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Western Water: The Ethical and Spiritual Questions*

Charles Wilkinson[1]

This day is set aside for quite a daring inquiry: an explicit examination of the role of ethical and spiritual questions in Washington water law. The inquiry will not be easy, for the burden of history lies heavy. Because of the central role of water in the West, the water laws are among the oldest, most important, and most deeply ingrained western laws. The prior appropriation doctrine of the nineteenth century is a hard-edged, utilitarian doctrine that leaves most decisions to individual water users. The language of spirituality—words like love and beauty and wonder—has never been part of the language of western water law. The idea of cooperation among the many different kinds of people who care about water still has not fully settled in: cooperation, as I will discuss, has had a major role in western water, but it meant something quite different in the nineteenth century than it does in the twenty-first. In all, the softer and slower and abstract and emotive aspects of our language, of our humanity, have been left outside the scope of the water laws.

Yet who among us here, or among our friends who know western waters, would deny the essential worth of a clutch of spring Chinook who have moved up the canyon to the deep pool below the waterfall and are now waiting out the low water, ready to move when the spring freshet comes down; the crawfish under the stones of a small creek where a little girl, up to her knees, silently inspects for clawed movement; the still, shallow arm of a tiny mountain lake where insects work the surface and a few cutthroat, too small to catch, fin in the shadow of the sunken limb; or, the unplanned gift of the

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community that has grown up along the irrigation ditch—the willows and cottonwoods and wild roses and the field mice seeking cover from the redtails above?

Western water law puts off-limits the emotions we all feel toward water. It walls off any ethical obligations to the animals, to the inanimate rivers, and to the inanimate and immobile canyon walls. The law, it is said, must be objective and rational. But the question now rides in the currents of every one of Washington's rivers: how can a law be rational and objective if it leaves out the unquantifiable, the immeasurable, the emotional, the abstract, the spiritual?

I come here as one who believes that we have made progress over the past generation but that western water law remains seriously outmoded and needs substantial reform. But much more needs to be said. The society that created the laws was not somehow ignorant or even shortsighted. My guess is that those of us here today, were we alive in the nineteenth century, would have done the same. The problem is not those people. The problem is that those times are not these times.

Nor is the problem the farmers, cities, and others who hold the old rights today. They, like the new societal concerns, rightly expect to be treated fairly. Making new water laws while respecting those who benefit from the old laws has been challenging in the extreme. What we need is more understanding, open-mindedness, and appreciation of other people's situations. We must generate an understanding and a spirit that will be useful to ourselves and others.

Western water law grew out of the epic westward expansion of the mid-1800s, one of the two great rushes, along with the one we are in now, that fundamentally remade the West. The Europeans who came out here were making large history but had little time to think of it that way. Mostly they

were intensely practical. They had to be. They were constructing a new society from the ground up under hostile conditions—stingy aridity, formidable mountain ranges, immense distances, and Native people who were determined, just as we would be, to defend their land and societies. The gold and silver strikes ignited the movement, then farmers and ranchers moved in to create more lasting and stable communities.

Water was paramount, whether to wash the non-paying dirt out of a pan, to blast away placer deposits on a hillside, or to farm, for in the dry country you farm with water, not land. The mining and farm societies both wanted stable water supplies so that businesses and families could, amid all the potential chaos, plan for the future.

Two ideas came to the fore during the nineteenth century. The "first in time, first in right" requirement of the prior appropriation law brought clarity. You knew exactly where you stood. Second, because you needed physical as well as legal stability, settlers used dams and reservoirs to smooth out the flows—to tone down the big spring runoff and beef up the low July, August, and September flows.

We need to mark down the stark conflict between these nineteenth-century utilitarian ideas and twenty-first-century ecological needs. Prior appropriation, before ecology was a word, was premised on steady, reliable flows. Ecosystems, on the other hand, are constantly changing through disturbances—fire, blowdown, landslides, insect kills, floods, and droughts—and we now understand that these disturbances are critical to biodiversity. The human communities needed certainty, stability, and predictability. The natural communities have always needed disturbances. Thus the programmed flow regimes of dam-and-reservoir projects often inhibit or eliminate the erratic, disruptive natural forces that insure healthy plant and animal communities.

