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The Public Interest in Western Water

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ESSAYS

THE PUBLIC INTEREST IN WESTERN WATER

BY
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In the rush to settle the West, the federal government divested water rights to the states. However, emerging public rights such as the public trust doctrine and reserved water rights are bringing private rights back into a more balanced public-private approach. This shift in focus will result in a more environmentally sensible use of water resources.

I. POLITICAL HISTORY OF WESTERN WATER

In the spirit of this conference, I thought I'd see if I can broaden, just a bit, the issue of title navigability to streams and water resources generally, and give you my view of the public interest as it relates to these resources here in the West. The reason we are constantly at each other's throats—litigating these water and stream issues endlessly—is because of an historical evolution that is of enormous importance in the American West.

On the threshold of settlement and development in the mid-

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19th century, the federal government made contrasting decisions with respect to land, on the one hand, and water, on the other. Most of the West beyond the 100th meridian was federal property, and, in theory, the federal government was in an ideal position to look to the next century and make some decisions about the use of both the land base and the water resource. To some degree, the federal government did make those decisions concerning the land base. But it did so in a very tortured, difficult, strung-out and incoherent way. There was continuing federal concern about maintaining control and ownership of the land base which is now the National Forests, the Bureau of Land Management lands, the National Parks, and a variety of other land holdings. The government presumed that this land would remain federal, subject to certain rules regarding settlement and transfer of title.

But curiously, we made the opposite decision in the case of water, the lifeblood of western land. The federal government simply let the water go, divested it to the states early on. With no foresight or planning, and with none of the debate that characterized the issues relating to land, the federal government passed the Desert Lands Act[1] and other legislation that simply divested federal title to water, leaving water allocation largely to the states.

As a result, in the rush to settle the West, water became a commodity to be privatized. The concept of a residual public interest was seldom in any of the discussions. Water was just divested, left to private markets. Worse, we then had the bad fortune to invent the Bureau of Reclamation. The Bureau became part of an extraordinarily powerful political force composed of the U.S. Congress, local interests, and a hungry bureaucracy. This coalition elected Westerners to Congress by promising to dam every single stream in the region, paid for with a continuous flow of tax dollars from people east of the Mississippi River. Thus did we create and subsidize a welfare state in the West, under the paternal guidance of the Bureau of Reclamation.

I suspect there will be some that will say that this is a modest overstatement. But it is *only* a modest overstatement. I grew up in a reclamation state called Arizona. We learned the political game early in our history. We knew that in order to participate in

1. 43 U.S.C. §§ 321-329 (1988).

a cornucopia of benefits at the expense of the environment, we had to select our Congressmen young, send them to Washington, watch them for a term or two and, provided that they were not drunks or total incompetents, we would send them back forever because we knew that the way to get those subsidies was to acquire congressional seniority. We knew we were a small boat on a very, very large ocean.

Of course, Arizona did play the seniority game in an extraordinary way. We sent Carl Hayden to Congress the year that we became a state, and we kept him there for fifty-six years. There was one troublesome election in 1968. The dear old gentleman had not been back to Arizona within the memory of anybody under forty years of age and, at the last minute in October 1968, a rumor started circulating that Carl Hayden was actually dead. The *Arizona Republic*, understanding the game, sent a reporter to Washington in a frantic search for Senator Hayden. The reporter finally found him, almost totally covered by a white sheet in the Bethesda Naval Hospital. But the Senator managed to sit up and raise his hand off the bed. That picture was printed on the front page of the *Arizona Republic*, and Carl Hayden won re-election with the largest landslide in our state's political history.

That's a thumbnail sketch of the history of Western water politics: an unthinking divestment of the water resource to the states and from them to users, with the federal government a coconspirator in the reclamation process that accelerated this divestment. What is happening in our generation is an extraordinarily rich, diversified, creative effort to reassert the public interest in a water resource which has been divested—some would say rather thoroughly—over the last one hundred years. And we are now engaged in the effort of this generation to find the strings to pull the water back, to see if we can find some balance, so that Western water will not just be used, misused, and polluted but instead will be part of a living, sustainable-use, multiple-purpose environment.

