The Limits of Private Rights in Public Waters

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THE LIMITS OF PRIVATE RIGHTS IN PUBLIC WATERS

By

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Increasing demand for instream flows to protect downstream water quality can be met without violating vested property rights in water. Private property claims in water have always been subordinate to the right of the public to maintain its waters “undiminished except by such drafts upon them as the guardian of the public welfare may permit . . . .” The rights of water users have always changed to meet new public demands, whether for mill dams during the Industrial Revolution, for navigability to float logs during the timber era, or for reduced discharges under modern pollution laws. Holders of appropriative rights in the West will now similarly have to adapt to new conceptions of the public trust in public waters.

I. INTRODUCTION

This conference has wisely chosen to focus on the intersection of water rights and the public trust. For all its uncertainties and difficulties of application, and its uneven reception in various states, the traditional public trust doctrine—which involves filling or disposition of submerged lands to private or to allegedly inappropriate public uses—is now well set on its way. The kind of problems that arose in the California case of Marks v. Whitney, in the Idaho Kootenai Environmental Alliance case, or in the Oregon Morse case, are part of the well-developed, if not fully realized, mainstream of the public trust doctrine. Consequently, I

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1. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (plan to fill coastal tidelands).
will not emphasize that body of law; it is well treated in the other articles in this symposium issue.¹

Instead, I would like to turn to the setting where important things are now happening: the relationship between the public trust and water rights. The kinds of problems that arise in this relationship are characterized by the Mono Lake⁶ case and the Delta water decision.⁶ The issues raised in those cases will be at the center of the controversy and will provide the focus of legal developments in water law over the next several decades in all the arid states.

II. THE NEED FOR CHANGE

The problem is really quite simple; it does not require mastery of abstruse legal doctrines to appreciate what is going on. The heart of the matter is that public values have changed, and the use of water has reached some critical limits. One result is that we need to retrieve some water from traditional water users to sustain streams and lakes as natural systems and to protect water quality. Moreover, traditional sources of new supply—such as dams and transbasin transportation of water, on which conventional users historically depended—are being closed off for a variety of familiar reasons, including both federal reluctance to finance new projects and environmental objections. Thus, we have a potential head-on conflict between existing water users and their existing and future demands, and the existing and future demands of what may broadly be called in-stream uses.

Existing water users are distraught by decisions like the Mono Lake case, and understandably so. Enormously valuable, long-recognized interests in water are at stake. Such cases por-

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tend major changes in the status of water rights. Traditional water users understand full well that a fundamental transition is taking place in the conception of how water ought to be used in the West. Before making some observations about how the conflict this transition poses can be resolved with a minimum of pain and a maximum of benefit to all legitimate water use interests, I want to set the legal stage on which its resolution will be played out.

Let me start by saying that as a matter of legal analysis, the holders of existing water rights are in deep trouble. In his article, Professor Johnson is absolutely correct in suggesting the pollution control analogy. There is no legal or logical difference between poisoning fish by what you put in the water and suffocating them by what you take out. The question for both irrigators and industrialists is whether one can acquire a property right to destroy an aquatic system, however long destructive uses have continued, and however committed a particular enterprise may be to those uses for its profitability. Polluting industries learned long ago that the answer is no; one may not acquire a property right to kill the fish in a river. Once irrigators see that they have no better standing than their industrial counterparts, they will recognize that the principles of pollution law are finally catching up with the holders of agricultural and other traditional diversionary water rights. That recognition is the essence of the Delta water case, which essentially says that the demands of downstream water users to be free from pollution run as effectively against upstream water diverters as they do against upstream industrial water users.

The central and unambiguous message is that water is and always has been a public resource. The law is that water flows to benefit those uses that advance the contemporary public interest. No private right may stand in the way of that flux and reflux of water rights. Since the public interest, as now perceived, demands the retention and augmentation of in-stream water supplies, that is the way the water is going to flow. Property rights secured under the prior appropriation system will not be able to resist this basic limitation on the privatization of water.

To understand the nature of the public claim on water, it is useful to look back to a time when the use of water to promote industrialization was considered a primary, if not exclusive, public goal. At that time there were cases recognizing a right to pollute, but—significantly—not a property right to pollute, and that difference is central to understanding the legal status of water. In other words, when the public interest was seen as primarily developmental, people were permitted to use water in the service of development. They were not, however, being vested with a private property right that could be asserted against that interest when public goals changed. They obtained a right because they were making a use that was at the time compatible with the public interest. Their water right extended only as far as that compatibility.

