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The First Half Century of Western Water Reform: Have We Kept Faith with the Rivers of the West?

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SYMPOSIUM ESSAY

THE FIRST HALF CENTURY OF WESTERN WATER REFORM: HAVE WE KEPT FAITH WITH THE RIVERS OF THE WEST?

BY

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I. INTRODUCTION

When I taught law at the University of Oregon, Ann and I lived for a while south of Eugene near Dexter in a little house on Lost Creek. The stream didn't carry much water, but I fly fished it every now and then. I got to know a farmer who lived across the creek and one day we got to talking about water. I asked him if he knew about the instream flow that the state had set upstream and he said he did. "What do you think about it?" I inquired.

 Distinguished University Professor and Moses Lasky Professor of Law, University of Colorado. This Essay was presented as the keynote address at the Lewis & Clark Law School Conference, *Western Instream Flows: 50 Years of Progress and Setbacks*, held in Portland, Or. on April 20–21, 2006. I give thanks to my assistants, Josh Tenneson and Cynthia Carter, for their fine work here and elsewhere. I dedicate this to Jan Neuman, Professor of Law at Lewis & Clark, for her commitment to the laws and flows of Oregon's rivers.

"I don't like it," he said firmly. "I don't like it at all. It can't do me any harm and maybe it would help me some by keeping some diversions out. Even if they're junior they could cause some trouble by taking water when they shouldn't. And maybe it would help the fishing. But I don't care about any of that. I just don't believe in those things."

There are many reasons why western instream flow statutes have mostly failed to fulfill their promise, why today we commemorate as much as we celebrate the fiftieth anniversary of the 1955 Oregon law. Some of those reasons are attitudinal, as witnessed by my discussion on Lost Creek, and I'll return to that, but first let me address obstacles to free-flowing rivers that are purely structural, the inadvertent genius of the early miners and farmers who cemented prior appropriation into the legal system of every western state.

II. WESTERN INSTREAM FLOWS: POLICY, PERCEPTION, AND REALITY

Water is free. You pay nothing to anyone to obtain a water right. To be sure, it may take hard work to put in a diversion ditch or canal, or sometimes a transmountain tunnel. You may pay the Bureau of Reclamation or an irrigation district to operate and maintain the delivery system. But for water, to which we regularly attach the homily that it is the West's most valuable resource, you pay no fee, tax, charge, or royalty, not even a token payment like the $5 per acre fee for taking a lode claim to patent under the hardrock mining law.

Though free, a valid water diversion becomes a vested property right, fully protected by the Fifth Amendment, the moment the water is diverted. If a state wants to buy up a water right and convert it to an instream right, it must pay full market value.

Beneficial use supposedly prohibits waste, but western states seldom imposed any efficiency requirements at all until about a generation ago. Even today, water conservation, whether by regulation or incentive, is still in its infancy in almost every corner of the West.

Finally, while we are seeing some change, the western state water agencies, regardless of what their mission statements may say, have traditionally seen their job monolithically: to protect senior rights. Seniors not only have free, vested, superior, and unregulated rights, they also have had their own captive agencies to enforce them and, importantly, advocate for them.

So how is a right to a free flow of water, with a priority date of 1955 or likely much later, supposed to make a difference on western rivers that are locked up by a block of senior vested rights? I received a telling answer one afternoon when I was out on the St. Vrain River in Colorado with the state watermaster for the St. Vrain, the man who, more than anyone, knows water rights allocation on the river. Ever curious about instream flows, I asked him how they are administered. His response surprised me: "Are there any?" I

stammered that, well, I was pretty sure there would be some since the St. Vrain has its headwaters in glory country, in Rocky Mountain National Park and Roosevelt National Forest. He asked what the priority date would be. I said that they could be no earlier than 1973, the year of Colorado's (the West's second) instream flow law.[1] He chuckled and gave me the missing information that explained why he had no reason to know about instream flows on the St. Vrain: "Look, I don't think I've ever administered a right junior to *1892*."

But there's trouble for instream flows that goes beyond the formal structure of western water law, beyond finding water for junior rights when there is no water for juniors, beyond even finding instream flows for a senior right when you can get one by purchase or donation. It goes back to the suspicion held by my farmer friend on Lost Creek, a good man, who like most people in the water business, just flat can't abide dedicating a drop of river water to the river.