II. Title Navigability

There are a lot of very difficult problems in the effort to find a balance. One is an obvious difference of opinion on use. Lawyers, public official, academics, and just plain caring citizens are

seeking to pull the federal rights back toward a more balanced center. But at the same time, we see the rise of the Wise Use movement and the takings problem. The Wise Users anxiously await the progeny of *Lucas v. South Carolina Coastal Council*,[2] claiming that not only did the federal government sever the water from our public lands for consumptive uses only, but that any modification will constitute a constitutional taking, requiring payment of just compensation. These arguments are going to form the background against which the effort to forge a more balanced approach to water will be tested. There is a constant threat that a new conservative judiciary will frustrate this effort to find a more balanced pattern of water use by expanding the concept of constitutional taking beyond any reasonable measure.

The title navigability issue is extremely important. Not because of the "title" aspect but because of the "navigability" aspect. The concept of navigation is one of the most extraordinarily rich and powerful of our common law doctrines. Navigability is a surviving strand of public interest, which when started centuries ago, was a fairly simple concept. You had to have passage for commercial purposes. The concept evolved over the years. Now the U.S. Army Corp of Engineers is responsible for protecting the passage, access, public interest, as well as maintenance of the waterway. Navigation is an important aspect of the public interest in water because it has such deep historical roots. These roots might prove to be a formidable defense to takings claims.

For those of you who have clients who are private landowners who are getting excited about title navigability, I would recommend that you consult with them and ask some questions because, frankly, the title question is no longer the key issue. Who would want raw title to the bed of a river anyway? I had a client come to me and say, "I am prepared to stake my firstborn and my life's fortune on getting title to the streambed of the Verde River and defeating these navigability presumptions in court." I said, "I know you own the land on both sides, but why is it you want title to the river?" He said, "First of all, I will reap a cornucopia in sand and gravel and mineral rights in the agate industry." I said, "Have you ever heard of the Clean Water Act[3] and

2. 112 S. Ct. 2886 (1992). *See Colloquium on* Lucas, 23 ENVTL. L. 869-932 (1993).

3. 33 U.S.C. §§ 1251-1387 (1988).

section 404,[4] the Army Corps of Engineers, the EPA, Two Forks Dam?" I said, "I'm sorry, but whether or not you own the streambed, section 404 of the Clean Water Act has asserted a federal primacy over dredge and fill operations, irrespective of who owns the underlying streambed. My client said, "I want to prevent access, to keep people from fishing on my property, from walking along my property." I said, "Why would you want to do that?" He said, "Well, I just do. Furthermore, I want to build a fence across the river." I said, "Then I am not sure I want you for a client; I may want to go back to public service someday. We might have the misfortune of winning your case."

My advice to my client was, "If you win on the title navigability and the title of the streambed does not reside in the state, it is not necessarily going to be definitive of the access problem because there are other doctrines called public trust."[5] There are a whole variety of doctrines related to the fact that the State of Arizona—and in many other states—owns the water resource.[6] Moreover, there is a certain sort of penumbra of rights which flow down the river with the water irrespective of who owns the streambed. So, that is just a way of illustrating that, while the navigability title is significant, the issues have evolved way beyond ownership issues and ought to be seen as a part of an effort to recapture the public interest in the water resource. This effort ultimately will not be decided by cases determining who owns the streambed. Some of you now may be asking: if navigability title is not that important, then why are we having this conference? The answer, of course, is that title navigability is an important component of this overall effort.

III. Other Issues of Public Interest in Water

What I would like to do now is to discuss some other issues that relate to the public interest in streamflows that should be of concern whether you are a legislator, a Native American, an academic, a lawyer, or a reformer. Rivers are important, and we are

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4. *Id.* § 1344.

5. *See Symposium on the Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow*, 19 Envtl. L. 425-735 (1989).

