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INTRODUCTION TO THE CULTURE OF WATER SYMPOSIUM

*Charles Wilkinson**

This issue of the Law Review derives from a lively and enlightening symposium entitled *The Culture of Water: Watering the West and the Evolution of Ownership, Control, and Conflict in the West*, held at the Buffalo Bill Historical Center in Cody on October 13-15, 2005. The symposium called for a consideration of the juxtaposition between society in the mid-nineteenth century, when western water law was created, and western society in the twenty-first century. The question, in light of that juxtaposition, is whether and how the law ought to evolve and be reformed.

Western water law developed in order to stabilize access and control of this resource, so precious in the arid American West. Today, traditional users, including farmers and ranchers, municipalities, and mining and power companies, struggle to maintain the certainty called for by the “first in time, first in right” doctrine of prior appropriation. Others believe that now we see more values in our rivers than we did in the nineteenth century and that western water law, with its heavy emphasis on extraction, with its built-in incentives for drawing down, clouding, and sometimes drying up water-courses, and with the way it dealt out Indian tribes, is too narrow and rigid. Needless to say, these are complicated and controversial matters that raise many competing considerations of fairness, economics, science, recreation, and aesthetics.

Perhaps the real origins, the real inevitability of western water law, trace to January 24, 1848, when James Marshall made his historic gold find in the foothills of the Sierra Nevada in California. Three years later, a dispute between two miners, Matthew Irwin and Robert Phillips, became the vehicle for the official announcement of the doctrine of prior appropriation. Irwin came to the South Fork of Poor Man’s Creek in the Sierra foothills in

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1851, set up a mining claim, and used water. Phillips came a year later, in 1852, and he immediately saw that he had a problem: he needed water to mine, but Irwin had taken the whole stream. The case of the senior water user, Irwin, and the junior water user, Phillips, went to the Supreme Court of California in 1855.

The justices well knew the importance of mining and water to California. They knew—and had lived—the California gold rush, the sky-rocket that took the population of California from 15,000 non-Indians to over 200,000 in four years. They knew that the whole state ran on gold—not just the mining camps, which were bringing the state and nation into the world economy, but also the supply towns, Sacramento, San Francisco, and dozens of others. They knew, too, that gold mining depended on water, which was used in all manner of ways—from simple instruments such as the mining pan to powerful hydraulic hoses that could take out entire hill sides—all designed to separate the gold from the nonpaying soil and rocks. Mining, the economy, and the society were all bound together by water.

The miners themselves understood water and they made their own rules, all emanating from the “first in time, first in right” rule, to govern the mining camps. And so the California Supreme Court, in as classic a case that the law has to offer in terms of blending law with society’s felt needs, ruled for Irwin, the senior user, in *Irwin v. Phillips*.¹

Prior appropriation, with the security it offered to early settlers, swept across the West. The later states, as did California, applied the doctrine to farming as well as mining. In that dry country, where a person farms with water as much as land, agriculture—the Jeffersonian Ideal itself—depended on secure, dependable supplies of water. First in time, first in right was an “imperative necessity.”²

By the 1880s it became clear that, whatever legal water rights a person might have, geography and climate were fighting back. Western rivers, unlike those in the east, are inconstant from year to year and from month to month within each year. In the West, we get our water mostly from snow pack and most of it comes in a big surge, the run-off from March or April through late June or early July, according to conditions in particular watersheds. This created problems for late nineteenth-century farmers. The big run-off blew out some irrigation works in high years. Then, by late July, August, or early September, when it was still the irrigation season, the rivers were so low that juniors were unable to take water. As a result of this, homesteading was slowing down, and something had to be done. To boot,

1. 5 Cal. 140 (1855).

2. *Coffin v. Left Hand Ditch Company*, 6 Colo. 443, 447, 449 (1882).

many of the watersheds simply had so many irrigators that it had become increasingly difficult to administer water rights.

