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WATER RIGHTS AND THE COMMONWEALTH

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WATER RIGHTS AND THE COMMONWEALTH

by Eric T. Freyfogle*

Our session this afternoon is billed as a debate about water rights, which is to say about private property rights in water flows. This phrasing of the issue suggests, but I think does not quite pinpoint, the matter that is now so disputed within the water-law community.

Observers these days mostly agree that changes are needed in the ways water is used. Too often the withdrawal of water from rivers and aquifers causes ecological damage. The use of water on the land causes further problems, to the land itself and to returning water flows. Storing water in a river, and other disruptions of natural flows, cause a third set of ecological harms. Although there is much for us still to learn about these problems, the needed inquiry would address details and technical matters, not fundamental principles.

The disputed issue today is about, not the desirability of changing water uses, but how these changes ought to come about. The water-rights solution relies on two methods of stimulating changes--market transfers of water rights, and government purchases. The reasoning behind this position goes something like this:

1. One of the main virtues of the market is its ability to guide valuable things to their highest and best uses. As alternate resource uses fluctuate in value over time, the market provides a low-cost, quick-acting way of bringing about transfers. When the market works well, resources end up shifting to higher valued uses, and the lowest valued uses come to an end.

2. People today value certain uses more than they used to, particularly instream flow uses for fishing, recreation, ecological integrity, aesthetics, and the like. If that's what they want, the market can deliver: They simply purchase the water they need from low-valued uses, and the change then occurs.

3. Some new needs for water are so peculiarly public that no private group is likely to step forward and buy the water needed to meet the needs. In such instances, tax money should be used to bring about the transfers, either through purchase on the open market or through condemnation.

4. Finally and vitally, all of this can occur without tampering with currently vested private water rights.

There's a lot to be said for this line of thinking. But there's a lot to be said against it, and since that's my main task this afternoon, let me turn to it.

I

Like all markets, a water market provides good price signals only if the market works efficiently. Water markets, however, do not and cannot work efficiently. Indeed, so pronounced and so fundamental are the inefficiencies that a water market can do little to bring about sensible resource allocations. Many of the inefficiencies have to do with imperfect information and transaction costs and inadequate numbers of willing buyers and sellers. But the chief culprit is that of externalities. In market theory, externalities are viewed as minor problems, best dealt with by internalizing them, assuming they're sizeable enough to worry about in the first place. But this just isn't so in the case of water, which is

an integral part of a complex natural community. External costs and benefits are hugely important, and they vary greatly from place to place and time to time. Indeed, the external impacts of a water use can be greater than the internal ones.

Beyond just the sheer quantitative importance of externalities, the market's way of internalizing impacts is by paying money to the person harmed. In the case of water, however, many external harms are ecosystem ones, or harms to future generations, or harms that are difficult to calculate and trace, or harms that are uncertain. Paying money simply cannot redress them.

This issue of externalities is no small problem for market theory. When externalities loom large, market allocation methods are severely flawed, so much so that their very legitimacy is in doubt.

A related assumption in the water-rights logic is that, like other commodities, water is readily transferable, sufficiently so to give rise to a functioning market. A market only works if enough buyers and sellers are present. In the case of water, however, there are problems on this front. The assumption that water is easily transferred, from place to place and use to use, is an idea firmly grounded in a pre-ecological era, in an intangible realm of economic theory that is detached from any real place. When we put down our economic textbooks and wander out into the natural world, with its richness and complexity, what we find is that every detail of a given water use has peculiar ecological impacts--where the water is withdrawn, when it's withdrawn, where it's used, how it's used, whether and how long it's stored, and in what way and by how much it is polluted. In the abstract, a water flow is a water flow; it's the fungible widget of microeconomic theory. In real life, the matter is

much more messy.

If I may stretch an analogy, trading water is like trading employees. Like water, labor is a business input. Businesses can and do transfer employees from place to place. But water and labor are special kinds of inputs; they're special in ways that distinguish them from, say, steel rods or hamburger buns or software programs. Employees come embedded in local communities; they have spouses that work, they have children in school, they have homes that they own, they have friends and attachments and local people who depend on them. A company can undertake to move its labor input from one place to another, but it needs to recognize that only part of that input is going to transfer. Even then, transfer costs will be high.