Another way in which the traditional water system contrasts with contemporary circumstances involves cooperation. The West was settled, not by lone fur trappers or miners heading out toward the horizon, or by steel-eyed marshals gunning down outlaws, but by families working cooperatively to

create communities. Cooperation became a treasured tradition in water use. Whether the Okanogan, the Deschutes, or the Gunnison, farm and ranch families with senior rights regularly made pragmatic, creative adjustments that both met the seniors' needs and also allowed neighboring junior users to receive wet water that their paper rights might not entitle them to.

But this cooperation worked within the closed system of water law that allowed in only water users who physically diverted water from the streams and put the water to a beneficial—that is, extractive—use. The cooperation did not reach to Indians, salmon fishers, or the recreationists who had become significant water users, though not water diverters, by the end of the nineteenth century.

Consider, then, how radical the western water law system is by today's lights, logical though it was by the standards of its own day. Anyone was allowed to divert or impound as much water as they wanted from any watercourse with the only restriction being that senior diversion rights could not be abridged. The water was absolutely free. Once water was diverted, even though it was obtained for free, the diverter immediately obtained a vested property right, protected by the Constitution, to the full economic value of the water. There were no limits on how much could be taken out of the rivers, which could be drawn down or dried up entirely. There were no conservation requirements. In every case, these decisions were left up to the individual, not the larger community.

It bears repeating that there was no intent on the part of ordinary farm and ranch families to harm anyone or anything. They were trying to build their lives in a land where diverting water was essential. Yet we now understand that there have been impacts, sometimes serious, on Indian people, on recreationists, on people who simply love wild and free rivers, and on the natural world.

The prior appropriation doctrine invented in the mid-nineteenth century underwent relatively few changes for well over a century. During that time, senior vested property rights continued to be established on rivers all across Washington and the West. Importantly, an aura, still at work today, grew up around water administration. Existing rights were permanent, sacrosanct. New users, so long as they didn't affect seniors, had carte blanche on the rivers. Any conservation requirements, it was thought, would infringe on vested rights.

We might have taken a different course in the early twentieth century when San Francisco wanted to inundate Hetch Hetchy, sister canyon to Yosemite. We might have based our decision on the valley's splendor, its ability to fill us with wonder and bless us with time to reflect. We might have discussed in a serious way whether we had obligations to Hetch Hetchy, and what they were. But the gray language of development, storage, and municipal use won out.

The western states each had a chance between 1890 and 1920, when they enacted codes to replace common law prior appropriation. Washington so legislated in 1917. There were many approaches other than traditional prior appropriations we might have adopted. The early, rural Mormon settlements de-emphasized the individual and proceeded on a community basis. Ward bishops distributed water rights to members of the community equally—there was no notion of "first in time." The Mormons imposed limits: only community members could receive water rights and they could receive no more than their own families could farm. Hispanics had a somewhat similar system, based on the mother ditch that served the whole community. Water rights were held, not by individuals, but by *acequia* associations and were administered by a mayor domo. John Wesley Powell wrote his famous *Arid Lands* report in 1878, premised on the idea that water should be set aside for watershed communities and that transfers out of the watershed should be prohibited. Powell's whole approach toward the West was based upon its aridity, upon the limits imposed by this dry land.

To Indian people, water was spiritual. Like the land and animals, water was part of the whole natural world, to which duties were owed. Human beings and the rivers were equals, and human beings could use them, but with respect and with prayers. And John Muir had offered his own alternative vision. Like the Indians, he saw spirituality everywhere in nature, including water. He also saw beauty and spirituality in the deep canyons and believed that they should be preserved.

But in the early decades of the twentieth century ideas such as these were of no moment at all. The original Mormon ideal was long dead; by the late 1800s, the Utah Supreme Court had adopted the prior appropriation doctrine wholesale. As for Indians and Hispanics, who would want to listen to them? They were societies on the way out. And Powell, who had not yet been memorialized in Wallace Stegner's great book, *Beyond the Hundredth Meridian*, was, at best, just a half-remembered nineteenth-century figure who had been drummed out of his post as Director of the U.S. Geological survey by angry western senators in the 1890s. Muir, like Powell, was a vague presence and, besides, he had lost at Hetch Hetchy, which broke his heart, but also showed that his views about water had not yet made their mark.