The first set of reforms began in 1890 in Wyoming, which adopted the West's initial state administrative system. Anne Mackinnon, in an article in this issue, will be addressing these state laws that provided state procedures to lessen, although not eliminate, the need for resort to the old adage that in the West "whiskey is for drinking, water is for fighting." The procedural reforms that Wyoming adopted, and every state followed in some fashion, retained prior appropriation as the controlling substantive law.

The second great event was the passage of the Reclamation Act of 1902, by any account one of the most influential statutes in the history of the American West. The reclamation movement, which was born in the early 1890s and quickly gathered steam, engaged in plenty of hardball politics and was premised on a closed system of water rights that recognized only extractive rights and did not acknowledge Indian rights. At the same time, this was a genuinely idealistic movement. It was about farming, community, and holding out promise to average Americans. Everybody in power backed it, including John Wesley Powell, Gifford Pinchot, and the person who stood astride natural resources policy at the turn of the century—Teddy Roosevelt, who enthusiastically signed the Reclamation Act into law.

The 1902 Act was passed to breathe new life into homesteading and it worked. Land entries spiked to their highest levels ever in the early twentieth century. The basic mechanism of the 1902 Act was to provide federal funding for dams, reservoirs, and canals. The Act respected all prior appropriation rights. Basically, new users received secure water rights made possible by the vast amounts of reservoir storage created by the new projects.³

Reclamation also has come under severe criticism. Although Congress, in the General Allotment Act of 1887, had set as its major Indian policy the goal of assimilating Indians and making them into farmers, precious few acre-feet of reclamation water went to the tribes. As was the case with homesteading, and with prior appropriation itself, the Reclamation Act was heavily subsidized. The costs of construction of the projects were supposed to be reimbursed, but, with the aid of creative accounting, large blocks of costs were assigned to other project uses, including inflated amounts for flood and recreation purposes. Repayment by irrigation districts was mostly

3. On reclamation law, see generally A. DAN TARLOCK, ET AL., *WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY* 815-35 (5th ed., 2002). On the historical context for reclamation, see WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* (1954).

by forty-year, no-interest contracts. Many districts were slow to pay, and some have yet to pay in full.⁴

Still, while subsidy is often a pejorative term, governments can and do provide good subsidies. It is a fair question whether free water, free land, and below-cost reclamation projects qualify as good subsidies. Certainly, as was the case with prior appropriation, all of them enjoyed broad public support at the time. While reclamation will always be debated on many different grounds, the idealism was real, the people, or at least a clear majority of those with a right to vote, were behind it, and this was a job too big for private companies or even the states.

In any event, after the adoption of the state codes and the reclamation statute, water law remained remarkably stable until roughly the 1970s. But the culture of water has evolved. The tribes are active, insistent on recognition of their rights and so, too, are land-based Hispanic communities in the Southwest. Westerners of all stripes, while respecting farm and ranch cultures, love their landscapes and expect their rivers to be rivers. We understand more about—and have adopted laws respecting—watershed health and endangered species.

And so today we are in a time in the development of western water law when, having so long held to the American legal system's ideal of providing stability, we have brought another, and equal, ideal to the fore—the law's ability to change, in an ordered way, so as to meet new needs and values of society. Now law and the people must wrestle with insistent questions that hang in the air above the rivers of the American West. To what extent has the nation kept faith with the tribes? How great a toll have the reclamation projects taken on the canyons and the rivers? How long will the nation countenance the water subsidies in the name of the Jeffersonian Ideal? Will the sights and smells and sounds of living rivers be honored? How much of the burden of change should be placed on our ranch and farm communities? Ultimately, how flexible will prior appropriation and reclamation be in evolving to accommodate a host of values and concerns that could not have been comprehended by the California Supreme Court in 1855, by the drafters of the 1902 Act, or by the societies they represented?

4. For criticism of the impact of reclamation policy on Indian tribes, *see, e.g.*, NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 474-75 (1973). For economic analysis of the reclamation program, *see, e.g.*, RICHARD W. WAHL, MARKETS FOR FEDERAL WATER: SUBSIDIES, PROPERTY RIGHTS, AND THE BUREAU OF RECLAMATION (1989).