A near-paranoia pervades nearly every aspect of instream flow policy. Consumptive rights requests have always been rubber-stamped. Proposed instream rights almost always face outright opposition and, even if a right is granted, the quantity is fly-specked. Once instream rights have been set, state agencies sometimes waive them in times of low water. Their legitimacy is called into question at every turn. A few cubic feet per second for trout or kayaks becomes a brouhaha whether the instream right is a junior or even a senior resulting from a straight market transaction in a context where the market is supposed to be honored. Instream rights are different. Instream rights are dicey, dangerous, and potentially disastrous. There is reason, if you catch my drift, to question the loyalty of those people who support them.

The debates are conducted in the grey, vague, and unfeeling language of water. The misnomer "beneficial use" hides the fact that the great blocks of extractive water rights that define our rivers originated in a system that denied legal protection to all manner of uses that a person would expect to be considered "beneficial"—swimming holes, the flows in front of a kid's casting rock, the views from a streamside home, the river sounds near a family picnic spot, and the beauty and inspiration that we know rides in the rush of every freeflowing watercourse. Beneficial doesn't mean beneficial in the language of water.

A. The Water Project Reality

Dams are not dams. They are "projects" or "storage." The immensity of western water development and of the amount it takes from the rivers is disguised by the language of water. A friend of mine, an intelligent woman who grew up in the West, thought that "water storage" referred to small

[1] Act of Apr. 23, 1973, ch. 442, 1973 Colo. Sess. Laws 1521 (codified at COLO. REV. STAT. §§ 37-92-103, 37-92-102, 37-92-302 (2005)).

structures, probably with wood slab sides, like stock tanks. My impression is that the public perceives the several water pipelines being proposed for the Colorado River as being kind of like garden hoses. No, they'll be four, five, or six feet in diameter. The proposed pipeline to take water—now bound for the Grand Canyon—from Lake Powell over one hundred miles to St. George, Utah will transport 70,000 acre-feet annually.[2]

To the public, 70,000 acre-feet is an impenetrable figure, an abstraction in the extreme. But let's look at this more closely. An acre is about the size of a football field. Imagine retaining walls around a football field. One acre-foot would fill the acre-sized retainer to the depth of a foot. Five thousand acre-feet would fill the retainer almost a mile high. Seventy thousand acre-feet would create a column of water the size of a football field nearly fourteen miles high. The St. George pipeline would take that fourteen-mile-high column of water from the Colorado River and the Grand Canyon every year.

The boosters in St. George treat this project as routine. It has always been this way in the West. The San Juan-Chama Project takes 110,000 acre-feet of water annually from the Colorado River and the Grand Canyon under the Continental Divide to Albuquerque and El Paso. That football-field-sized column of water would be even greater, more than twenty miles high. I once heard a developer describe the San Juan-Chama Project as "a medium-sized project."

The language of water has its colorful spokesmen. The former mayor of Colorado Springs wanted to bring water from the Rio Grande, and away from the traditional Hispanic farming communities of the San Luis Valley, to Colorado Springs. He also urged a tunnel from the Gunnison Valley under the Continental Divide. At state and federal hearings, he would regularly begin his presentations by introducing himself: "I represent 300,000 thirsty citizens," he would exhort.

This interested me, so I drove down to Colorado Springs one day to do a survey. I went door to door, asking people if they were thirsty. Some, though not many, were polite but no one professed to be thirsty. Disappointed, I went over to a nearby park. A jogger came by and I flagged her down. "Can I help you?" she panted as she ran in place. "Yes. Could you tell me if you're thirsty?" Flustered, still pumping her legs, she stared me down for a moment, then blurted out, "You're damned right I'm thirsty!"—and then raced off down the trail.

At last, I had located one of the mayor's constituents.

And if the truth be told, in many ways the vision of the mayor and the other boosters still holds. Freeflowing rivers, and the poets and painters and common people who love them and speak of and feel the magic and mystery and allure of moving water, are not part of the language of western water law. Water is scarce. It is the most valuable resource in the West, and

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[2] Todd Wilkinson, *Roman Aqueducts of New West: Water Pipes*, CHRISTIAN SCI. MONITOR, May 3, 2001, at 3.

complex legal doctrines have developed over more than a century and a half to govern existing water rights and future water development. If we run short of water, everyone will suffer; everything will grind to a halt. *We cannot lock our rivers up and take them out of use.* We need certain water projects and they should be state of the art. All of these calculations are very complex and need to be done by people who fully understand the intricacies of water law and water development. These are matters too arcane, too challenging, for lay people, for the public.