This observation can be illustrated by reference to a famous (or perhaps infamous) old case, Sanderson v. Pennsylvania Coal Co.,8 decided by the Supreme Court of Pennsylvania just over a hundred years ago. This was a property rights case about pollution. A coal company was mining and dumping its wastes in the river, and a downstream landowner objected, claiming that the traditional laws of riparian rights gave her a right to have the river flow down to her unchanged in quality and quantity. She also invoked the long-standing doctrine that each person must use his property so as not to damage the property of others. The coal company's discharges were plainly transgressing both these doctrines.

The coal company urged that "the law should be adjusted to the exigencies of the great industrial interests of the Commonwealth and that the production of an indispensable mineral . . . should not be crippled and endangered by adopting a rule that would make colliers answerable in damages for corrupting a stream."9 Though the court at first refused to define the property rights in water to meet the demands of an industrial economy, it finally agreed with the coal company that the law should be "adjusted." On the fate of the plaintiff's property rights, the court had this to say:

[W]e are of opinion that mere private personal inconvenience . . .

9. 86 Pa. at 408.
must yield to the necessities of a great public industry, which . . . subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community.\textsuperscript{10}

Thus, the court recognized that property rights satisfactory in a preindustrial era must cede to the demands of the public interest of the time. When the public interest was developmental, traditional property rights in water—long-standing property rights to natural flow—yielded, just as they had before and have since in many other instances.\textsuperscript{11}

\hspace{1cm} 10. Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 149, 6 A. 453, 459 (1886).


Asserted federal constitutional limits on changing definitions of property rights in water has been the subject of a protracted litigation in Hawaii. Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), cert. granted, vacated, 477 U.S. 902 (1986). The strongest statement about limits appears in Justice Stewart's concurring opinion in Hughes v. Washington, 389 U.S. 290, 296-97 (1967) ("[A] State cannot be permitted to defeat the constitutional prohibition against taking property . . . by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law . . . presents a federal question . . . "). See also Cherry v. Steiner, 716 F.2d 687, 692 (9th Cir. 1983) ("[A] state cannot validly effect a taking of property by the simple expedient of holding that the property right never existed."), cert. denied, 466 U.S. 931 (1984). In Hughes, Justice Stewart did not address the special status of water, as spelled out in the opinions of Justice Holmes. See infra text accompanying notes 14-23. I see nothing in Justice Stewart's concurring opinion in Hughes to suggest that Justice Stewart would have disagreed with anything that Justice Holmes had to say in his opinions, for Justice Holmes emphasized the limited private claim inherent in the initial definition of water rights.

Beyond this, proposed constitutional limits on redefinition of property present a much knottier problem than may at first appear. It is not sufficient to suggest that only prospective changes are permissible. Otherwise property rules would
III. HISTORICAL SUPPORT FOR CHANGE

Of course, the specific results in old cases like Sanderson have been swept away by modern pollution law, just as those cases had earlier swept away natural flow doctrine. There, as here, and then, as now, the fundamental rule remains that beneficial use is the basis, measure, and limit of property rights in water. When uses cease to be seen as beneficial, however long standing, they are repudiated in favor of modern conceptions of beneficiality. Contemporary pollution control laws are merely the most obvious example of changed conceptions of beneficial use. Whether the year is 1886 or 1989, the law adjusts to the "exigencies of the . . . interests of the Commonwealth." 12

Does this mean that the wheel of history might turn again, and that resource protection might again someday be subordinate to development? The answer is yes. In theory, it might happen, although such a reversion is unlikely. The great strength of the environmental movement is not simply that it reflects a current fashion in the "interests of the Commonwealth," but that it reflects as well a scientific, knowledge-based recognition of the importance of estuaries and wildlife, of genetic diversity and biological productivity, and of the possibilities for sustainable development. Today we seek both a prosperous economy and the maintenance of viable natural systems in order to avoid in the future the damage we have wrought in the past. We know enough

