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## A Few Ironies of Western Water Law

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## A FEW IRONIES OF WESTERN WATER LAW

*Reed D. Benson\**

We have a truly outstanding panel of speakers this morning to discuss issues and history relating to water resources in the American West. Water, of course, has always been scarce out here. Some nineteenth century maps of the United States had the words “Great American Desert” written broadly across the West, and that characterization reflected how many people viewed the West in that era. The story goes that President Grant sent a cabinet member to the West with orders to report back on “what it is they need out there.” The secretary dutifully wrote back saying, “All this place needs is good people and water.” President Grant sent back a four-word telegram: “That’s all hell needs.”<sup>1</sup>

We have just heard from Charles Wilkinson, one of the great authorities and commentators on the evolution of water law in the West. He once co-authored a book on the development of western water law called “Searching Out the Headwaters.”<sup>2</sup> Here in Cody, we’re not far from the headwaters of four great western rivers—the Missouri, the Snake, the Yellowstone, and the Green—and Charles, we’re grateful to you for bringing us

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1. I heard Interior Secretary Gale Norton tell this story a couple of years ago. Interior Secretary Gale Norton, Address to the American Bar Association Water Law Conference, Feb. 20, 2003, *available at* <http://www.doi.gov/secretary/speeches/030220speech.htm> (last visited Oct. 1, 2005). When I checked the text of her speech, however, I found that she had attributed the story to former U.S. Senator Alan Simpson of Wyoming. *Id.* It turns out that Senator Simpson had planned to tell the same story in his luncheon speech at this conference. My apologies to Senator Simpson for preempting one of his stories. I must admit that I don’t feel too badly about this, however, as his talk still included about a dozen excellent water stories.

2. SARAH F. BATES, DAVID H. GETCHES, LAWRENCE J. MACDONNELL AND CHARLES F. WILKINSON, *SEARCHING OUT THE HEADWATERS: CHANGE AND REDISCOVERY IN WESTERN WATER POLICY* (1993).

to the headwaters of the law that governs how the water of such rivers is allocated and used. Before introducing the speakers on this outstanding panel, I want to say just a few words about some of the ironies of western water law.

That law is primarily, but by no means entirely, state law. This situation arose because in the nineteenth century the federal government allowed the territories and states to decide for themselves which system of water allocation they would choose.<sup>3</sup> As we've heard, the states chose prior appropriation, and for reasons that were very compelling at the time.<sup>4</sup> But the states not only chose appropriation, they embraced it fiercely, as though human survival in the region would be impossible without it.<sup>5</sup>

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3. The choice was between the older riparian rights doctrine, which recognizes rights to use water based on ownership of land along a natural watercourse, and the newer prior appropriation doctrine, which recognizes water rights based on diversion of water from its natural course and application to a "beneficial use." Amy K. Kelley, *Federal-State Relations in Water*, in 4 *Waters and Water Rights* § 36.02 n.21 (Robert E. Beck ed., 1991). Professor Kelley has summarized these origins as follows:

All of the original states adopted the riparian rights doctrine as their method of water rights allocation, and the federal government, having no substantial landholdings, had no interest and nothing to say. In the western states, matters developed differently. The federal government had, and still retains, significant public lands; but miners and settlers who were quite literally trespassers arrived and started using the waters long before the United States decided what it wished to do with its lands or waters.

*Id.*

4. Professor Charles F. Wilkinson explained many of these reasons in his remarks. Audio Tape: Symposium: The Culture of Water, Watering the West: The Evolution of Ownership, Control, and Conflict in the West (Oct. 14-15, 2005) (on file with author).

5. U.S. Supreme Court Justice Sutherland, a westerner, wrote that by 1877,

it had become evident to Congress, as it had to the inhabitants [of the arid West], that the future growth and well-being of the entire region depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water. The streams and other sources of supply from which this water must come were separated from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the transmission of water for long distances and its entire consumption in the processes of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation.