B. The Progess of Water Reforms

Still, other voices have been heard and, while progress on stream flows has come slower than in any other area of western environmental and natural resources law, change has come. I would count as the biggest change, not so much the explicit improvement in laws and policies, but the simple facts that westerners today really do understand how much they revere their rivers and that they are increasingly suspect of the old ways and words. The 1955 statute was tentative and introductory, but it was also creative, brave, and profound. So too, though problems persist today, with the cleanup of the Willamette River beginning in the 1960s, which is best understood as the first comprehensive action in the name of a western river. The substance of law and the language of water have been enriched by scientists who measure the health of streams in ecological terms and offer ways to improve stream health. New blood is coming into the state water agencies.

Look across the West now. Every state has some fashion of an instream flow law and virtually every city has brought the river through town back so that it is accessible to the people of the community. Those advances also can be said to be tentative and introductory in light of the larger picture, but they stand for the love that westerners feel toward their rivers. The trick now is to take that love and turn it into broader and deeper results.

III. WORKING WITHIN THE FRAMEWORK OF INSTREAM RIGHTS LAW

Given the structural power of the extractive bias that permeates western water law, reformers have had no choice but to work mostly within certain institutions and ideas. The virulent states-rights rhetoric, a cover for continuing to treat rivers as industrial engines, was exemplified by Bernard Devoto's characterization of the states' attitude toward the federal government: "Get out and give us more money."[3] In light of the ensuing Carter "hit list" that shut down several projects and instream flow protection from an unexpected federal source, we might be tempted to say that the federal response to the states' "get out" declaration was "we'll give you less

[3] WALLACE STEGNER, THE AMERICAN WEST AS LIVING SPACE 9 (1987).

money and more Endangered Species Act"—but that would be far too easy. In spite of some important federal initiatives, federal deference to state law remains a mantra.

Thus the rise of WaterWatch, the Center for Environmental Law and Policy, and the Trout Unlimited offices. Bottomed in the knowledge that national environmental groups can never penetrate this relentlessly state-oriented regime, with each of the western states running its rivers through its own laws, institutions, and personalities, the new river reform organizations focus on just one state and work comprehensively in the legislatures, courts, and, importantly, water agencies where so many of the key decisions are made. Now those organizations are complemented by water trusts in several states, including Oregon and Washington. Every one of these essential reform offices is outmanned, but every one is making a difference. Change is coming slowly, but that is part and parcel of progress for the rivers. The impatient need not apply: You have to be an incrementalist if you want to bring our rivers back. It is not a fundraising appeal but a fact of law, policy, and politics to suggest that a person who places a priority on western water reform should support the state water reform groups.

Within each state, therefore, the statewide laws and administrative regulations on instream flows and other water issues need to be improved, sometimes in the legislatures and agencies, sometimes in the courts. But a word of caution: advances at those levels, while plainly needed, can be paper, not wet, reform. Usually, the laws need to be applied on individual rivers. And it goes one step further. Closely related to Aldo Leopold's maxim that to have healthy animals you have to have healthy habitat is the knowledge that to have healthy rivers you have to have healthy watersheds.[4] Any person who loves rivers wishes it were otherwise, but, in most situations, good river laws, state or federal, don't heal rivers by themselves. Local citizens, sometimes allied with advocacy groups, must bring those laws to each watershed.

Two main laws will apply in most watershed restoration efforts. One tool is the state instream flow laws. The other is state water conservation laws, which prohibit waste and require reasonable efficiency. The two work together, for a main technique of watershed restoration is to achieve greater efficiency of currently wasteful uses and then put all or some of the saved water into an instream flow, hopefully with a senior priority. Western state laws acknowledge efficiency as an objective, but state water agencies often drag their feet. Nonetheless, as stresses become more evident, we are seeing more enforcement. As the *State Department of Ecology v. Grimes*[5] case in Washington makes clear, just because an irrigator diverts, say, three cubic feet per second (cfs) does not mean that the water right is 3 cfs if the

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[4] ALDO LEOPOLD, A SAND COUNTY ALMANAC 224–25 (1949).

[5] 852 P.2d 1044 (Wash. 1993).

irrigator has earthen conveyance ditches and uses flood irrigation of the fields.[6] Instead, the doctrine of beneficial use, along with implementing statutes, requires "reasonable efficiency."[7] The true water right will be, for example, 1.5 cfs and the irrigator will be allowed to divert just 2.0 cfs to allow for reasonable loss.

To be sure, these and other aspects of water law present their difficulties, but not more than other fields of law. The old language of western water law is wrong in using complexity as a shield from public scrutiny. My experience is that citizens can fairly easily grasp the law. What is truly complex, though, is the watersheds themselves.

