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Values and Western Water: A History of the Dominant Ideas

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VALUES AND WESTERN WATER:
A HISTORY OF THE DOMINANT IDEAS

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In 1988 the Natural Resources Law Center initiated the Western Water Policy Project with the support of a grant by the Ford Foundation. This project includes a broad-ranging review of the laws, policies, and institutions governing the allocation and use of water resources in the western United States. It is aimed at addressing the adequacy of western water policy to respond to the needs of the contemporary West.

A major objective of the Western Water Policy Project is to encourage discussion of water policy issues. To further this objective we are initiating this Discussion Paper series. The papers in this series are written in conjunction with periodic workshops primarily involving a water policy working group. The members of this group are F. Lee Brown, James E. Butcher, Michael Clinton, Harrison C. Dunning, John Echohawk, Kenneth Frederick, David H. Getches, Helen Ingram, Edwin H. Marston, Steven J. Shupe, John E. Thorson, Gilbert White, Charles F. Wilkinson, and Zach Willey.

We welcome comments and responses to these papers.

Larry MacDonnell
Values and Western Water: A History of the Dominant Ideas

Charles F. Wilkinson

Law is sometimes painted as value-neutral but in most cases that characterization is wrong. Law is usually value-laden and it ought to be, for societies lodge many of their philosophical ideals, their economic objectives, and their passions in their laws. Surely this is evident in statutory law, the direct product of the political process. It is also true of judge-made law. Thus, for example, we conduct national debates over great social issues through the lenses of litigation over the procedural rights of criminal defendants and the standing of civil litigants. In elaborating on his adage that "the life of the law has not been logic: it has been experience," Oliver Wendell Holmes explained that "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men have had a great deal more to do than the syllogism in determining the laws by which men should be governed."1

Because law tends to be societal values codified or decreed, careful students of law and public policy never study the face of a law in isolation. Instead, they look to the interests and ideas that propelled the law into existence. You understand law and public policy by understanding its sources as well as its text.

Western water law is a prototypical example of these things. Prior appropriation is often implicitly presented as a self-evident set of immutable principles leading inexorably to a neutral system of private property rights. But in fact prior appropriation is profoundly ideological. Among many other things, it is a choice of the first magnitude to decide that water ought to be viewed largely in terms of the rights of private parties to capture and use it, rather than as a public resource to which the public retains rights.

This paper is a beginning attempt to catalog some of the basic values that underlie the laws dealing with western water, to search out, borrowing from Kurt Baier's definition of values, the various qualities of water that can confer benefits on people and make a favorable difference in their lives. My attempt is to identify substantive values that societies in the American West have found to be intrinsic in water and important enough to incorporate into law. I do not intend to deal with doctrine, such as "first in time, first in right," beneficial use, or public trust, or with non-water-related philosophical positions, such as a belief in capitalism.

Those things influence water policy powerfully and are embedded in water law, but in this setting they are instrumental, ways of achieving certain ultimate values of water.

This presentation, then, is narrow in that I am attempting to deal with underlying values, not with the resulting doctrine. In another respect, however, the paper is broad. This presentation will not be limited to the ideas reflected in traditional western water law, but rather will search out the larger body of laws that affect water in the American West. It is exceedingly important—perhaps the single most critical click of the mind in our endeavor—not to be bound by the values of water as recognized by the prior appropriation doctrine. Rather, we need to recognize squarely that prior appropriation is instrumental, created by interests holding particular values in water and made the private domain of those interests. Prior appropriation is only a part of the law of western water. Therefore, to search out the values of water that are recognized in law, we ought not to be confined by classic prior appropriation and ought to look far beyond it.

This paper will identify ten values that have, over time, been recognized in the laws governing western water. I will present them in the chronological order in which they were recognized by society in the West. Thus, while all of these values continue to be recognized in law in one fashion or another, this paper will not rank or weigh values in order of their importance or influence. To be sure, as of the year 1988, certain of these values trump all of the others in the American West, and one of our principal tasks ought to be to think about why that trumping has occurred, whether it probably will continue, and whether it ought to continue. But it seems to me more principled, and an approach far more likely to produce an understanding of the enduring values in water, to begin by analyzing them in the order in which they were recognized by society.