Like labor water can indeed be transferred, but it isn't an easy or efficient process, and it doesn't ever work very well.

A third assumption of market theory is that, if we simply get private property into private hands, and give the owners clear, secure, long-term rights, and allow them to transfer their rights freely and at low cost, then the property will be safe and secure. The owner will take care of it, and keep it useful and healthy in the long run. Put simply, people take care of what they own.

There's a fair amount of truth to this line of argument--people do typically take better care of long-term rights than short-term ones; they often take better care of secure, transferable rights than they do rights that are temporary and precarious; and of course commonly owned resources and government resources are often badly used. But in the end it takes only a little empirical data-gathering to realize that even holders of secure, perpetual

rights do not always take good care of them. Timber companies sometimes clearcut their forests and simply walk away. Farmers often plow hillsides, knowing full well the erosion that ensues. Irrigation practices ruin soil; groundwater pumping drains aquifers.

The point is, private owners don't always take care of what they own. When the destruction or consumption has few or no public ramifications, this shortcoming doesn't present a public problem. But in the case of water, bad water use does affect the public, just like bad land use does. As we seek to promote ecological integrity, to restore and maintain sound waterways, we have to concern ourselves with how water is used. Buying back water flows is one way of promoting this goal, sometimes a good one. But with a resource as public and vital as clean water, we simply can't give private owners free rein over what they own; we can't assume, particularly when faced with such contrary evidence, that private owners will maintain a sure focus on the long term and the sustainable.

II

Let me turn for a moment from market theory to the essential role of law in expressing public values and promoting public understanding. We're here today because we believe that the West faces a water problem. But that isn't quite so. The problem isn't with water, it's with people, and with the way those people--the way we--use water and seek to use more water. What we have is a people problem. How people use water has a lot to do with the way they think about it and value it, which relates to their understandings and to the shared values of our culture. One of the public functions of the law, perhaps it's most vital function, is to express cultural values and to help us remind ourselves, and reeducate

ourselves, about how we can and should act.

When we consider water rights thinking as a form of public moral education, what messages does it convey?

The dominant message of water rights is that water is a commodity, an object that exists for humans to move and manipulate, a thing that exists primarily to serve human needs. As a commodity, water is like other commodities, like bricks or teacups or paper bags or pianos. It's something we can use and consume and throw away, all as we like. This message isn't entirely false, but it isn't true by more than half. Water-as-commodity misses the ecological values, the spiritual values, the aesthetic values. It erroneously and dangerously suggests that water is valuable primarily as a tool for one person--the owner--to use to gain advantage over other persons. Water is far more than a commodity, it is far different as well, and our water-law regime needs to recognize that something else. It needs to embody and transmit more varied cultural messages, more sensitive and ethical messages about the multiple values of water and, in particular, about the kind of cautious, respectful attitude that a person needs to possess whenever he tinkers with natural hydrologic cycles.

Talk of water rights and vested entitlements conveys a related influential message. In the ideology of the free market, a human community is nothing more or less than a collection of individuals, a gathering of individual people whose purchasing preferences are aggregated by invisible market forces. The human community is the sum of its parts, and is fully understood by summing its parts. Free-market thinking appeals to Americans because it comports so well with our liberal heritage, because of its clear focus on the individual, because it exalts individual freedom rather than countervailing ideas of commitment and interconnectio

Water rights thinking taps into this atomistic social view, a view that transfers all too perniciously from the social realm to the natural one. If the social order is simply a collection of individuals, what then is the natural world but a collection of discrete parts? What then is the great outdoors but a grand storeroom of "resources" waiting for some human to come along and pull them off the shelf? Markets work best when people act independently, when products and services come in discrete pieces that the market can move and shift to meet customer demands. When market thinking turns toward the natural world, it inevitably retains this inherent focus on individual parts. Customers don't want to buy ecosystems, they want to buy its pieces and elements--its trees, its animals, its water, its soils; they want to "part it out," as they say in the auto trade. The pitfall here is that we undervalue the connections, assuming we even perceive them. In nature, the whole is far more than its parts. As we move up the scale of complexity, for cell to organism to community to ecosystem, emergent properties arise that were not present in, and often were not even predictable in, lower levels of organization. In its main thrust, market thinking stands in fundamental opposition to the ecological truths of connection and interdependence.

