists in the West — a system of prior appropriation. I have not here dealt with riparian systems or permit systems that exist elsewhere. I have focused my remarks in this way due to time limitations as opposed to a belief that these other property based systems are any less deserving of defense.

purposes. The solution offered is to ignore the private property nature of water rights and underlying constitutional protections in favor of some new, vaguely outlined system in which a governmental entity reallocates water based upon "society's" dictates.

This entire proposition is absurd. In the first instance, the heart of the problem is not the water rights system but, rather, the limited supply of water that may be available, at any given time, to meet whatever demands exist. The water rights system itself developed to meet the needs of society in allocating water with some degree of certainty during times of shortage. The water rights system is the tool that was developed to deal with the problem. Rather than being ignored when shortages occur (regardless of whether the cause of the shortage is supply- or demand-driven), we should rely upon this system of law to assist us in dealing with these problems.

Second, one should be very certain that what society wants is clearly understood. While it is true that society wants clean water and a healthy environment, society also wants food, fiber and water for municipal, industrial and domestic purposes. Understanding this enables one to protect oneself from simplistic arguments that assert that society's needs are defined by the environment without regard to other important and historic water uses.

Finally, one should be very wary of anyone who looks for solutions to the so-called problem by ignoring fundamental and constitutionally protected property rights in water in favor of ill-defined concepts involving the redistribution of water by a governmental entity based upon notions of societal needs.

B. References

Wallace Stegner, Where the Bluebird Sings to Lemonade Springs (1992).

Charles Wilkinson, Crossing the Next Meridian: Land, Water, and the Future of the West (1992).

Professor Frank J. Trelease, The Model Water Code, the Wise Administrator and the Goddam Bureaucrat (14 Nat. Resources J. 207 (1974)).

National Audubon Society v. Superior Court of Alpine County (1983)
33 Cal.3d 419

Clean Water Act, 33 U.S.C. § 1251, *et seq.*

Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

III. The Debate: Are Water Rights and Sustainable Water Use Compatible?

A. The "Problem" Defined

In many respects the debate begins with the definition of the problem. The debate topic attempts to define the problem from the perspective of the water rights system. "Is the water rights system compatible with sustained yield?" If one defines the "problem" as the water rights system, then the solution is to ignore the water rights system and create something new. There are numerous problems with this tack, not the least of which is that the system itself is property-rights based and, as a consequence, protected by property law and the Constitution. Thus, in order to advance solutions which seek to overturn the existing water rights system, one must either redefine the fundamental nature of the property right or ignore constitutional protections. I reject these "solutions."

More fundamentally, however, I reject this postulation of the problem. In my view, the problem, simply stated, is that demand is greater than the available water supply. The water rights system, much under attack by environmentalists, is merely a tool adopted to deal with shortages. Moreover, for the most part, it is a tool that works well. Rather than being abandoned for some other ill-defined and untested system, it should be reinforced and used, as it was intended, to assist in allocating water in times of shortage. The water right system, therefore, is not the problem; it is the solution. The fact that, at times, the supply of water in the West is not capable of meeting demand is not surprising. As noted, this is the "problem" and it is

not new. Indeed, the "problem" as it is properly defined is, in fact, part of what defines the West.

I teach a course in Natural Resources Law and Public Land Law; and since most of what is dealt with is western in nature, I focus on this physical/cultural fact a great deal. I attempt to remind my students that they must understand the uniqueness of the West in order to understand the law of the West as it addresses natural resources. It is difficult because I teach in California and the mini-culture of California masks the broader western culture which underlies us all. As a western water lawyer, I sometimes quote from a western author who is also much quoted by environmentalists.

"[T]he western landscape is more than topography and landforms, dirt and rock. It is, most fundamentally, climate — climate which expresses itself not only as landforms but as atmosphere, flora, fauna. And here, despite all the local variety, there is a large, abiding simplicity. Not all the West is arid, yet except at its Pacific edge, aridity surrounds and encompasses it. Landscape includes such facts as this. It includes and is shaped by the way continental masses bend ocean current, by the way the prevailing winds blow from the West, by the way mountains are pushed up across them to create well-watered coastal or alpine islands, by the way the mountains catch and store the snowpack that makes settled life possible in the dry lowlands, by the way they literally create the dry lowlands by throwing a long rain shadow eastward

"Aridity, more than anything else, gives the western landscape its character. It is aridity that gives the air its special dry clarity; aridity that puts brilliance in the light and polishes and enlarges the stars; aridity that leads the grasses to evolve as bunches rather than as turf; aridity that exposes the pigmentation of the raw earth and limits, almost eliminates, the color of chlorophyll; aridity that erodes the earth in cliffs and badlands rather than in softened and vegetated slopes The West, Walter Webb said, is 'a semi-desert with a desert heart' [T]he primary unity of the West is a shortage of water.