1. WATER AS A SOURCE OF SUSTENANCE

The earliest value of water in the American West was for drinking—always the most essential use of water by human beings. But watercourses also supplied sustenance in the form of food.

At least 11,000 years ago Indian people up and down the Pacific Slope lived off of the seemingly limitless runs of salmon. Like many other eras of water use, this early one calls out to our romantic imagination, with skillful Indian fishermen using all manners of nets, traps, weirs, and spears to remove the giant fish from the streams. They consumed this rich source of protein on the spot, dried it or pounded it into pemmican for later personal use, or used it as a medium of barter with inland tribes. Understandably, since the salmon was so central to their existence, Indian people used the salmon as the focal point for their religious ceremonies, the "first salmon ceremony" and many others. The Indian take during aboriginal times was much greater than is commonly realized. The 50,000
Indian people who lived in the Columbia River basin harvested approximately 18 million pounds of salmon annually. Today, the total take by all fishers ranges between 6 and 10 million pounds annually.

In pre-Contact times, tribes had elaborate laws governing fishing. As a matter of private law, fishing sites were allocated by family; intruders were barred from fishing or banished from their tribes. There were also laws regulating harvest. Most tribes prohibited night fishing and had days of closure. If the runs were low, a chief had authority to shut down all fishing.

Non-Indians moved into the salmon harvesting business in the West in the mid-19th century. Fishing was extensive on the Sacramento River during the late 1850s, but the resource was substantially diminished by overfishing and the results of hydraulic mining. In 1866, a new era opened when the Hume brothers, capitalizing on the newly-discovered process of canning, opened a cannery on the lower Columbia. Commercial fishing boomed on the Columbia and on most other coastal streams in the Pacific Northwest and remains a staple part of the regional economy today. Of course, even offshore fishing is directly affected by inland water policy, because migratory salmon are born inland and depend upon rivers and streams for habitat.

Most of the legal systems protecting the salmon resource are found outside of prior appropriation, which offers little protection for anadromous fish. There are numerous legal programs, but three are perhaps most important. First, the Northwest Power Planning Council, established in 1980, has planning authority over salmon and steelhead in the Columbia River basin. Second, Indian treaties, as construed by the Supreme Court, protect both the tribal harvest and tribal management authority. Third, state licensing systems and management regimes govern important aspects of commercial fishing.

2. WATER AS AN INSTRUMENT OF AGRICULTURE

The second value of water, for irrigation, began to be realized in the Southwest between 3500 and 2500 B.C. with the growing of maize, squashes, pumpkins, and gourds, and perhaps beans. Much later, about a thousand years after the birth of Christ, truly extensive Indian irrigation systems were flourishing. At Chaco Canyon, the Anasazi water matrix of dams, headgates, and canals supported a population of about 10,000 people. In southern Arizona, the Hohokam built an irrigation system containing more than 125 miles of canals, some of which were 30 feet wide and 10 feet deep. Numerous other Indian societies in California,
Arizona, New Mexico, and Texas used irrigation as a primary means of subsistence. Permanent Hispanic settlements appeared in the region in the late 16th century and they, too, engaged in extensive irrigation practices.

Of course, the value of water as an instrument for irrigation is recognized and protected by the classic prior appropriation doctrine. This is one of perhaps the most fundamental values embodied in the doctrine—Elwood Mead wrapped the first administrative system around it in 1890 and irrigation was the raison d'être for the reclamation program, perhaps the most influential of all water policies.

3. WATER AS A COMMUNITY GOOD

From the beginning, water in the American West has been perceived as possessing community values that transcend any specific uses: in the West, control over water enriches and empowers communities. This was evident in the pervasive influence of water in early Indian societies. The primacy of water as a community good was perhaps even more apparent in Hispanic communities, where the acequia system was a principal community institution, creating benefits and obligations that bonded citizens together. As the creative research of Lee Brown and Helen Ingram has shown, the acequia system promoted the community values of fairness, participation and local control, opportunity, and stewardship.

The idea of the community value of water was part and parcel of the early irrigation movement. In his 1879 Report on the Lands of the Arid Region, John Wesley Powell argued that irrigation ought to proceed by a "colony" system so that the residents of these communities would gain from the larger opportunities held out by the control of water: "that the inhabitants of these districts may have the benefits of the local social organizations of civilization—such as schools, churches, etc., and the benefits of cooperation in the construction of roads, bridges, and other local improvements, it is essential that the residences should be grouped to the greatest extent possible."

