

WATER WORKING GROUP, UNIVERSITY OF CALIFORNIA, BERKELEY

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“Water allocation among new and traditional users”

(Note: This talk could not be taped. I have therefore put it together from my notes from the meeting. Isha Ray)

The working assumption regarding law and the legal system is that they are stable, that the rules of the game are stable. But they may not be so. The law in general, and environmental law in particular, has shown an ability to change, to adapt to changing economic and social values. The conventional wisdom a few years ago was that existing water rights were “vested” in cities, or in agriculture, for example, and were protected by the Constitution. Today there’s a dramatic change in this thinking, and these rights are no longer seen as absolute. Similarly, the term “beneficial use” was reserved for measurable economic uses, generally of water that had been diverted away from its streambed. Many rivers were de-watered as a result. Water which flowed down to seas or lakes was literally considered “wasted”. But today we accept that in-stream and aesthetic uses are also valuable. We are actually re-watering dry channels, especially post- the Endangered Species Act.

So how do we put these two values together, especially when “existing rights” imply that the water in many rivers is already allocated? Increased supplies are generally not feasible – we aren’t really going to bring water down from the Yukon to Los Angeles, or float icebergs in from Alaska. Yet new demands for in-stream flow, for fish, fowl and preservation, are rising. Is this a zero – sum game? It is not at all clear the courts know how best to steer a course between the new and old claimants.

I think that the law changes with changing social values, and it has done so in the past. Take, for example, the historical view of who owned water. The “natural

flow doctrine” argued that you had the right to use any water that flowed past or through your land, as long as the water flowed along its natural course – “as the river was wont to do”. Over time, under pressure to make water more productive, you got the right to the “reasonable use” of water, even if that meant you had to alter the natural flow. The “reasonable use” doctrine took over. Another example is the changed definition of “navigable river”. Navigation was once for ships, but navigation by ship is no longer important and a river is now “navigable” if it passes the “floating log test”.

These examples show that deeply rooted property rights do change, and have changed, over time. But people need time to adapt and to adjust their ways. Over a short period of time, it’s very difficult to change the rules. So where does this leave the new demands for in-stream use? And what are we doing to help traditional users (agriculture, mainly) to adapt?

1. The water supply may not be as tight as people fear

The governing assumption in the arid West is that all the freshwater is fully allocated. But in fact more water is available in the system than the formal allocation of rights / shares would suggest.¹ The classical example is that of agriculture. Irrigation uses old delivery systems – the water goes through unlined earthen channels with huge seepage and evaporation losses. But there are many other possibilities. There is unallocated water in public reservoirs – much of the live storage has been contracted out, but there is water not yet contracted to anyone. Additionally, operational and managerial changes may be possible. The timing of water deliveries can be everything, for example. Adjustments are possible in *when* water is delivered for one or other use – not all conflicts are around water quantity. In short, the tightness of the overall supply may be less severe than is commonly imagined.

¹ (In response to a question): It’s in the interest of all the parties to operate on the basis of the worst case scenario for them. Therefore worst case scenarios dominate the public dialogue. But that doesn’t mean that they are *real*.

2. Ambiguity has its uses

The present strategy with respect to the law is: Let's operate within the existing rules, but let's take advantage of the ambiguity in the rules. If you confront existing property rights head-on, you have two choices. You can tell a farmer, okay, we want 10% of your water for the fish. You have to comply, otherwise you're breaking the law. Just as industrial users had to cope with pollution – related acts, e.g., The Clean Air Act and The Clean Water Act. Or, you can say, the traditional user (the farmer) has these property rights. If we take 10% of his water, we have to pay compensation. What is the answer?

Each group, farmers included, thinks: Do we want to know the answer? Maybe not! If we go to court with this, we'll eventually get an answer, and it might not favor us. So perhaps we should negotiate in case the alternative to *not* negotiating is even worse. Therefore the ambiguity in the legal positions of various parties has made room for negotiation.² Then there's a general understanding that in the *process* of coming to a solution, we need to mitigate hardship. If there's pain, we'll need to spread it around. If there is a pot, we'll all throw something into it. So some compensation or government help may be forthcoming -- but we can't completely compensate anybody because that would suggest he / she had firm property rights.

3. Agreeing to negotiate forces a measure of flexibility

Once everyone is actually at the table, peoples' agenda change. Existing contractual obligations, and accepted negotiating practices, soften the hard edges of pre-existing negotiating positions. Just being at the same table changes the agenda of the water community.³ Suddenly you've got people who never cared

² (In response to a question): Of course clarity is needed when you have to finalize certain transactions. But as to where the border is between the need for clarity and the need for ambiguity – well, that's a deep question. I'll have to think about it some more, when I get home.

³ (In response to a question): Of course you could get up and walk away from the table. But would you? If you do, no one is there to speak for your interests. Most interest groups are reluctant to walk away, even if they're frustrated.

about the minnow sitting around and talking about how to save the minnow, and how to do it at minimum cost. They probably started out with, how do I protect my water supply requirements. They've ended up with the minnow. Once you are at the table, and you've put in a lot of energy and resources into the negotiation, you *want* an agreement. You become invested in success, because you want to succeed in what you've put a lot of time into.

Could these agreements ever have been made explicitly, by tackling the existing laws? Probably not. They're made by treading around the existing laws.

4. Two case studies

The Middle Rio Grande: The Middle Rio Grande in New Mexico is fully appropriated, if not over-appropriated. Most of the water goes to irrigation. The silvery minnows downstream are "listed" in the Endangered Species Act, there's not enough water for them. Now, water is held in Bureau of Reclamation reservoirs in New Mexico for Texas, by law. At present this water is sent downstream to Texas in the winter, because there's less evaporation then. So why not send it down in the summer, when the silvery minnow needs it? This seems trivial, but it's not.⁴

Since 1996, Albuquerque has released water, which it imports from the San Juan River, for the minnow. This is a year – by – year lease, the long-term prospects for the minnow are still uncertain. There have been some complexities with respect to water-loving plants, mainly salt cedars on the river banks, but...we have at least a temporary agreement.

The River Platte: The Platte has very little water, and it's almost all in use for agriculture, power generation and municipal use. But they've got ESA problems – some listed fish, the whooping crane. There was some unallocated water,

⁴ (In response to a question): The irrigation interest there is the Middle Rio Grande Conservancy District. They have no incentive to collaborate with any one else – why should they bother? Who

though not much. Three states use the Platte – Wyoming, Nebraska and Colorado. They negotiated; each state felt forced to negotiate to ensure that the other states paid their shares of the cost of compliance. So now some water has been put into an “environmental account”, to be released downstream when needed, to protect habitat. Existing dams elsewhere are going to be raised in height, so more water is available for agriculture and power. Colorado now pumps and holds water in a wildlife refuge, and then sends it downstream when it’s needed for ESA purposes. Here’s an example of how environmental protection, once forced on these parties, has become the *goal* of the negotiations.

5. Conclusion

Both these rivers have been thought of as over-stretched. And of course all the claimants argue forcefully in defense of their interests. But the prospect of something worse in the offing has forced these negotiations, and water has been found where no one thought it existed. These threats and fears are, of course, a result of environmental legislation. So it seems that laws and rights, formally and informally, have evolved to accommodate changing social values. It’s not all sweetness and light – in fact it can be very dark – but I see more upside than downside for the environment and for biodiversity.

wants to consider interests other than protecting their own turf (n this case, water)? There isn’t one water, there are many waters, and bits of it belong to different people.