Perhaps the central fault with market thinking is its grounding in an intellectual limitation that permeates western culture and has done so for centuries. Our ingrained tendency is to separate ourselves from the rest of the natural world, to assume that humans are subjects and that nature is mere object. French philosopher Rene Descartes is often blamed for this dualism, but he hardly originated it, nor was he the only major thinker of his generation to make this dualism a central element of his world view. Since the age of Darwin we've been slowly narrowing this radical separation of humans and all else. We still

have far to go. Environmental problems are widespread because and to the extent that human ways and nature's ways are out of alignment. We can't restore that alignment without embracing our dependence on the natural order. And to do that, we have to develop more mature ways of explaining our place in the natural world. Nature is here for us to use to meet our needs. But we are part of that nature, as dependent on it in the long run as any wolf or jellyfish or newt. Our laws, particularly those dealing with the land, need to reflect and proclaim this dependence.

III

The water rights system that we're considering today is part of a larger private property regime that was created over many centuries and that's been passed down within our culture. Private ownership is a form of state-sanctioned private power; by owning something, we gain rights that offer power over other people. The main justification for this system, almost the only defensible justification, is that it is useful, it provides benefits that exceed its costs. Utilitarian thinking supplies a potent justification for many forms of private ownership, but it's a shaky and insecure justification in that calculations of utility depend on values and circumstances, which vary greatly over time. Because communities vary and circumstances vary, private property regimes have come in a wide variety of shapes and sizes over the course of human history, each arising to meet the needs of a particular people.

For a property regime to fulfill its functions and to retain its justification it needs to be kept up to date, to bend and take on new shapes as communal values and circumstances evolve. Sometimes that happens smoothly, as it largely did in the United States in the

nineteenth century when cultural values shifted to place greater emphasis on expansion and economic development at the expense of sensitive land uses and settled agrarian culture. Sometimes, though, change doesn't come smoothly. Sometimes property regimes get out of date, a prospect that becomes both more likely and more ominous when holders of private rights are powerful enough to resist change. When change is halted, a property regime begins to lose its legitimacy. Step by step, people come to view it as unfair, as an illegitimate exercise of state-sanctioned power, as an enemy that divides and destroys the community rather than as a tool that supports and sustains it. Sometimes it's the allocation of property within the society that causes the problems. More commonly it's the way ownership rights are defined, it is the elements or attributes of what private ownership entails. Private property yields its legitimacy when it vests owners with the power to impose harm without consequence, when it allows them to dominate others unfairly, when it allows them to abuse and undermine things that the community has come to value.

Back in the 1960s Congress passed laws banning racial discrimination in public accommodations, in restaurants and motels. Affected property owners claimed that their property rights were being altered, and they were right. Before the new laws, landowners had the right to discriminate; after the laws they no longer had that power. They lost the power to discriminate for just this reason--because in the evolving culture of the day, the power to discriminate represented an unfair form of power, a cruel and hurtful form of domination.

Consider a second scene, this one from the hills of eastern Kentucky, a landscape of badly polluted rivers and degraded communities. During the first half of the century, holders

of mineral interests in Kentucky had the right to destroy the surface of the land, and every structure on it, in their race to stripmine the coal. They caused grave damage, and paid nothing in the way of compensation. By the 1960s that form of private ownership had lost public favor, and the push for change gained strength. By the 1980s, disfavor had become so strong and so angry that, for many Kentuckians, the very legitimacy of the government was in question. For far too long the government had bent to the wishes of the coal mining industry. Change came slowly in Kentucky, but come it did. Today mining companies still can destroy the land surface without bothering to seek permission. But at least they have to pay for what they destroy. Sooner or later, one day, they will need to get consent.