A similar vision was held by Elwood Mead who, as one writer observed, was "more than an engineer, more than an irrigator. He is a dynamo of social improvement, a counselor of human progress." Paul Conklin viewed the essence of Mead’s philosophy this way: "Past land policies had led to speculation, high land prices, wasted soil, inefficiency, tenancy, and, most important, to a

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8 Wyoming State Engineer, 26th Biennial Report, 1941-42 p. 87 (1942).
deplorable lack of the social and community life obtainable in towns and cities. A planned rural development was vitally necessary in order to check political unrest and the migration to the cities. One of the deepest ironies of western water policy is that Mead, who inveighed against "any system which puts the values of a farm at the mercy of a corporation," presided over the very federal projects that became the domain of agribusiness, destroyed community values, and spawned the heartfelt protests of Paul Taylor, Ben Yellen, and the United Farm Workers.

The classic prior appropriation has few built-in protections for community values. Yet, if anything, this value may be on the rise rather than on the wane. Hispanic communities are taking steps to strengthen the acequia system and Indian tribes are exercising greater control over their water than at any time during the last century and a half. Further, Owens Valley stands both as a pragmatic lesson and as a vivid symbol to rural communities across the West of the consequences that can result when community values in water are ignored.

4. WATER AS A MEANS OF TRANSPORTATION

At the formation of the Union, the nation conceived of the major watercourses principally in terms of navigation. Indeed, from the time of Gibbons v. Ogden in 1824 and The Daniel Ball in 1870, the dominance of navigation as the foremost objective of federal water policy has been so entrenched that confusion persists today over whether congressional power over water extends beyond navigability, in spite of the long line of Supreme Court cases since 1937 recognizing Congress's nearly-unlimited regulatory authority under the commerce clause. Navigation has always played a more prominent role in the East, because the smaller size and steeper pitch of western rivers generally makes navigation more difficult. Nevertheless, there was early and extensive use of western rivers for navigation. Lewis and Clark depended heavily upon river navigation in 1803 through 1805, and a new wave of explorers responded to William Henry Ashley's 1822 advertisement in the Missouri Gazette and Public Advertiser "to ascend the river Missouri to its source, there to be employed for one, two or three years." For a generation, mountain men used rivers and streams all across the West as a road system for their canoes, bullboats, and other contraptions. Later, timber companies made regular use of western rivers for log floats. Today, commercial transport remains significant on the Columbia, the Sacramento, and the Missouri up to Sioux City.

Transportation, like commercial fishing, does not receive its primary manifestation in the classic prior appropriation doctrine. Rather, the value of water as a means of transportation is protected by the navigation servitude; subjected to regulation for safety and other purposes by various state and federal agencies; and promoted by various construction programs, including those for locks and dams.

5. WATER AS AN INDUSTRIAL COMMODITY

The shape of American water law was irrevocably changed by the California Gold Rush, the epochal series of events that depended so directly on the consumptive use of water. Water—whether for pans, sluices, long toms, or hydraulic hoses—was the engine for this social and economic movement of regional, national, and world importance. Water was not a direct agent for removing lode deposits (gold embedded in quartz or rock) but water was critical to lode as well as placer mining. Mining camps were often located dozens of miles from any reliable watercourse and it was necessary to bring in water through the elaborate, serpentine canal systems that yet today weave their way through gold country in western states.

The commodity use of water spread to other industries. Factories in growing western cities required significant amounts of water. At the turn of the century, the use of water for hydro-electric generation boomed. In modern times, water remains a necessity for nearly all forms of energy production, whether it be coal-fired power plants, oil shale retorts, or nuclear generating stations.

The industrial use of water was the first value to invoke prior appropriation in the gold country dispute between two miners in Irwin v. Philips in 1855. Of course, industrial uses have been and are favored by traditional prior appropriation, and are fully encompassed within it.

6. WATER AS A CLEAN AND PURE RESOURCE

Concerns with water pollution followed on the heels of heavy industry in the West, but this is an instance in which historical action is astonishingly sparse. Court decisions in California substantially halted the practice of hydraulic mining in the 1880's due to the impact on the streams. Litigation in the form of nuisance was a theoretical option, but relief was limited and the device was rarely used. Until after World War II, there was only miscellaneous state, municipal, or county legislation to protect pure drinking water supplies or to keep water unpolluted for other uses.