IV. FLEXIBILITY AND OPPORTUNITY FOR RESTORATION EFFORTS

Out on the watersheds, you find some or all of the following: physical characteristics that include mountain and low-lying land, forest and range land, upland and riparian areas, and productive soils and those less so; water uses that include farm, ranch, municipal, domestic, mining, and power generation; structures that include dams (storage, hydroelectric, or both), reservoirs, and diversions; land uses that include towns and cities, subdivision development, logging, ranching, mining, and farming; and government offices including state and local, the Forest Service, Bureau of Land Management, and other federal agencies, and Indian tribes, who may have reservation lands or off-reservation treaty fishing sites in the watershed and who have provided leadership in several modern restoration efforts.

Amid this cacophony of complexity, two broad—and ironic—facts of western water development bring flexibility and opportunity to restoration efforts in most watersheds. First, we have overbuilt, especially in the profligate Big Build-up years after World War II—westwide, we have far more water in reservoirs than we can use. We now have about 300 million acre-feet impounded behind dams,[8] enough water to flood all of Oregon, Washington, Montana, and California to a depth of one foot. Depending on the watershed, this overdevelopment means that some stored water can be moved to other uses, that releases from dams can be timed to correlate with the needs of fish and rafters, and that some dams can be taken out entirely.

The second area of flexibility and opportunity, also ironic, is the widespread waste on the farms and in the cities. We have begun to make progress in conservation. By the year 2000, the City of Seattle's conservation program had reached the point where the city was using less total water—gross, not per capita consumption—than it was in 1975.[9] In 2000, Seattle

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[6] *Id.* at 1052–53.

[7] *Id.* at 1052.

[8] CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 259 (1992).

[9] Growth in Population and Water Consumption, Seattle Regional Water System: 1975–2004, http://www.seattle.gov/util/stellent/groups/public/@spu/@csb/documents/webcontent/waterusag_200312020908103.pdf (last visited Nov. 12, 2006).

then adopted a goal of reducing gross consumption by one percent a year during the first decade of this century and so far is on target.[10] There are even greater opportunities in agriculture, which still accounts for more than 80% of all water use in the West.

These and other general notions of law, flexibility, and opportunity must then be applied in the elaborate circumstances, at once ordered and chaotic, of individual watersheds. It always takes time, and is never remotely easy, but the first task is to comprehend the whole watershed in all of its intricacy and to identify those uses and physical attributes that hold out particular promise for restoration. The leading success stories have been built on that kind of intimate knowledge of the watershed as a natural and developed place.

In the Nisqually watershed of Washington, development in the 1800s—the diking of large areas of the delta at the mouth of the river at Puget Sound to create fast land for cattle and pig farms—had ruined especially valuable salmon habitat.[11] The Nisqually Tribe, the local land trust, and the watershed council targeted that land, purchased it, and soon will breach the levees and bring in the water in order to restore those rich feeding grounds for young smolts. In addition, the groups, in their strategizing, came to realize the surprising importance of the habitat within the military base, Fort Lewis; forested and with many tributaries, the base is the largest land holding in the watershed, including the national forest. But the mission of Fort Lewis did not include timber harvesting. Billy Frank, Jr., the Nisqually leader who served in the Marines during the Korean War, explains the dynamic between the tribe, its conservation partners, and the Army. He said this of Fort Lewis and the restoration of the Nisqually, but the creativity and sense of personal relationships resonates in most of the successful restorations:

> You can deal with the army. The commanding general is the boss. It's not like with the governor or the president or the Secretary of the Interior. When I talk to those guys, I don't know who the hell's in charge. But when I go across the river to Fort Lewis, I know who's in charge. When he tells his soldiers—"Don't drive any more tanks across Muck Creek," or "Don't poison that lake anymore," or "Let those Indian people collect their medicines"—that's what's going to happen. Boy, that is powerful. When you've gotten a handshake with the General—Boy! It's been very positive over the past twenty years.[12]

In the Walla Walla watershed of far southeastern Washington and northeastern Oregon, a young but promising citizen initiative, which has produced increased flows in just a few years, builds on various local

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[10] *See* SEATTLE PUB. UTILS., TEN YEAR CONSERVATION PROGRAM PLAN 3 (2002), *available at* http://www.seattle.gov/util/stellent/groups/public/@spu/@csb/documents/webcontent/cos_002837.pdf.

[11] *See* CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 66–87 (2000) (discussing the Nisqually River Cleanup).