Since prior appropriation was born in the 1850s, it has undergone a continuing evolution in the elements that define private rights. Yet even with this evolution, people are increasingly offended by it. As critics see it, water law gives owners too much power to dominate and harm. What is noteworthy about this otherwise unexceptional evolution is that the underlying harm is not harm to other people, at least not directly; it's harm to the land itself. Restaurants that discriminated by race caused human harm. Strip miners did destroy land, but the harm that moved Kentucky citizens was less the environmental degradation than it was the human drama, the farm houses slipping down hillsides, the towns being literally uprooted, the poor people ejected as so much trash.

Cultural values change, circumstances change, definitions of harm change, aesthetic appraisals change. If water law is going to retain its legitimacy, it too needs to change, far more than it has already done.

The water rights advocate, of course, has a ready response to all of this. Aren't we

just talking about the need to shift water uses? Can't the market accommodate this fluctuation in preferences? Can't tax dollars be used to purchase the water flows now needed to promote ecosystem health and other new public values?

The answer is: yes, the market can help alleviate this problem; yes, tax money can end the most affronting and damaging water uses. But moving money around doesn't address the core problem. Market transfers shift rights among owners, they bring about resource reallocations, but they don't alter the nature of those rights. In the case of water law, as with the 1960s restaurants and the Kentucky stripminers, the complaint is not about the distribution of property rights. It's about the meaning of ownership itself, about the power that private ownership entails. For the law to remain legitimate it needs to ban harmful activities, which is to say activities that the community has come to view as wrong and illegitimate. It's not enough for the law to furnish mechanisms to pay property owners to stop the harm. We could have paid motel owners to stop discriminating, and maybe there was a moment in time when payment seemed sensible. By the 1960s, that solution was no longer just. And it was not, I emphasize, it was not a matter of simply saving tax money. Race discrimination had come to be wrong. It was no longer legitimate for state-sanctioned power to stand ready to aid landowners who chose to discriminate.

If I'm right, if our current water rights regime faces a crisis of legitimacy, what is the nature of the problem?

If I read it correctly, the complaint being raised today does not call into question the idea of private rights in water--no more than past complaints challenged private restaurants or private coal mines. Americans aren't socialists, particularly Americans who live in arid

places. Moreover, the complaint against water law also has little to do with priorities based on time. First-in-time is not the fairest method of allocating scarce resources, but it isn't the most unfair either. By all appearances, our culture remains content to let many races go to the swiftest.

Water law faces a crisis of legitimacy because of the elements of owning water, because Western water law allows owners to use water in ways that now seem wrong. Some permitted uses, in fact, now seem so wrong that it would be an affront to communal values, as well as a distasteful reaffirmation of a flawed property regime, to expect taxpayers to pay owners to change their hurtful ways. To expect the market to remedy this situation is to misunderstand the law's unavoidable role in expressing communal values, particularly our shared, evolving senses of justice and fairness.

IV

How then should the law of water rights change in order to regain its legitimacy, to respond to the mounting claim that it empowers private owners to use their property in ways that unjustly harm and oppress?

One obvious target for change is the diversion requirement. By requiring diversion from a streambed, water law discredits water uses that promote instream flow values. To the ecologically aware, the law's stupidity could hardly shine more clearly. Aside from the harm they do, stupid laws lack the requisite level of legitimacy. The time has come for change.

A second target for reform is the longstanding, much-modified rule that water is

available for appropriation so long as a single drop remains in the stream or aquifer. Total consumption, draining a river dry, is the apotheosis of shortsighted, anthropocentric hubris. A more sensible rule must be found.

