Water Quality, Water Quantity: The Reluctant Marriage

by

Anne W. Squier

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WATER QUALITY UNDER WESTERN WATER LAW

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BY
ANNE W. SQUIER*

Charles Wilkinson's[1] eloquent and provocative eulogy to Prior Appropriation anchored the proceedings of Lewis & Clark Law School's "Reluctant Marriage" conference, and is published in the first pages of this issue. The following brief conference overview[2] highlights a few central ideas flowing from the proceedings, as a backdrop to Greg Hobbs's[3] rejoinder to the Eulogy.

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* Member of Planning Committee for a conference with the same title as this Article, held at the Northwestern School of Law of Lewis and Clark College (Feb. 22, 23, 1991); Assistant Professor of Law, Northwestern School of Law of Lewis and Clark College; J.D., 1983, Northwestern School of Law of Lewis and Clark College; B.A., 1960, Reed College.

1. Charles F. Wilkinson, Moses Lasky Professor of Law at the University of Colorado, is one of the nation's leading scholars and lecturers on issues relating to natural resources law and policy in the American West. His *Eulogy for Prior Appropriation* appears at page v of this issue.

2. Water Quality, Water Quantity: The Reluctant Marriage was a continuing legal education conference sponsored jointly by Northwestern School of Law of Lewis and Clark College and WaterWatch of Oregon, and held in Portland, Oregon on February 22 and 23, 1991. These few pages can do justice neither to the materials presented nor to the many talented participants, only a few of whom can be mentioned. Printed materials and video or audio tapes of the proceedings are available from the Continuing Legal Education Office at Northwestern School of Law of Lewis and Clark Law School.

3. Gregory J. Hobbs is a partner in the Denver firm of Davis, Graham & Stubbs where he leads the firm's Water and Environmental Practice Group. Hobbs serves as principal counsel to the Northern Colorado Water Conservancy District. His response to Wilkinson's *Eulogy* appears at page 1087 of this issue.

Wilkinson suggests that if there is to be a marriage between water quality and water quantity, we'll not find traditional western water allocation doctrine, Prior Appropriation, standing at the altar. Yet over the course of the Reluctant Marriage conference, speakers demonstrated a multitude of ways in which that traditional doctrine can, and indeed has, accommodated water quality considerations.

Using a variety of current and historical examples, keynoter LaJuana Wilcher[4] sounded two important themes: water quality and water quantity are not separable elements today; and, in carrying out its charge under the Clean Water Act (CWA) the Environmental Protection Agency (EPA) regulates not just water quality but water quantity as well.

The first of these themes surfaced again and again. Wes Martel[5] observed that when the Shoshone at Wind River talk of water, they never assume that quality and quantity are separable. Thus, the water code the Wind River Tribes have drafted to manage the water awarded in the *Big Horn* adjudication[6] treats quality and quantity in an integrated fashion. Another example came from an economist. On his way to demonstrating (through reference to a hockey stick, a paycheck from God, strawberries and okra) that we are presently underpricing "bad" water and overpricing "good," Ed Whitelaw[7] noted that from an economist's standpoint, water quality and quantity are inseparable—if you diminish the quality of water, it becomes a different economic good.

Surely, if western water interests have viewed the prior ap-

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4. LaJuana S. Wilcher is Assistant Administrator for Water at the U.S. Environmental Protection Agency. Prior to that appointment, she was a partner in the Washington, D.C., law firm of Bishop, Cook Purcell and Reynolds, specializing in environmental matters.

5. Wes Martel is Senior Partner in the consulting firm of Wind River Associates in Fort Washakie, Wyoming. Martel was a member of the Shoshone Business Council for 12 years, through virtually all of the litigation surrounding adjudication of the Wind River Tribes' water rights. Martel also chaired the Wind River Environmental Quality Council for four years.

6. *In re* Rights to Use Water in the Big Horn River System v. Owl Creek Irrigation District, 753 P.2d 76 (Wyo. 1988); *aff'd by an equally divided Court*, 109 S. Ct. 2994 (1989).

7. W. Ed Whitelaw is the president and founder of ECO Northwest, an economic and financial consulting firm. He is a professor of economics at the University of Oregon and has acted as an advisor and consultant to numerous state and federal agencies.

propriation doctrine as creating legal claims unrelated to water quality considerations, that view is not shared by economists, by municipalities, by Indian nations, by EPA, or by environmentalists. Any separation between water quantity and water quality is artificial and stands in the way of solutions.

As to Wilcher's second theme, Vic Sher[8] outlined five substantive provisions of the CWA that provide a basis for water quality regulation to affect water quantity allocations. Sher called on legislative history and case law in agreeing that section 101(g) of the CWA[9] was not intended to take precedence over legitimate water quality considerations.

A third point surfaced again and again during the conference. Using scarce water resources to assimilate pollutants is increasingly unacceptable to water users and regulators alike. Fred Hansen[10] noted that the Oregon Department of Environmental Quality (DEQ) does not view acquiring instream water rights for dillution as an appropriate way to manage dioxin or any other pollutant. DEQ's approach is to look first for an alternative to discharge. Second, the highest and best technology should be applied to any source of pollution, even if water quality standards could be met with a lower level of technology. Thus, DEQ discourages the idea that so long as water quality standards are met, high quality streamflow is a sink ready to receive additional pollutants. Hansen suggested that one seeking to put more load into a stream should have to obtain the necessary instream water right for that load, and therefore to bear the burden of showing that "pollution dilution" rather than some other public use is the proper fate for available water.