Modern water pollution law began in 1973 with the passage of the Federal Water Pollution Control Act Amendments (the various clean water acts and their
amendments are now collectively referred to as the Clean Water Act). It was an ambitious time and our nation announced its determination to further the value of clean water by achieving fishable and swimable waters throughout the nation by 1983. The goal was not achieved, but we have seen real progress in the reduction of water pollution from point sources since the passage of the 1972 Act.

Nonpoint source pollution has been the stepchild of water pollution law. Finally, in 1987, Congress instituted a requirement of state management plans for controlling nonpoint sources. It is too early to tell, but there may be something of a new determination to take on the thorny matter of nonpoint source pollution, including erosion from timber harvesting, agricultural run-off, and range erosion.

Elimination of water pollution is a value that is not much reflected in prior appropriation: most states have failed to integrate water quantity and water quality, which is largely managed under Clean Water Act programs. Another key area of water policy relevant to this value is the field of soil conservation, where, since Hugh Bennett's inspirational leadership in the 1930's, the Soil Conservation Service has attempted, largely through cooperative programs, to reduce the hundreds of millions of tons of soil that erode into the nation's watercourses each year. In all, however, although clear progress has been made as to point source pollution, there has been not much of an indentation made on the daunting issues of soil erosion from our farm, range, and timber lands.

7. WATER AS BEAUTY

In 1915, Oregon passed legislation prohibiting water diversions above many of its scenic waterfalls in the Columbia River Gorge. But beauty was reflected in laws affecting western water long before that. In 1872, Congress established Yellowstone National Park "as a pleasing ground for the people." Plainly this was water policy—a great act designed to preserve forever what its proponents called its "wonders"—the geysers, Yellowstone Lake, Yellowstone Falls, the Yellowstone River deep in the gorge, and many other lakes, rivers, and boiling springs throughout the Park. In 1892, Yosemite was declared a National Park. There, too, water—in the form of the famous falls—was a prime motivating factor for the legislation.

I want to underscore my point that these actions, and a great many similar ones since then, are water policy and that they evidence water policy premised upon a concept of water and beauty. The niggling over federal reserved water rights epitomizes our preoccupation with prior appropriation. In fact, we can and have protected water, and the beauty within it, by legal means other than

traditional water law. The waters of our national parks, national forests, national scenic rivers, and wilderness areas are given stout protection by a mixture of federal governmental sovereign immunity, real property law, and principles of federal land management—all blending into the idea that the government can and will deny access to water developers, whether or not they have a water right under state law.

Traditional prior appropriation does not countenance talk of soft things like beauty. But we as a people believe in beauty—and in sacredness, too—and we have insisted, if prior appropriation will not have beauty, that other laws will. And, today, one can visit most areas of our national forests, nearly all of the areas of our national parks, and literally all areas of our wilderness areas, and one will find in those places the beauty that our nation insisted upon in this area of water policy, areas described in the 1964 Wilderness Act as places "where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."

8. WATER AS A DESTRUCTIVE FORCE TO BE CONTROLLED

The values listed above are positive in that they identify qualities of water that produce benefits. In this instance, a particular quality of water must be harnessed and it is the harnessing—the elimination of one of water's natural tendencies—that we value.

During spring run-off, western rivers can be raging destroyers of property and human life. Photographs taken earlier in the century show western cities such as Yuma, Sacramento, Eugene, Spokane, and Missoula under several feet of water. The most dangerous river of all is the Missouri, where the Rocky Mountain snowmelt treated whole trees not much better than toothpicks and continually threatened cities such as Sioux City and Omaha.

Government agencies, most notably the Army Corps of Engineers, have built major flood control projects all across the West. As a result, damage to cities is largely a thing of the past and injury to cropland has been substantially reduced. Much of the flood control work has been in the form of dams, but flood losses have also been reduced by channelization. On the Missouri, the Corps has eliminated several hundred river miles by replacing ox-bows with straight channels. (It has not yet come to pass, although the plans may still be in the drawing books, that the Corps will have fulfilled its mission by connecting up the Arkansas and Roaring Fork Rivers, thereby making Aspen a deep-water port.)