"The consequences of aridity multiply by a kind of domino effect. In the attempt to compensate for nature's lacks we have remade whole sections of the western landscape. The modern West is as surely Lake Mead, . . . Lake Powell, and the Fort Peck reservoir, the irrigated greenery of the Salt River

Valley and the smog blanket over Phoenix [and Los Angeles], as it is the high Wind River Range or the Wasatch or the Grand Canyon. We have acted upon the western landscape with the force of a geological agent. But aridity still calls the tune, directs our tinkering, prevents the healing of our mistakes; and vast unwatered reaches still emphasize the contract between the desert and the sown." (Stegner, Where the Bluebird Sings to Lemonade Springs (1992) at pages 16-17.)

* * *

"California, which might seem to be an exception, is not. Though from San Francisco northward the coast gets plenty of rain, that rain, like the lesser rains elsewhere in the state, falls not in the growing season but in winter. From April to November it just about can't rain. In spite of the mild coastal climate and an economy greater than that of all but a handful of nations, California fits Walter Webb's definition of the West as 'a semi-desert with a desert heart.' It took only the two-year drought of 1976-77, . . . to bring the whole state to a panting pause. The five-year drought from 1987 to 1991 has brought it to the point of desperation." (*Id.*, at page 60.)

It is out of this basic — and I do mean basic — understanding of the West that the solution to the problem of water shortages was developed — the law of prior appropriation. How ironic that now because there is a perception that the supply-demand problem is greater than it has been in the past, some suggest that we abandon the old solution. They argue that we abandon the old solution and instead erect a super bureaucracy for the redistribution of water in a governmental managed way that caters to "society's" needs.

B. Property Rights in Water

This cry for a new order ignores the fundamental nature of water as property. Even Charles Wilkinson, who has argued that the doctrine of prior appropriation is dead and that, at best, it is one of the "Lords of yesterday" which should not govern us today, recognizes this fact. Professor Wilkinson acknowledges that "water rights are the property rights of appropriators. [He says] . . . water users do plainly possess vested property rights." (Wilkinson,

Believing this legal truth to his core — as I do — Professor Frank Trelease advised back in 1974 in an article aptly titled “The Model Water Code, the Wise Administrator and the Goddam Bureaucrat” (14 Nat. Resources J. 207 (1974)) against the type of bureaucracy that is currently advocated by some.

In attempting to explain the concept of property rights in water, Professor Trelease offered an analogy to another resource with which we are all quite familiar and which, like water, must be wisely protected, sometimes preserved from use, and which must be shifted from old uses to new and more desirable uses as times and needs change. He said, “Think Land.”

“Land is just as valuable and indispensable a resource as water. Our lives and our wealth depend upon it. The government, the ultimate source of title, wishes to see that the resource is put to its highest and best use. . . . [I]t could have distributed land through a “land bureaucrat” [who would] . . . allow its temporary use for particular regulated purposes at will or for a term of years, but when a new or better use is seen, reallocate it by moving off the present tenant and installing a new one. [But that is not what is done.] Instead, the government allocates the land in discrete and identifiable parcels, as private property. The land laws make these property rights very firm and secure. Land is then available for use by individuals to produce wealth. Since each person will try to make the best use of it that he can, the total of individual wealth will approach the production of maximum national wealth. Yet new and more productive uses by a different person may come to be seen desirable. Since the land is a valuable asset, if it were to be transferred to another person without compensation, the first holder would be impoverished and the later enriched. Therefore, the laws provide that the property rights are not only secure but are also voluntarily transferable. The land can be bought by the new user for the new purpose by paying the owner a price. In most cases the government is willing to let the change occur because it knows the new use is better than the old, since otherwise the buyer could not afford to pay the seller the capitalized value of the seller’s use plus a profit. If private land uses and transfers are likely to have harmful effects on others,

however, zoning law, land use planning laws and other regulatory devices may be used to prevent the harm. If the government comes to need the land for a public purpose that outweighs its value for private purposes, it has power to condemn it. In this fashion, social plans for schools, roads, parks, green belts and housing projects are implemented. If such needs are known before the government has disposed of the land, it may reserve it and prevent the acquisition of private rights: no homesteads in Yellowstone Park."

The solution to the problem is not to do away with the law of prior appropriation but to strengthen it. Recognize existing property rights in water and tear down the bureaucratic obstacles to the free exercise of those rights.

The counterpoint to the view I express here is, in part, that it is unfair. That is, some senior right holders may be benefited at the expense of junior interests. While my first reaction is to question what "fairness" has to do with anything, the solution to the alleged disproportionate burden that might have to be borne by junior water right holders is not to do away with the law of prior appropriation, but to strengthen it. Recognizing existing property rights in water allows one to fully rely upon a basic and essential attribute of any property right which is alienability — the ability to transfer that right to others. Thus, a recognition of the prior rights system would allow the shift of water toward junior appropriators so that adverse impacts to those junior uses can be avoided.