6. *See generally* Michael Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 Envtl. L. 573 (1989).

witnessing an enormous time of transition. Navigability, the public trust doctrine, and the public interest in waterways, together with the backdrop of *Lucas* and the takings issue, are going to produce an equilibrium which I hope will be much closer to a balance which has been lacking historically.

I mentioned the public trust doctrine. In many historical respects, the public trust doctrine is intertwined with navigability. But it is a much broader doctrine of enormous power. The classic case, of course, is the *Mono Lake*[7] litigation where the California Supreme Court handed down a decision which applied the public trust to water diversions. The court required the City of Los Angeles—forty years after the city obtained its water right—to limit its diversions from the lake to protect its ecological integrity. And the court said that there was no takings problem because all water diversions are subject to the public trust. All water rights are nonvested contingent rights.

A second issue relating to the public interest in water is music to the ears of the Native American tribes. It is called "reserved rights," another judicial doctrine of extraordinary power, and I don't think that we have seen the full elaboration of it yet. In the process of privatizing western water, we managed, of course, to leave out all of the Native Americans who had been here for a millennium. Then, in 1908, the U.S. Supreme Court heard a case concerning a Montana reservation, and said, "wait a minute, it doesn't seem very just that the Native Americans are living with no water, while the guys who arrived yesterday have taken it all."[8] The Court ruled that there was a reserved right in the water; that is, when Congress created the Indian reservation, it must have intended (but simply forgot) to reserve water for the tribe sufficient to carry out the purpose of the reservation. Then, in *Arizona v. California*,[9] fifty-five years later, the Court said that same logic applies to the creation of a national monument, a national forest, or any tract of federal land which Congress has designated for a use. These reservations carry implied water rights,

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7. National Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709 (Cal.), *cert. denied sub nom*, City of Los Angeles Department of Water and Power v. National Audubon Society, 464 U.S. 977 (1983).

8. Winters v. United States, 207 U.S. 564 (1908).

9. 373 U.S. 546 (1963).

which often pre-date all other uses.

The concept of reserved rights can be extended further, although it suffered a setback in a case called *United States v. New Mexico*,[10] where the Supreme Court construed the doctrine narrowly in the case of the national forests. The *New Mexico* Court ruled there is no reserved right for wildlife in the forests, only for the forests' primary purposes: timber production and watershed maintenance. The latter purpose may nevertheless require significant reserved water. Although this last issue has not been determined, it has been raised in a pending case for which we await a decision.[11]

These bundles of rights in water also need to be examined in the context of two of our most important environmental laws. The first is the Clean Water Act. I already mentioned section 404, which requires a federal permit if you dredge and fill in any wetland or stream in the United States.[12] This is a very important assumption of federal regulatory power because it reaches everything that is wet (and some things that arguably are not so wet). Water quality standards are another factor which must be considered in evaluating the effect of the Clean Water Act on streamflows because the Environmental Protection Agency is responsible for water quality designations for every stream in this country.[13]

The second federal law is the Endangered Species Act,[14] the single most inventive and trailblazing environmental law of this century. I am certain that members of Congress who passed the Endangered Species Act did not fully understand the American West. They did not understand the amount of endangered fish in the American West. They had no idea that this law would affect a place like Nevada. Yes, there is some water in Nevada. There is not much, but the fact that there is not much has extraordinary consequences. As the pleistocene lakes began to dry up in the West, we were left with a lot of little relic ponds, small springs and water sources around the Great Basin. They have been there long enough that, in each of them, evolution has had time to pro-

10. 438 U.S. 696 (1978).

11. The decision, which I have not seen yet, was handed down in April by a Colorado water court.

12. 33 U.S.C. 1344.

13. § 303, 33 U.S.C. § 1313.

14. 16 U.S.C. §§ 1531-1544 (1988).

duce a distinct species of fish. Not very pretty perhaps, not very big, some spiked fish, some spined fish, little tiny things, some of them blind, most of them ugly. Every single one of them is a separate species now, and many are protected from taking by federal law. Of course, that says nothing of the obvious endangered fish runs, your magnificent Columbia Basin salmon runs, for example.