Flood control has coordinated nicely with the intensive-use values of water. When flood control projects are placed relatively high in a drainage, the spring run-off can be stored and then released for irrigation, energy production, and municipal and industrial use. Increasing attention is being given to the late-
season release of water from flood control projects to improve trout fishing and white-water recreation, as with the El Vado Reservoir on the Rio Chama in New Mexico.

9. WATER AS FUEL FOR URBAN DEVELOPMENT

Water's first role is for the purpose of drinking, and I have included that domestic use (along with the use of water for personal sanitation) within my first-listed value, water as a source of sustenance. Around the turn of the twentieth century, however, the use of water for domestic purposes increased in some locales in the West by such a magnitude that the use for urban development needs to be treated separately. Further, this new use of water was fundamentally different than traditional domestic use because it has been driven by a new set of forces—real estate developers and other entrepreneurs who have convinced city councils to produce major supplies of water so that major new development can occur. Water thus became a component in major real estate development in a way never seen before.

Of course, the prototypical examples of the effects of this value are San Francisco and Hetch Hetchy, Los Angeles and Owens Valley, and Denver and the Colorado Western Slope. All across the West, however, growing cities produce a nexus between economic growth, residential and office property, and the value of water as fuel for urban development. Again, traditional prior appropriation supports and promotes this value. Increasingly, however, this aspect of water policy is being regulated by city and county laws that, although designated as land use laws, in fact carry out important aspects of water policy by regulating water hook-ups, requiring sustainable sources of water, and mandating conservation through the use of meters and other devices.

10. WATER AS A PLACE FOR RECREATION AND WILDLIFE HABITAT

The modern instream flow movement, which began in Oregon in 1955 and has spread to most western states, epitomizes the value of water for recreation and wildlife. Again, however, there are antecedents. The use of water for recreation is deeply rooted in our history and is promoted, not just by the public land systems already discussed, but by countless city, county, and state parks and riverfront greenways. The value of water for recreation and wildlife is the premise for the ambitious wildlife regulatory and licensing system, found in every state, governing fishing and hunting for waterfowl. The value of water for protection of wildlife habitat also has specific roots in the national wildlife refuges, many of which are wetlands areas needed for waterfowl breeding or migration. The value of water for wildlife has even been implicitly reflected in international negotiations, including the Migratory Bird Act of 1920.
In spite of the burgeoning provisions regarding instream flows, this set of values presents an ambiguous fit within prior appropriation. Although there are instances in which instream flows have a bite, more often the accumulation of a century or more of existing appropriations means that instream flows with modern priority dates carry no wet water. The apparent rule that senior consumptive rights cannot move upstream above junior instream rights (because to do so would change the stream conditions that existed at the time of the junior appropriation, the maintenance of which is one of the prerogatives of the junior rights holder) is mostly of theoretical significance only. Further, there have been numerous instances in which state officials have refused to make calls when instream rights have been violated during low-water years. As a result, the value of water as recreation and wildlife habitat may be furthered less by instream flow programs, important as they are, than by the various programs discussed above and, not incidentally, by the National Environmental Policy Act, state environmental policy acts, the Endangered Species Act, and Army Corps permitting procedures.

My ending is not a conclusion but rather a series of questions. The first, and most obvious, is whether my listing makes sense. But the subject calls for much more than that of you. Why is it that certain values so clearly transcend others today? Is it capitalism? Can very old values simply be dismissed in the real world because they originate in other cultures of the West, Indian or Hispanic? Is it the end of the discussion because some values, even old and dignified ones, don't carry much economic clout? On the other hand, is economic analysis, and the economic value of those uses, changing enough that they can be justified as an economic matter now or in future years?

Perhaps it has been in part a matter of strategy—some proponents of some values have simply done a better technical and political job of installing their values in law. If so, how exactly did it happen? Should that be changed? How can it be?

Last, how does this set of values, or a more valid set, comport with law when laid alongside it? Do the water laws, taken as a whole, faithfully reflect the people’s views, as good law ought to? If not, is change coming, is it coming in the right direction, and is it coming fast enough?

I hope as colleagues that we can make some inroads toward the answers to these questions, for in the last analysis it is one of my fondest hopes that ours will be the generation to identify the truest sources—the highest and first headwaters—of water policy, and see to it that our policies truly emanate from those places.