These two matters, and several others like them, would improve prior appropriation law. But if we're going to cut to the root of the problem we need to put teeth into the requirement of beneficial use. The main defining limit of water rights needs to be the beneficial use rule, or something like it. And beneficial use must mean beneficial by the standards of today's culture, not some culture long-eclipsed by changing values and circumstances. As too-often applied, beneficial use is far out of date, not the least because it ignores water quality. As currently defined, beneficial use is an affront to citizens, who know stupidity when they see it. It is also, I would add, an unnecessary embarrassment to defenders of private water rights, who have the unenviable task of claiming, for instance, that some benefit arises when a river is fully drained so that its waters might flow lushly through unlined open ditches onto desert soil to grow low-value, surplus agricultural crops and cause severe water pollution. People know better than this, and if the law doesn't soon learn better, more trouble lies ahead.

To foster these changes we have two options, both unfortunately with limitations. Back in the last century the chief method used to update property law was by way of common-law decisionmaking. Property law was a creation of state courts, and judges did their best to keep it current. During the past century, the main lawmaking work in the property realm has shifted to legislative and regulatory chambers. Ownership norms are now set forth in land-use regulations and environmental laws, with the common law left behind.

For several good reasons, change in water law is better made by legislature and regulatory agencies. Change made in this manner can build on detailed hearings and multiple views, with experts called to help. Legal lines can be drawn sharply in a way that common law courts find awkward if not impossible. As usefully, change can occur prospectively; it can be phased in, with advance warning to parties affected.

But legislative and regulatory change also has drawbacks, largely political ones. Try as they might agencies have trouble identifying and fostering a public interest. Too often and too visibly they are bent by vested interests. Legislatures, unfortunately, are just as prone to lend support for public choice theories of small-group domination. If the experience of public-lands politics is any model, prospects for useful reform are guarded at best.

Common-law change usually escapes this undue influence, but it too faces limits. Courts cannot hold exhaustive hearings. Judges are rarely experts in water law, must less water policy. Courts favor vague standards, not sharp lines. Perhaps most troubling is that common law adjudication usually works retroactively, with newly announced rules applied, not just to future arising disputes, but to the very case under consideration. When a court decides that a water use is unreasonable or non-beneficial, it doesn't admonish the water user to halt the practice soon: It declares the water right at an end.

On balance, legislative and regulatory changes offer the better option. So long as we have an interested public--as we seem to have on water issues--lawmaking entities can pursue the public interest. Still, there is another lingering concern that needs comment. One of the reasons why the water-rights debate is so contentious is because our ideas of property ownership are so tied with one particular part of our legal culture. Until the mid-nineteenth

century, land-use regulations were viewed as amplifications and modifications of the ownership norms set forth in the common law. But right around mid-century, a break occurred. Land-use statutes and regulations came to form a separate realm of law, a public realm, distinct from private ownership norms. In time, as environmental laws arrived, they too were placed in the public law category; they didn't serve to refine and update ownership norms, they cut into them to foster public aims. This split was particularly apparent in the case of environmental statutes, which were promulgated at the federal level, visibly distinct from ownership norms arising under state law.

In reality, land-use ordinances and environmental regulations are very much part and parcel of what private ownership is all about today, including the ownership of water. Only the legal mind holds on to this artificial separation; only the legal mind remains dominated by the law's old dichotomies--private v. public, common law v. statute, state v. federal. Until we can rise above these dichotomies, or more aptly put them behind us, positive law changes to water law will not fully succeed. To remedy our current predicament, new definitions of beneficial use and other needed changes must be understood for what they are--updating changes in the ownership rights of private rights holders. They are redefinitions of those private rights, modernizations of those rights, not interferences with them. If defenders of the old order are going to keep going back to the nineteenth century, if they're going to keep insisting that the common law is the one and true source of private ownership norms, statutory and regulatory change can only partially succeed.

This leaves us, finally, with the question that's been looming ominously in the background, awaiting its turn to cause mischief. If lawmakers do wield the power to redefine private water rights, is there any limit to how far they can go? Can they redefine private rights into oblivion? Is there, in practice, a useable distinction between redefinition and confiscation?

This issue, I sense, is the crux of the matter today. Because no firm answer yet exists to it, and indeed because few if any possible answers are even apparent, defenders of private rights have taken a firm line, the firmest being that any alteration of water rights, however modest, amounts to a taking, triggering the payment of just compensation.