[12] *Id.* at 80.

attributes.[13] The ninety-foot-deep soil in some areas may allow for aquifer recharge that will facilitate better conjunctive use by switching from stream diversion to wells when stream flows are low. It helps, too, that the watershed is within the region where we see the most extensive use of dry farming of any place in the West. Using the Washington and Oregon instream flow programs and water trusts, which can create senior instream flows made possible by purchase and conserved water, is a central thrust of the strategy. Notably helpful has been pressure—from the U.S. Fish and Wildlife Service and supported by the Washington Department of Ecology—to protect the salmon. South of there, in the stressed Umatilla Basin, with the Tribe taking the lead, water has been brought in from the Columbia to revive the runs.

The breaking down of the natural and developed qualities of watersheds to find the most effective points of reform is also evident in the restoration efforts at both Pyramid Lake and Mono Lake and on Montana's rivers. As for Pyramid Lake, the restoration has been truly comprehensive—and interstate—but the priority always has been to reduce the diversion at Derby Dam.[14] This early-nineteenth-century project took a full one-half of the Truckee River out of the watershed to the Truckee-Carson Irrigation District—and away from magnificent Pyramid Lake, the band of Paiutes whose reservation encompasses the lake, and the native Lahontan cutthroat trout and cuiui. After a quarter-century's work, the diversion has been cut back, the lake stabilized, and fish habitat restored. At Mono Lake, where diversions were lowering the lake level and destroying the brine shrimp and bird populations that depended on them, the cause was a goliath—the Los Angeles Department of Water and Power—but the ensuing settlement owed a great deal to the fact that success could be achieved through altering one operation, not many.[15] In Montana, the setting of stream flows and public stream access has been facilitated mightily by the coordinated efforts of progressive Montana ranchers who wear on their sleeves their passion for big Montana rivers.[16]

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[13] *See* Kristie Carevich, *Reasons for Hope in the Walla Walla River Basin*, WASH. WATERWATCH (Ctr. for Envtl. Law and Policy, Seattle, Wash.), Fall 2001, at 1, 9.

[14] *See, e.g.*, Dan Tarlock, *The Creation of New Risk Sharing Water Entitlement Regimes: The Case of the Truckee-Carson Settlement*, 25 ECOLOGY L.Q. 674 (1999) (examining the Truckee-Carson Basin as an example of newer approaches to water allocation in the West); Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, 104 Stat. 3289 (1990) (defining Fallow Paiute Shoshone Indian Tribes' water rights, including to the Truckee River, Carson River, and Lake Tahoe).

[15] *See, e.g.*, Mono Lake Committee, Restoration of the Mono Basin, http://www.monolake.org/restoration/index.html (last visited Nov. 11, 2006) (discussing the ecological importance of the Mono Basin and the impact of the settlement on restoration efforts).

[16] *See, e.g.*, Travis H. Burns, *Floating on Uncharted Headwaters: A Look at the Laws Governing Recreational Access on Waters of the Intermountain West*, 5 WYO. L. REV. 561, 575–84 (2005) (discussing Montana's public stream access laws); Jason S. Wells, *Leasing Water Rights for Instream Flow Protection: The Opportunities and Impediments to Improved Public Interest Involvement in Colorado's Instream Flow Protection Regime*, 7 U. DENV. WATER L. REV. 309, 324–33 (2004) (discussing Montana's progressive instream flow regime).

V. REASON TO HOPE: THE FUTURE OF THE RIVER RESTORATION MOVEMENT

Learning the intricacies of a watershed and then focusing on the best opportunities that arise from the land, the development, and the personalities doesn't make restoration easy, only somewhat easier. It takes patient and committed citizens and professionals who know they are in it, never for the short-, maybe for the medium-, probably for the long-term. But the rewards are hard to match. You will have given back to the people a part of the sacred landscape of the West.

And when the results finally come in, let's be sure to celebrate. We're going to have an opportunity soon on the north side of the Olympic Peninsula. In about three years they'll start to take out the Elwha Dam and begin the process of opening up the lush, nutritious upper reaches of one of the West's great salmon rivers. And we can gather there and give due credit to the idea of preserving flows, an idea born into our law late, just 1955, and give credit most of all to the local citizens, conservation groups, dedicated state and federal officials, and, as so often the case, the band of American Indians that together will have given us back the Elwha. The institutions are changing, the skepticism is blending into understanding, and the language is brightening.

We all have our own river. We each love our river, its runs and riffles, its sounds and smells; we love its rush on top and the life underneath. Tell people, in private and in public, about how you love your river. That love, the frank and open telling of it, and the hard work in its name—that's what is changing the law and the rivers and that's what will continue to change them.