Appropriation swept the West despite its very humble origins. The doctrine did not spring from the mind of a great jurist, or emerge from lofty debates in a constitutional convention; rather, it bubbled up from the mining camps of the California gold rush. The court in *Irwin v. Phillips*<sup>6</sup> declined to apply riparian law largely because both parties were squatters on the public domain,<sup>7</sup> and instead recognized the customary rules of the mining camps even though these rules were in many ways “crude and undigested.”<sup>8</sup> Here is perhaps the first great irony of western water law: a legal system that arose from the relatively lawless mining camps of the Wild West would come to be viewed as though it had been handed down directly from God.<sup>9</sup>

In the mining camps, disputes over water were decided on the same basis as disputes over mining claims: whoever got there first had the better right.<sup>10</sup> “First in time, first in right” was the guiding principle, and it has always had some reflexive equitable appeal. This seemingly simple rule, however, did not necessarily protect the first user of water from a river against interference by a later user. Under traditional prior appropriation principles, a person could not obtain a water right without first diverting water from its natural course, even if that person was making an economi-

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California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 157-58 (1935). See also *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446-450 (1882). In this well-known case involving a water dispute between an appropriator and a landowner claiming riparian rights, the Colorado Supreme Court rejected the idea that riparian rights were the law of Colorado prior to 1876, when the state constitution enshrined the appropriation doctrine of water rights. *Id.* at 447. The court found the common-law riparian doctrine “inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith.” *Id.*

6. 5 Cal. 140 (1855).

7. *Id.* at 145-146.

8. *Id.* at 146.

9. As stated by the Supreme Court in *California Oregon Power*,

[T]his substitution of the rule of appropriation for that of the common law was to have momentous consequences. It became the determining factor in the long struggle to expunge from our vocabulary the legend “Great American Desert,” which was spread in large letters across the face of the old maps of the far west.

295 U.S. at 158.

10. DONALD J. PISANI, *TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY, 1848-1902* 12-24 (1992) (discussing the water use practices, customs, and rules of early California mining camps).

cally valuable use of the water.<sup>11</sup> This diversion requirement disadvantaged users whose livelihoods depended on naturally flowing rivers<sup>12</sup>—including, significantly, Native American tribes. Prior appropriation recognized water rights only if users took certain definite steps, and unless the tribes took those steps to obtain water before non-Indian water users in the same area, they typically found themselves without the water they had counted on for their livelihoods. Thus, a second great irony of western water law is that a system based on “first in time, first in right” would cut against those people who had lived in the West for thousands of years before anyone thought of prior appropriation.

The bedrock principle of western water law is that beneficial use is the basis, the measure and the limit of a water right.<sup>13</sup> Thus, water rights are created based on water being applied to a so-called “beneficial use.” Traditional uses such as irrigation, mining, and domestic water supply have always been beneficial under the law.<sup>14</sup> Only in the last half-century or so, however, have the states begun to recognize environmental and recreational uses as beneficial,<sup>15</sup> even though the West’s spectacular scenery, wildlife, and other natural amenities have long been seen as valuable resources.<sup>16</sup>

11. “Cases involving stockwatering directly in a stream, irrigation by natural flooding, storage in on-stream reservoirs, and the like all ultimately involve traditional consumptive uses that are identifiable and quantifiable. But they fundamentally lack one of the three requisites of an appropriative right: diversion.” A. DAN TARLOCK ET AL., *WATER RESOURCE MANAGEMENT* 162 (5<sup>th</sup> ed., 2002) (The other two requisites are intent to appropriate and application of water to a beneficial use.).

12. *See Empire Water & Power Co. v. Cascade Town Co.*, 205 F.123 (8th Cir. 1913) (recognizing the economic and social value of a scenic waterfall that provided the centerpiece of a popular resort, but denying the resort’s request for a water right that would protect the waterfall in its natural state).

13. Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 920 (1998).

14. *Id.* at 924.

15. As summarized by Professor Neuman,

States that list specific beneficial uses in statutes normally began with a basic list many years ago, covering the late nineteenth century needs of domestic use, farming, and some industry, and then supplemented their statutes over time to add more “modern” purposes, such as instream uses for recreation and fish and wildlife. In other words, statutory expressions of beneficial use have changed to reflect changes in values and changes in scientific understanding.

*Id.*

16. John W. Hoyt, who served as Territorial Governor of Wyoming from 1878 to 1882, saw the real value in Wyoming’s natural amenities: “A pure and invigorating atmosphere . . . a cheerful sky, and attractive scenery, can one of them be weighed in

Under traditional prior appropriation principles, there was no way legally to preserve the natural flows of rivers and streams, and by the time states began enacting laws allowing for the protection of instream flows, countless streams across the West were already dried up in the summer months by the exercise of senior water rights.<sup>17</sup> A third great irony of western water law is that the region with the world's first national park<sup>18</sup> would take so long to recognize recreation and resource protection as beneficial uses of its waters.

