INSIGHTS

MEGABUCKS FOR NEGABUCKS: SOLVING THE WATER CRISIS

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There's more than one way to skin a cat. When Henry George wrote "We must make land common property" it was in a place and at a time when most land in sight had been privatized only recently, using crude methods. "Force and fraud" were not dim memories in 1879, but a living presence. So George's phrase did not strike people then as being any more shocking than it is today to remind them that the public domain, with its pasture-lands, waters, rights of way, the air, radio spectrum, fish, mineral riches and timber, belongs to us all in common. Today, to replicate George's impact, we would do well to train our sights on the public domain that is currently being privatized.

The public soon forgot about force and fraud, aided by apologists like crafty old Richard T. Ely. As early as 1890 he wrote to deplore taxing Wisconsin landowners because they had owned "since time immemorial." That sounds like a long time, but it was barely a generation after the Blackhawk War had wrested the lands from the Sauk and Fox Indians, (who left their traces in place-- names containing a "wau" or "woc" syllable).

Today, landowners and their agents have built up strong legal, political, semantic and sentimental barriers against taxing fee-simple lands. We may advance faster by probing for resources with weaker defenses. This month we write of water, a resource of paramount value.

The California Constitution and Water Code, like those of most states, are explicit that "The waters of California belong to the people of California." Water is not private property, evidenced by its not being taxed as such (except indirectly, as it adds to the value of fee simple land). Water is not, therefore, subject to the limits that Prop. 13 (and cognate laws in other states) impose on property tax rates. The State, as owner, can presumably charge whatever the legislature decides, without its being considered a tax at all. Water claimants would of course resist strenuously, with all the lawyers and pawns and media that money can buy, and social pressure sway, but the public has a strong case.

It's not just water per se, but also the lands under what were originally shallow waters. Most coastal cities have increased their areas greatly by filling in shallow waters. The surface of San Francisco Bay is about half of what it was before filling began. Boston has doubled its area by filling. Just who owns the original seabed is a complex legal tangle, but in many areas the public has basic ownership rights for which it usually fails to claim market rents. The "Public Trust Doctrine" applies to some shallow waters. In 1983 the California Supreme Court resurrected it from the dead letter office (Mono Lake Case), and many cities, with a little positive thinking, could enhance their shriveled revenues greatly by moving aggressively on these rents.

There are four major ways that individuals and corporations acquire the use of waters. One is by riparian rights. To own the bank of a lake or stream is to have a right to the water, theoretically "undiminished and unpolluted," that nature put there - subject to the equal rights of other riparians, but not of anyone else. When waters must be prorated it is in proportion to the area of backlying land in the smallest undivided parcel that has ever existed - a penalty for selling off any land. Some riparians have succeeded in dominating large areas by virtue of owning the banks of streams. The Miller and Lux empire on the lower San Joaquin River was a classic case of the 19th and early 20th Centuries.

Consiglieri for riparians encourage us to believe that these rights are "part and parcel" of the land title, hence untouchable, but in fact voters have breached and limited them severely when they became too obnoxious. In 1928 Californians amended their Constitution to limit riparians to "reasonable use" (now article 2 of section 10). Oh, yes, it was a big monopoly power company, Southern Cal Edison, that financed the amendment, to abet its own heist of a power drop, but still the legal point was made. When thieves fall out, the public has an entree.

A second way to claim water is by owning land overlying ground water, and the aquifers that store it. For generations, overlying landowners could pump at will (usually with subsidized power). Most of them still may, and do, heedless of overdrafts and falling water tables. When pumping costs rise, the common answer has been to photograph a wilted field or dying grove for publicity, and get state or federal governments to pay for "rescue projects," importing water to recharge the aquifers, as in the Coachella Valley and the southern San Joaquin Valley. These in turn lead to more pumping and another rescue project: a "treadmill effect" of long standing. It worked in the San Fernando Valley in 1913, and it keeps working. The Metropolitan Water District of Southern California (MWDSC), its Board dominated by land speculators, is now a big agent.

In a leading case of 1949 (Pasadena v. Alhambra) the California Supreme Court did limit pumping from the Raymond Basin. It based allocations on histories of past use. This led to a statewide "race to the pump house" to establish histories of waste as bases for future prorationing. It is hard to devise anything so counterproductive, but that's what the judges did (and then some people blame overpopulation and natural scarcity). The point is, though, that the State can manage aquifers, and what the State can manage it can tax.

With the current movement toward water marketing, landowners may now "export" water from lands overlying the basin being pumped. This has moved some giant speculators to buy up vast areas with a view to exporting the groundwater and renting out space in the aquifers. Some publicized examples are PG&E Properties in northern California, Peter Hensen and John Huston near Denver, BCE (Bell Canada), Cadiz Land in Riverside County, Tenneco in Kern County, a few major oil firms, and the Maurice Strong consortium in New Mexico. Where natural resources are on the auction block, and taxes are

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zero, big money rushes in.

A third way to claim water is by "prior appropriation." The key rules are "first in time, first in right"; "due diligence"; "beneficial use"; and "history of use." The precondition for putting water to "beneficial use" is owning land on which to spread it. The "beneficial" part is a joke. "Use" is what counts, and "use" in practice means "taking" (by withdrawing or diverting). The State charges nothing for taking its water, and often subsidizes the appropriators. So the scarce and priceless waters of the west have been allocated mainly in proportion to prior ownership of land.

Part of appropriating water is securing sites for dams and reservoirs and rights of way, either from public domain or from private owners by use of eminent domain. A major case is San Francisco's seizure of the site of the Hetch Hetchy reservoir inside Yosemite National Park. This scenic site on the Tuolumne River once rivaled Yosemite Valley itself, on the neighboring Merced River. Rent has been $30,000 a year, fixed since the 1920s. The Administration is now proposing $8 million a year. However this case goes, the charge is for the site alone, not for the water or the power drop. San Francisco seized so much more than its own needs that it sells 2/3 of what it takes to other cities, for a fat profit that helps keep land values in San Francisco nearly the highest in the U.S.A., and its housing the least affordable.

A fourth way to claim water is by getting "sweetheart" contracts from large supply systems: Federal water from the Bureau of Reclamation; State water from the State Department of Water Resources; and mixed-source waters from the giant MWDSC. No sooner are these contracts inked than learned counselors go to work to convert them into perpetual obligations of the taxpayers and other ratepayers. The original 40-year contracts that the U.S. Bureau of Reclamation executed in the 1950s at giveaway prices came up for renegotiation in the 1990s, and only a few old timers even remembered their origins. Meantime the once-surplus water had multiplied many times in value, and the contractors were busy securing rights to resell water that they buy for some $10 per acre-foot to coastal cities for $200-$500 per acre foot. A rather shocking decision by Senior Judge John Wiese, December 31, 2003, requires the Feds to compensate the Tulare Lake Basin Water Storage District for withholding some of "their" water to comply with the Endangered Species Act to save fish downstream. Said District is a front for the J.G. Boswell Company, owner of 200,000 (sic) acres in the Basin.

What's the moral? We can turn "Negabucks into Megabucks" for state and Federal treasuries by charging water takers a market price for what they get, instead of subsidizing them to get it, as now. The stakes are huge; the barriers are surmountable. Besides raising revenues we would institute a regime of "demand management," promoting water conservation in the most economical way. We would solve our factitious "water crisis" and "revenue crisis" in one stroke.

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