From a different perspective, Gregory Hobbs also opposed use of water as a pollution sink. To him, reliance on assimilative

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8. Victor M. Sher is Counsel for the Sierra Club Legal Defense Fund, and is based in Seattle.

9. Section 101(g), the "Wallop Amendment" states:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. . . . nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.

33 U.S.C. § 1251(g) (1988).

10. Fred Hansen has been the Director of Oregon's Department of Environmental Quality since 1984.

capacity is nothing more than a back door way of imposing the natural flow theory of riparian water law on prior appropriation states. Instead, Hobbs urged the cleanup of pollution[11] and management of instream flows within prior appropriation, public interest, or public trust schemes.

Perhaps environmental interests would do well to take Hobbs's criticism to heart. Where is the consistency in counting use of instream flows to assimilate pollution a "beneficial use," while at the same time challenging existing appropriators to be more efficient and less polluting in order to accommodate public interests in the nation's waters?

Conferees raised a number of cautionary notes. Bill Young[12] and several others observed that in our zeal to marry water quality and quantity, we ought not lose sight of land management practices that are driving the degradation of both. Panel discussions of hypothetical changes and conflicts in the basin of a (not-so-hypothetical) River Why illustrated need for land use controls as both the obvious solution to nonpoint pollution and an important component of water supply regulation.

Young flagged another rising specter. Many irrigation systems around the west are not well managed, with the result that some kind of a sump is created by "excessive" runoff at the end of those systems. In Young's example, that "sump" is a small lake that has for fifty years provided an oasis of wetland and habitat for waterfowl and other animals. If zeal for conservation of water leads the state to crack down to make that system more efficient, there will be no wetland left. Such a result seems to violate the "no net loss of wetland" goal for which the water quality arm of this game is struggling so hard. How, Young asks, are we going to balance the need to recover that water with the real public values served by the sump created by inefficient deliveries?

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11. This will mean strict management of agricultural chemicals and pesticides, regulation of flood irrigation, and reduction of return flows that carry pollutants. Hobbs suggests the agricultural community will soon wake up to the fact that, in hindsight, one of the clear disasters for that community was its success in keeping agricultural return flows exempt from CWA regulation in 1977, when there were federal funds available to defray pollution abatement costs. Now that improving these practices is inevitable, there are no federal dollars for the task.

12. Bill Young has served as Director of Oregon's Water Resources Department since 1983, and for seven years preceding that appointment, was Director of the Oregon DEQ, which is responsible for water quality regulation in the state.

Yet another caution was sounded by Tom Jensen,[13] who believes the senescence of traditional western water organizations has made way for new power centers to coalesce around western cities and environmental interests. Both of these groups are turning to agricultural water for new supply, and both want to stop the degradation of the water that has come from agriculture. Jensen described the 1990 Newlands project legislation which significantly reshaped the oldest reclamation project in the West. The bill was based on a deal struck by the area's urban interests, environmentalists, and Indian tribes. Jensen queried "Did farmers like it? Not at all! Did it matter? Not at all!" Why was this? Because for years the farmers have been utterly uncooperative in efforts to accommodate new needs. "So, they got rolled." Clearly, Jensen's message is that water users must work to make room for new needs and to meet water quality requirements or they, like Wilkinson's Prior, will be overcome by change.

Jensen's message comes as close as anything to capturing a consensus of the conference. Gregory Hobbs agreed that water users simply must cooperate to enhance water quality, and believes they can do so within the prior appropriation doctrine:

> It is not a doctrine of waste, it is not a doctrine of degradation, it is not a doctrine of pollution, it is a doctrine of beneficial use. And throughout 130 years of the prior appropriation doctrine, the truth of it is there is a common law of the public interest working through the . . . doctrine to identify those commonly held values of the community. . . . The marriage can work.

Although Chris Meyer[14] is hardly in the same camp with Hobbs, Meyer too argued for accommodation within the doctrine to protect water quality and the multiple values of western streams. He pointed to a long history of case law that has responded to water quality concerns but noted that these precedents are not adequate today; they provide relief only for other water users, and do not deal with the subtle incremental burdens that multiple, individually benign uses put on a water source.

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13. Tom Jensen is Counsel to the Committee on Energy and Natural Resources of the U.S. Senate, where he is responsible for water resource issues. Jensen is a graduate of Northwestern School of Law of Lewis and Clark College.

14. Christopher H. Meyer is Counsel for the National Wildlife Federation and an adjunct Associate Professor at University of Colorado Law School in Boulder, Colorado.

Meyer sees the need for substantial adjustments on the part of existing water uses but like Wilkinson's Ramona, wishes to preserve the beneficial features of the prior appropriation doctrine rather than to throw it aside entirely. In Meyer's view, if western states and interests do not work out a solution that will protect water quality, Congress will—and Congress' solution likely will satisfy none of those interests.

In sum, the doctrine of prior appropriation cannot shield existing water rights from change; its core requirement of beneficial use is flexible enough to accommodate efficiencies and modified practices needed to protect water quality, not only for other users but to enhance public values in water. Whence came that flexibility? Read on, as Greg Hobbs recounts[15] how Prior's grandson Beneficial Use courted Miss Trust, and how together they raise a passel of little Trust Uses.

15. Saturday morning, after what must have been a short night indeed, Greg Hobbs presented the following rejoinder to the Eulogy Charles Wilkinson delivered at dinner Friday night.