And so, with their codes, Washington and the other states rejected the idea of reform and held firm to old-style prior appropriation, adding just a procedural overlay. Now permits were required but, other than Oregon's 1915 statute prohibiting diversions above several of its waterfalls, decisions on western water were still left to individual developers, whose applications for permits were rubber-stamped. The mid-nineteenth century view of water remained in place until well after the end of World War II.

But then evolution haltingly began to appear. Washington and Oregon put in laws that would stop some dams in order to protect salmon runs. Justice William O. Douglas—his federalist principles trumping the love of rivers he had held since his youth in the Yakima Valley—ruled, however, that the state laws could not stop federal dams. In 1955 Oregon adopted the first instream flow laws, plainly a major conceptual breakthrough, but the rights

were junior, and when they did apply, the state board was loathe to enforce them in low-water years.

The clearest indication that developers might no longer have an unbreakable grip on the rivers came in the Southwest. David Brower, like his predecessor at the Sierra Club, Muir, lost his first struggle against a big dam when Glen Canyon Dam went in on the Colorado River. But he won the next one—the proposal, the most audacious one of all, still fully viable in the mid-1960s, to dam the Grand Canyon. We ought to wonder why public opinion surged behind Brower as it did. Was it just because the idea of flooding the Grand Canyon was plain stupid? Was it too expensive? Or did a good many Americans see the watery burial of such a place in terms of right and wrong, that is, ethics?

Although water reform has moved more slowly than any field of conservation in the West, there are signs of progress. We have essentially put a stop to big-dam building. Every western state now has some form of instream flow laws. In the past decades, Washington and the other western states have seen the invention and proliferation of water trusts. The Endangered Species Act has made its mark. Some policies in individual states have been truly pathbreaking, among them California's adoption of the public trust doctrine, Arizona's Groundwater Act, Montana's river reservation program, and Washington's recognition of the hydraulic continuity between groundwater pumping and surface flows.

We are seeing some strong conservation programs in the cities, with Seattle as a leader, and gradual acceptance of conservation in agriculture. Water marketing has settled in. The modern tribes have become significant participants. They have developed a respected management capability: in Washington the tribes account for about a third of the total governmental

effort to save the salmon; the number of tribal fisheries scientists is roughly equal to the fisheries scientists employed by the State of Washington and by the federal government. The tribes' voice is genuine, deeply ecological, and spiritual. Secretary Babbitt's dramatic releases from Glen Canyon Dam to mimic more closely the high spring runoff have helped educate the public on the importance of natural flow regimes. The commitment of the churches, evident in the Pastoral Letter on the Columbia, is a vivid example of the widespread concern over the state of our rivers and the search for new ideas.

A recent but overarching development is a wholly unprecedented level of broad-based citizen involvement. There is a growing realization that a range of factors—including modern innovations such as improved conservation strategies, instream flow programs, water marketing, and water trusts—help create flexible contexts that promote creative settlements in stressed watersheds. Thus in the 1992 Omnibus Water Act, the most extensive federal water legislation since the 1902 Reclamation Act, Congress approved complex settlements among irrigators, environmentalists, tribes, municipalities, and businesses in some 40 western watersheds.

It is too early to judge the new and burgeoning watershed council movement, but the vitality is impressive. Whether or not the watershed councils in their present form become principal vehicles for lasting resolutions, as well they might, we will not turn back. In some fashion, broad-based citizen involvement will be a key ingredient in future water policymaking. Westerners love their rivers too much for it to be otherwise.

And one can hope that broad public involvement will be coupled with an enrichment of our language about water. Our rivers are too diverse, they offer us too much, to be bound up in the bland, confining language of water development. The rivers bring into our lives beauty and joy and contemplation. They inspire us. We feel reverence and wonder and spirituality toward them. They, and the life within them have their own intrinsic worth. They deserve an ethic. When we speak of rivers, would it not increase the accuracy of our discussions—even the accuracy of our statutes and regulations—to use a broader language and a more inclusive vision?