For reasons more pragmatic than constitutional, private rights do deserve protection. And critics who seek to change water rights, particularly those who seek major change, must face up to the task of explaining that protection. If the Constitution doesn't protect every last detail of nineteenth-century water rights jurisprudence, what does it protect? If a state legislature or supreme court can't go all the way in redefining rights, how far can it go? As one reads the leading water-reform manifestos of the past few years--documents like the Long's Peak Working Group Report and the important recent volume, Searching for the Headwaters--it's hard to find much attention paid to this matter. Here and there are soothing words about viable private water rights, but soothing words are no replacement for clear constitutional protection. In fairness to holders of water rights, this project needs attention.

One of the key protections for water rights needs to be a requirement that new regulations and redefinitions apply broadly, to all water users similarly situated. With all the

current talk about full participation and public hearings and watershed planning and integrated assessments and the like, it's easy for a water user to fear that decisionmaking in the era of ecology will be subjective and ad hoc. Some institutional water czar will simply reach out to seize particular water flows that are needed to serve the public interest. And who's to say otherwise? Once a watershed master plan is finally developed, what then is supposed to happen? Does the governing agency simply ban all water uses that are less than ideal? More generally, how does watershed planning fit together with private water rights?

My suggestion is that a state should have substantial power to ban particular bad water uses, but only if the state makes a settled, uniformly applied determination that a particular practice is harmful, either because it is a wasteful water use wherever conducted or because it has side effects that are plainly harmful. A state should have no power to command one water user to halt while allowing a similarly situated water user to continue. A water use cannot fairly be halted simply because planners find a higher or better use. Without such a requirement of generalizability, water users would live in constant fear.

As vital as the beneficial-use idea is and needs to be, I wonder whether the term itself is adding to our current confusion. Americans don't like to be told what to do, particularly when it's the government telling us to be good. We're far more comfortable when told not to cause harm. At the core of property law is the old sic utere doctrine, which requires private owners to cause no harm to others. Private nuisance law builds on that doctrine today, banning unreasonable land uses that cause substantial harm. In contrast to nuisance law and sic utere, beneficial use conjures up images of ideal or socially optimum water uses, as determined, presumably, by agencies and bureaucrats. It's no wonder that beneficial use

makes water users nervous. To reap the communal benefits of durable private rights in water, we can't insist that private owners engage in the most socially beneficial water uses as identified from time to time by a never-ending planning process. What we can expect, and should by law demand, is that water users avoid actions that are harmful, under widely applicable statutes and regulations, preferably ones issued with substantial advance notice.

Once harmful water uses are halted, then we can step back and decide how much additional water is needed to foster ecological integrity and promote the other instream-flow values that have rightfully become so important. At that stage, however, money ought to change hands; private owners deserve payment for what they lose.

The power that I would give government--the power to ban harmful water uses--is far different from the power to confiscate private water rights. As harmful water uses are identified--whether phrased in terms of harm, or reasonable water use, or beneficial water use--new standards should apply prospectively. A water user engaged in a newly banned use should have three options: shift to a new beneficial use, sell the water, or do nothing and lose it. So long as all three options are open, so long as new rules apply fairly and widely to similarly situated water users, fairness concerns should not loom large. As more water users choose to sell rather than switch, water markets should expand, allowing private groups and governments more easily and cheaply to purchase water for instream-flow purposes.

VI

In many of its essentials, Prior Appropriation is not dead. More aptly, I think, his political party has lost a number of recent elections, and in a few western states has slipped

into minority party status. But if voters are getting a bit tired of old Prior, it's important that reformers avoid the all too common political mistake of interpreting a vote against their opponent as a vote in their favor.

Voters are turning against Prior because they dislike private property regimes that give owners the power to engage in wasteful water uses and to cause grave environmental harm. But voting against Prior is not the same as voting in favor of Mr. Endless Process Bureaucrat. Americans like private property, and with good reason. As a cultural institution, it's done well by us, and with updating and pruning it can continue to provide useful service. American voters are fickle creatures. Cleaned up and given a new suit of clothes, who knows, old Prior just might come charging back.