be insulated from reconsideration, a result that the Supreme Court is unwilling to apply to its own decisions. For example, not long ago the Supreme Court itself suddenly changed the property rule that governs ownership of formerly submerged land when a river changes its course. Compare Bonnelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) with Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (overruling the rule adopted in Bonnelli). The Supreme Court has repeatedly rejected the argument that a court decision changing state property law can, by itself, constitute a taking. E.g., Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930); Tidal Oil Co. v. Planagan, 263 U.S. 444 (1924); see also Brief of the States of Alaska, California, Montana, Nevada, North Dakota, Oregon, Utah, Washington, and Wyoming as Amici Curiae in Support of the Petition for a Writ of Certiorari at 8-12, Ariyoshi v. Robinson, 477 U.S. 902 (1986) (No. 85-406). One commonplace example of the dilemma can be illustrated: Did the California court's view that conveyance losses of 45% did not constitute waste, as set out Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 3 Cal. 2d 489, 572, 45 P.2d 972, 997 (1935), create a property right, insured against modification or reconsideration except on the payment of compensation?

12. 86 Pa. at 408.
to be confident that we can have both, and we are most unlikely to turn back to the heedless and unnecessary practices of the past.

IV. Legal Support for Change

The path of historic change is clear enough. Let me now address more fully the legal precedent supporting such change. The question is whether some vested right has been given to water users that would constrain the implementation of a new, ecologically based water policy. This question is hardly novel or unfamiliar. The United States Supreme Court addressed the issue eloquently and openly in a series of opinions by Justice Oliver Wendell Holmes some three-quarters of a century ago. The cases are strikingly analogous to modern in-stream use controversies. In them the Supreme Court articulated a fundamental principle for the governance of air, water, and land: it is within the power of each state to control its own economy and its own future by reserving to itself, and not abdicating to private property owners, the responsibility to determine the proper use of the natural resources within its border.

In Georgia v. Tennessee Copper Co., Justice Holmes said, "[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." In that 1907 case, which involved land, Justice Holmes left open the question whether the exercise of such interest would require compensation. A year later, however, Justice Holmes sustained the right of New Jersey to prohibit the diversion of water for export from the Passaic River against a water company's claimed property right. This time the Justice faced the property question directly. The language he used in that case, Hudson County Water Co. v. McCarter, seems almost eerily prescient of the issues posed by

15. Id. at 237.
16. For a contemporary example, see Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).
17. 209 U.S. 349.
the Mono Lake and Delta water cases, or more generally by contemporary demands for renewed and retained in-stream flows:

[F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots.

... The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.18

This may be the most important statement the Court has ever made about the constitutional status of water rights. The Court has rarely addressed in explicit terms the limits on the acquisition of private property rights in state water resources. Justice Holmes was not only a great jurist, but one who took property rights very seriously. He was not only the author of Pennsylvania Coal,19 but it was also he who spoke of "the petty larceny of the police power."20 Thus, coming from him, the statement that "the private property of riparian proprietors cannot be supposed to have deeper roots" than the right of the state to protect its rivers undiminished for public use, stands as a fundamental building block of property jurisprudence.21

18. Id. at 356.
21. Is this principle undermined by the Supreme Court's decision in Summa Corp. v. California ex rel. State Lands Comm'n, 466 U.S. 198 (1984), which suggests that a property right can be acquired against the state, at least in the land beneath navigable waters? I think not. The case need not be read as asserting more than a process-fairness principle, requiring the state to come in and assert its public trust claim when there is what amounts to a general adjudication of a property right.

Limits on the possibilities of private ownership were reaffirmed by the Supreme Court recently in United States v. Cherokee Nation, 480 U.S. 700 (1987). Though under "very peculiar circumstances ... the Indians were promised virtually complete sovereignty over their ... lands," and were held—despite the strong contrary presumption—to have obtained title to the land beneath the navigable
By 1931, in *New Jersey v. New York*, Justice Holmes again encountered the property question in a water rights case. New York's demands on the Delaware River, it was asserted, would violate the riparian rights of landowners in New Jersey. By ordinary standards of water law, the claim of interference with property rights was potent, but Justice Holmes brushed it aside with language reminiscent of what he had said in the *Georgia* case: "A river is . . . a necessity of life that must be rationed among those who have power over it . . . . [Notwithstanding riparian law] New Jersey [could not] be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished." These cases are entirely congruent with what the Court said in the now well-known language of *Illinois Central* when it observed as a matter of trust obligation that "the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake" cannot be abdicated, and "cannot be relinquished by a transfer of the property."  