The kind of mentality that permeates those who advocate the super-agency model for water reallocation is counterproductive. The goal in these schemes is to have government, in some form, control the market, and in that notion lies the real problem. Government's role should not be to manage the market but rather to solidify and bring legal certainty to the underlying property right based system.

In examining the problem and the water rights solution, I recognize that I have focused upon more traditional water use conflicts. For the most part, what has come before only deals with the environmental question tangentially. Issues associated with the environment are still left to be dealt with. Although I would argue that the doctrine of prior appropriation itself

could serve as a means to reallocate water to instream and other environmental purposes, this view has, for the most part, been rejected. In this regard, in some areas of the West (and elsewhere), the law has been modified to deal with the environmental question.

Environmental concern takes many forms, but can be broken down into two fundamental areas: (1) flow related issues; and (2) water quality issues.

Flow related issues tend to focus on more obvious, traditional types of environmental concerns. These issues deal with the needs of fish and wildlife and the question of whether they are accounted for in the water development equation. Historically, while recognized as a factor to be considered, little was done to affirmatively address these concerns. In most situations no real impact analysis was undertaken, and when one was, in fact, conducted, in most cases, the decision was made to proceed in spite of the potential adverse impact to fish and wildlife resources. This result stemmed in large part from a perception that these resources were, more or less, limitless and, as a consequence, the adverse nature of the impacts was of far lesser concern than the need to meet the West's population and economic demands for additional water supplies. Issues such as ecosystem protection, biodiversity and aesthetics never entered the equation at all.

Water law reflected this general attitude and, to the extent that some fish and wildlife laws found their way into the statutes, they were, for the most part, ignored.

All of this, of course, changed in the late 1960's with the birth of the modern environmental movement. A series of statutes was enacted, at both the state and federal levels, which required the decision maker to take environmental issues into account in the water allocation process. This, however, did not address the situation in which water had already been allocated away from the stream.

As the environmental factor grew to be a larger part of the water allocation equation, focus was given not just to the prospective use of water

but also to past allocation decisions. In *National Audubon Society v. Superior Court of Alpine County* (1983) 33 Cal.3d 419, which dealt with the Mono Lake situation, the California Supreme Court extended the tideland/shorezone public trust doctrine to the water allocation process. This doctrine mandates ongoing analysis of environmental questions, regardless of past decisions. Significantly, however, even this doctrine recognizes the prior appropriation system and requires a balance to be struck between environmental protection and property rights. It does not ignore property rights.

These judicial actions are, of course, not without their statutory counterparts. Legislatures and Congress also have chosen to legislate in this area. Two areas of legislation, in particular, are of note.

First, the addition of water quality regulation through the enactment and enforcement of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, to the other environmental concerns noted above has created an additional means by which to regulate historic water rights, and has also added a federal regulator, the Environmental Protection Agency ("EPA"), to the water allocation process. The EPA is a single-mission agency charged, in this instance, with the mission of ensuring "clean water," a mission which does not appear to be constrained by concepts of property rights. Moreover, EPA defines "water quality" so broadly as to subsume most, if not all, of the fish and wildlife, ecosystem and aesthetic concerns noted above.

The challenge posed by clean water concerns and EPA involvement is not created by regulation *per se*, but rather in how the regulation is, in fact, applied. Remember, the right to water is a property right. Recognizing this, however, does not mean that its exercise is free from regulation. Reasonable regulation is, of course, as permissible with respect to water as it is with respect to land. Similar to the instant situation, EPA, through the implementation of other statutes, routinely regulates land use.

The focus, therefore, is not on the question of whether society can protect itself from the harmful effects of land or water use through regulation. It can. However, in doing so it is limited by the doctrine of

reasonableness and by the Constitution's mandate that private property rights be honored. The same test of constitutional permissibility should be applied to regulations regardless of whether they are regulation of the use of water or land.

I recognize that placing constitutional limits on the ability to regulate property rights (water- or land-based property rights) may not be popular with some. However, these constitutional protections are, in my view, fundamental. The fact remains that the law and Constitution allow property (water or land) to be taken when societal needs outweigh the value of that property for private uses. The cost of that taking, however, is just compensation.

The second area of legislation that is of note is the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* The Endangered Species Act has been a significant factor affecting the exercise of property-based water rights. Again, as noted above, the limits of constitutional permissibility of regulation should be judged the same regardless of whether the property right in question is land or water.

IV. Short Summary

"Environmental" developments do not create uncertainty. Rather, they underscore the nature of the uncertainty that has always existed. The danger of the counterpoint, however, is that what could be dealt with through valid regulation of the property right in water, if exercised in a reasonable fashion mindful of constitutional limitations, is instead dealt with through the replacement of the existing system with a new system of allocation or reallocation which ignores the fundamental property rights in question. This view is destructive, not constructive, and should be rejected.