Water quality standards and endangered species issues will come to a head in the California Bay Delta within the next five years.[15] This will be a massive fight, which in my judgment, will make the spotted owl seem like a relatively gentlemanly discussion because of its complexity and the fact that it will cover the entire watershed of the Sierra and Central Valley.

A couple of other thoughts about things that relate to the title navigability issue. There is going to be a lot of site-specific federal legislation in the future dealing with water issues. If you have a problem on a local river, it is going to become a federal topic. Two striking examples became law the day after the 1992 election, when President Bush signed the Omnibus Water Act.[16] The first is the Central Valley Project Improvement Act[17] in California. This statute earmarked 800,000 acre-feet of water for the maintenance of streamflow and fish and wildlife protection. The second example is the Grand Canyon Protection Act.[18] When the Grand Canyon Dam was built, some twenty to thirty years ago, no one really thought about the downstream effects of building dams. But, there has been enormous downstream adverse effects, and this legislation designates minimum streamflows and requires a variety of other measures to mitigate against adverse downstream effects on the Colorado River.

You should also look carefully at the Federal Energy Regulatory Commission which grants license for nonfederal dam building. Through some wonderful quirk of history, these licenses are granted for terms not to exceed fifty years. Through another wonderful quirk of history, most of the dams were built in the 1930s

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15. *See* Harrison C. Dunning, *Confronting the Environmental Legacy of Irrigated Agriculture in the West: the Case of the Central Valley Project*, 23 ENVTL. L. 943 (1993).

16. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600 (1992).

17. *Id.* §§ 3401-3412, 106 Stat. 4706-31.

18. *Id.* §§ 1801-1809, 106 Stat. 4669-73.

and 1940s. This means that the renewal periods are coming up. This creates a policy planner's dream, because if you read the law literally, it says the licensee's rights *expire* at the end of the fifty-year period.[19] I would invite the public interest people to think expansively about that fact. One wonderful example is on the Olympic Peninsula where the Elwah River flows above Port Angeles, out of Olympic National Park, and is now trapped at the base in a dam which really should never have been built because it eliminated access to valuable salmon spawning grounds. There is now a serious discussion underway about removing that dam.[20]

IV. CONCLUSION

The public interest in waterways is not just about title navigability, not just title to submerged land, but actually involves a wonderfully complex bundle of public and private rights. We are moving toward a balance which has yet to be established but which is surely going to make the West a better place because it will reconcile the mistakes of the past with the requisites of a environmentally sensible future. You can predict some large things as a result of all of this.

There are not going to be any more large dams in the West unless there is the most excruciating evident case made, or unless they are built for a Native American tribe which has a special claim for water. Existing water projects all over the West are going to be reconfigured to give water back to the environment, both through the FERC licensing process and through new federal legislation.

There will also be expanded public access. The fights that now arising out of the title issue for stream access will be resolved in the next ten years. Public access will be seen as a fundamental right, obtained either through the courts or dictated by legislatures. Why? Because the West is an urban place and it is becoming more urban all the time. The idea of a rancher saying to the citizens of a state that "there is not going to be any access for fishing or boating on this stream because I am going to build a fence across it and guard it with a shotgun," is an example of why

19. 16 U.S.C. § 799 (1988).

20. Elwha River Ecosystem and Fisheries Restoration Act, Pub. L. 102-495, 106 Stat. 3173 (1992).

these guys are headed for extinction. It simply is not going to happen.

Finally, the water problems of the West are going to be solved, not by taking more water for private use, but by setting up markets to reallocate the water we are already using. These markets will allow those who need more water and who are willing to pay a higher price to move that water from lower valued uses in a thoughtfully regulated manner. That is just a way of saying that this conference has the good fortune of addressing a topic, the public interest in water, which is a growth industry. It will keep all of you wonderfully busy for your lifetimes. With any luck, it will provide your children with many years of rewarding contention.