V. Conclusion

Because rights granted in water have always been subject to what Justice Holmes called an initial limitation of private rights, the subsequent exercise of public authority as a limitation on waters of their reservation. Nonetheless, the Court held, that did not turn the river into a "private stream" or "a private waterway belonging exclusively" to the Cherokees. The United States was held not to have surrendered its public navigation servitude in the waters—a waiver of sovereign authority, the surrender of which, the Court held, will never be implied in recognition of the "unique position [of] the Government in connection with navigable waters." *Id.* at 1489-91.

A rather different view, though expressed only as dictum, appears in Justice Stone's opinion in *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651 (1927): "If the state chooses to resign to the riparian proprietor sovereign rights over navigable rivers which it acquired upon assuming statehood, it is not for others to raise objections." *Id.* at 655 (citing *Barney v. Keokuk*, 94 U.S. 324, 338 (1876)). The *Fox River* Court found that the state had not surrendered to the riparian owner the rights the riparian claimed, and it made the above statement in the context of observing that state law controlled the question of what property the owner had, and therefore what property could be taken. Nonetheless, the tone of Justice Stone's statement is at odds with the views expressed by Justice Holmes.

22. 283 U.S. 336 (1931).
23. *Id.* at 342.
25. *Id.* at 452-53.
such rights, as in requiring releases for in-stream flow maintenance, is neither a redefinition nor a repudiation of property rights. Instead, it is a realization of a limit that was always there. Such a concept is familiar to water law. For example, the exercise of the navigation servitude\textsuperscript{26} and equitable apportionment\textsuperscript{27} doctrines may operate to reduce or displace pre-existing private rights.

The roots of private property in water have simply never been deep enough to vest in water users a compensable right to diminish lakes and rivers or to destroy the marine life within them. Water is not like a pocket watch or a piece of furniture, which an owner may destroy with impunity. The rights of use in water, however long standing, should never be confused with more personal, more fully owned, property. Far from being a sudden and unpredictable change in the definition of property, recognition of the right of the state to protect its water resources is only a restatement of a familiar and oft-stated public prerogative.

I shall conclude with a brief word about where contemporary public interest transformations in water law and policy are taking us, and what the implications are for water users. Although the law is clear that private rights cannot stand in the way of trust obligations or of the transformation in public water policy we are witnessing, changing long-standing patterns of water use will not come about easily. Nonetheless, far-reaching changes are under way. Sudden and disruptive changes are always painful, and every effort needs to be made to ensure that transition periods proceed as smoothly as possible. Water users have not often been required to cut back on their uses, nor have beneficial use requirements been much enforced, despite their theoretical presence, in more than a century of western water law. That is part of the problem. Commitment to unrestrained development has encouraged the damming and diversion of rivers, culminating in dramatic threats to natural ecosystems—threats that are only now being understood.

Paradoxically, the shock of change now being felt by water

\textsuperscript{26} E.g., Gibson v. United States, 166 U.S. 269 (1897) (levee cuts off riparian's right of access to the river; no compensation required).
\textsuperscript{27} E.g., Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (preapportionment appropriator under state law has only such rights as can be accommodated within the state's share of an interstate river).
users is itself the result of a "deficit financing" approach to natural resource use. Western water users have benefitted from a long period of subsidy in the form of public projects to supply them with new supplies to meet each new demand. The result has been a systematic deferral of the responsibility to accommodate beneficial use requirements. In this area, as in so many others in the settlement of the North American continent, it seemed that the possibilities were endless. We would have both dams and free flowing rivers; both diversions and fish and wildlife; both endless dumping and potable water; both continued building and accessible shorelines; both endless privatization and the retention of public opportunities. Now, however, the barbecue is over.

The new era is one of reallocation. The direction is changing from agriculture to urban uses and in-stream flows for water quality, recreation, and ecosystem protection. Urban users will also have to adopt more efficient methods as demands to stop waste increase.\textsuperscript{28} No private property claims are going to halt this transformation. Fortunately, there are considerable opportunities to achieve this transition with a minimum of dislocation. Urban users can well afford to finance substantial reductions of agricultural water use. A significant contribution to the safeguarding of in-stream values can be achieved from waters saved through control of inefficiency. There will be a loser; low productivity caused by inefficient agricultural practice will go, its fatal illness revealed inexorably by the decline of subsidy and the fading away of the big project era. The winners will be efficient urban areas and efficient farmers, in-stream values, and the federal taxpayer who has too long borne the burden of misplaced subsidization. Those who adapt well will survive.