I mentioned earlier that western water law is not entirely state law. Traditional westerners may view federal water law as a new threat, a recent invention of would-be reformers. Janet Neuman, in a characteristically great turn of phrase, once wrote that "[t]he simple mention of 'federal' water policy in some parts of the western United States is akin to ordering a gardenburger at a cattlemen's convention."<sup>19</sup> In reality, though, there has been significant federal water law since the end of the nineteenth century.<sup>20</sup> It is true that Congress has often stated a policy of respecting state water law.<sup>21</sup> But it is also true that there are many areas where federal and not state law controls the development and use of water resources. The idea that the federal government has consistently deferred to states in water matters is largely a myth.<sup>22</sup>

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the balance or measured in the bushel; but yet each of them has a very important bearing on the health, happiness, and prosperity of a people." T.A. LARSON, *HISTORY OF WYOMING* 135 (2d ed., 1990).

17. See DAVID M. GILLILAN & THOMAS C. BROWN, *INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE* 40 (1997) (listing a number of major western rivers, including the Snake in Idaho, the Rio Grande in New Mexico, the Arkansas in Colorado, and the San Joaquin in California, "that are now dry or virtually dry during substantial portions of the year . . .").

18. Yellowstone, established by Act of Congress in 1872, was the first national park. T.A. LARSON, *supra* note 16, at 132. Wyoming Territorial Governor Hoyt foresaw the importance of Yellowstone National Park to Wyoming, predicting in 1881 that its scenic wonders "are certainly destined to attract a constantly increasing number of visitors from all parts of the world." *Id.* at 138.

19. Janet C. Neuman, *Federal Water Policy: An Idea Whose Time Will (Finally) Come*, 20 VA. ENVTL. L.J. 107, 115 (2001).

20. See *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

21. See *United States v. New Mexico*, 438 U.S. 696, 702 n.5 (1978) (referring to a list of "37 statutes in which Congress has expressly recognized the importance of deferring to state water law").

22. David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3, 7-8 (2001). I explore the reality and mythology of federal deference to state water laws in a forthcoming article. Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. (forthcoming June 2006).

Federal water law has its own set of ironies. The most obvious one, perhaps, arises from the West's longstanding attitude toward the federal government in natural resource matters. The historian Bernard DeVoto summarized this attitude as, "[G]et out, and give us more money."<sup>23</sup> In water resource matters, western politicians have insisted that the national government leave water allocation entirely to the states, but have also pushed successfully for a huge federal program of water project construction.<sup>24</sup>

The irony is that, while repeatedly acknowledging that the states have primary *authority* to allocate water resources, Congress effectively made it a federal *responsibility* to build water projects to develop these resources.<sup>25</sup>

The ironies do not end there, but these few examples show that western water law and policy cannot practically be reduced to a few basic

23. BERNARD DEVOTO, DEVOTO'S WEST 88 (EDWARD K. MULLER, ed. 2005). This famous quote originally appeared in an essay in the January, 1947 *Harper's Magazine*. *Id.* at 75.

24. The 1902 Reclamation Act, 32 Stat. 388, was the statute that authorized construction of federal water projects in the West. Professor Donald Pisani has written in detail on the origins of the 1902 Reclamation Act. *See* PISANI, *supra* note 10, at 273-325. Calling the 1902 Act "one of the most anomalous laws ever passed by Congress," *id.* at 273, Pisani observed, "as the Reclamation Act disbursed money to the states, it also prevented coordinated or unified water resource management in Washington." *Id.* at 323. "In 1902 there were plenty of justifications for tightening federal control over water, but the Reclamation Act pandered to home rule and institutionalized fragmentation." *Id.* at 325.

25. *See* B. Abbott Goldberg, *Interposition—Wild West Water Style*, 17 STAN. L. REV. 1, 8-21 (1964) (discussing, and dismissing, a variety of arguments against federal control of water resources). After giving examples of "the efforts of persons in responsible positions to use states' rights notions as if they were serious legal arguments," *id.* at 2, Goldberg explained the title of his article:

Thus, the ghost of John C. Calhoun still stalks the land crying the doctrine of interposition. Calhoun, like his successors, contended that the tenth amendment overrode the supremacy clause, that the relationship between the states and the nation was one of compacts among independent sovereigns, and that the United States should cede all of its public domain to the states. There are, however, major differences between old-fashioned interposition and its modern manifestation. Calhoun believed that the states did or should have the right to do as they pleased when disaffected with national policies. The wild west water version of interposition is improved and augmented: not only should the states have the right to do as they please, but they should be able to do it with federal property and at federal expense.

principles. Concepts such “first in time, first in right,” “beneficial use,” and “state primacy” may seem clear and unambiguous on paper, but as applied they are not necessarily simple or straightforward. The practical realities of water in the West are far more complex, and for better or worse, far more interesting.

Today’s speakers have a great wealth and diversity of experience in these practical realities....