In that spirit, I'd like to finish with a short passage from a book of mine called *The Eagle Bird* that may fit the sense of this gathering and that I hope will be useful to you.

> We need to develop an ethic of place. It is premised on a sense of place, the recognition that our species thrives on the subtle, intangible, but soul deep mix of landscape, smells, sounds, history, neighbors, and friends that constitute a place, a homeland. An ethic of place respects equally the people of a region and the land, animals, vegetation, water, and air. It recognizes that westerners revere their physical surroundings and that they need and deserve a stable, productive economy that is accessible to those with modest incomes. An ethic of place ought to be a shared community value and ought to manifest itself in a dogged determination to treat the environment and its people as equals, to recognize both as sacred, and to insure that all members of the community not just search for but insist upon solutions that fulfill the ethic.
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> This is a broad formulation, and like all such generalities, there is an inherent difficulty in moving it down close to the ground. But we need ethics in order to guide our conduct according to the larger considerations that ought to supersede day-to-day, short term pressures. It is one of our special qualities as human beings that we understand spans of time, that we can learn from history, from events that occurred before our birth, and that we can conceptualize the long reach of time out in front of us. Ethics capitalize on these special human abilities and can be critical in structuring attitudes toward land and community. Further, broad policies have always mattered in the West, whether they have been Manifest Destiny, conservation, multiple use, or the Sagebrush Rebellion. Such concepts provide us with points of departure in our continuing struggle to define our society and what it stands for.
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> One implicit theme in the ethic of place is that we westerners fail to aspire high enough. We fail to ask the hard but right questions. How great a society can we build? Should greatness be denied to us because our sophistication is of a different kind than Paris of the 1920s or ancient Rome or Athens? Are we somehow disqualified from greatness because we tend to build our philosophies around deep back canyons and the sweep of high plains vistas? Is the

quality of our personal relationships less because we draw our sustenance, not from rapid fire intellectual head banging, but from putting brakes on things, from toeing at the ground or pausing at the pass to look back over where we have been?

Another undercurrent involves romanticism. Although the ethic of place is solidly positioned on economics, ecology, several physical sciences, law, and the psychology of interpersonal relationships, one can also find a streak of what can be fairly called romanticism. But that should not be a conversation stopper. Romanticism—or, put somewhat differently, beauty, imagination, cultural conservatism, and a love of history and art—is as real as youth, democracy, or the market. All are part of the landscape of the mind and we deny something fundamental in ourselves if we deny the tangible existence of any of them.

The single greatest ally of those who would wreck the West is the idea that the West is homogeneous. If there is nothing special and distinctive about a silver current twining down a back canyon; or the hard caked ruts that you can see today and that were, really were, made by the wagons of the women and men who came over the Oregon Trail; or a wolf or an eagle; or a rancher putting up fence; or a tribal judge trying to blend the old and the new, and many different cuts of conscience, when he or she rules on whether the Navajo child should remain with her white adoptive parents or be awarded to a Navajo family; or yet another aspen grove on yet another forty five degree canyon wall; or an old Hispanic mayordomo going out to clean out the mother ditch—if none of those things is special, then we might as well do away with them, each of them.

We are taught by sophisticated people that regionalism is passé. Let us not participate in that and let us not permit our children to participate in it. Let us take the emotional and intellectual chance of saying that this is not the leftover sector of our nation; that, rather, this is the true soul of the country, the place that cries out loudest to the human spirit; that this place is exalted, that it is sacred. Use that word, *sacred*, and whatever kind of ethic it is, use the word *ethic*, because the word properly connotes rigor and high aspirations. Last, let us be sure to say this to all of the people, for the contentiousness really can wane when we realize, and act upon, our common melded past and future. For, as Wallace Stegner has written in *The Sound of*

> *Mountain Water*, when the West "finally learns that cooperation, not rugged individualism, is the pattern that most characterizes and preserves it, then it will have achieved itself and outlived its origins. Then it has a chance to create a society to match its scenery."

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