WATER LAW AND ECONOMIC TRANSFERS OF WATER: A REPLY

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(The following article was written in 1962 by Dr. Gaffney when he was a professor at the University of Missouri. It is published here with Dr. Gaffney's permission.)

This is a reply to Dean Frank Trelease's comment on a case study of western water law as applied to the Kaweah River, California. That case study finds diseconomies in water allocation, and lays much of the blame to water law. Dean Trelease finds this "very disturbing," which reaction I, in turn, find a little puzzling, since he is himself no mean gadfly on the subject. Probably the answer is that there is a real issue between us: he leaning to the view that the appropriative doctrine is essentially sound, needing some repairs about the fringes; I to the view that many diseconomies are inherent in the core concept of prior appropriation. Such issues are hard to join cleanly, however, and all subtleties hard to pinpoint, among the Dean's conjectures and divagations. One must admire the errantry with which he charges onto unfamiliar ground, but I find myself hard to recognize in some of the dragons he smites there, a crew of such mixed ancestry that I believe the greatest contribution I might make to this discussion would be to line them up for individual inspection.

The Dean's thesis, as I read it, proceeds as follows:

1. Gaffney blames appropriative law for initiating and perpetuating the misallocation of water on the Kaweah;

2. But California law is quite clear that water rights are transferable;

3. The real barriers to transfer in this case are probably:

a. present uses yield spillover benefits not accounted for by Gaffney,

b. present licensees are irrationally attached to their water rights and do not accept a legal and economic opportunity to sell;

4. The law represents the value judgments of the people.

Let me comment on those points in order.

1. On the relative merits of appropriative law.

As a champion of appropriative law, Dean Trelease has reacted selectively to different passages in my Kaweah study. The study allots blame impartially among the riparian, appropriative, and correlative doctrines, save to note that the Kaweah Delta has "more than the usual quota of riparian lands." In California's system of scrambled water law it is hardly possible to know just which doctrine is blocking what worthwhile project. If I had to choose I would share the Dean's partiality for the appropriative over the riparian system, just as I would rather be shot than hanged. But I would prefer a wider choice.

The Dean overstates my case a bit when he tells us that Gaffney tells us that transferable appropriative claims could not operate in a fashion to maximize benefits from water use. What Gaffney tries to tell us is that in California appropriative licenses are so hedged about with conditions and complexities as to be non-transferable in practice. Dean Trelease speaks of what they might be; I of what they are. I do not question that society could create definite and alienable claims on water. I wish it would.

But the Dean is correct if he intuits that I believe such negotiable instruments would little resemble what today we call a license to appropriate water. The present system is less one of licensing than of license. It encourages landholders to range as far as they can to claim more water than they use, and use more water than they need, sooner than they need it. I doubt that it can simply evolve into an economical system. The necessary changes would eliminate most of what is characteristically "appropriative." Dean Trelease offers no comment on the several points I raise in this vein.

The Dean has confused issues further by shifting between the transferability of appropriative licenses and that of shares in mutual water companies. From his second paragraph one would gather he was concerned about the former issue, but his later discussion concerns the latter, a related yet distinct matter which my Kaweah study treats separately. Now it may be well established in some jurisdictions, as Dean Trelease alleges, that an appropriator can only sell what he has been using consumptively, but there is no such general limitation on transferring water company shares in the southern San Joaquin Valley. Some shares have been restricted by the companies themselves within fixed perimeters, but others have rambled over the lea and far away, wagging their externalities behind them. There has been wailing and gnashing of teeth, but lamentation has not enjoined the transfers.

What really has blocked many other and more desirable transfers, however, is the law, which interdicts a change in point of diversion. In Consolidated People's Ditch Company v. Foothill Ditch Company the court did not enjoin the transfer of water as such. Lindsay-Strathmore could take the water corresponding to the shares it had bought, said the court, provided it did not do so in the direct and economical way, but let the water fall 200 feet and more to the diversion points that were good enough for Grandpa, and pumped it back uphill.

Dean Trelease is again intuiting aright when he wonders if the cross-hauling I deplore was not largely necessitated to avoid changing points of diversion. But whether that in turn reflects any (cont'd on page 8)

overriding legal solicitude for spillover benefits is doubtful. The law has permitted all manner of changes in place of use, provided only all ditches stem from the fixed ancient diversion points. Thus water has to reach its destinations in the same roundabout manner that the law has to reach some of its conclusions. Points of diversion are treated as precedents.

2. California law on the transferability of appropriative rights

"How," asks the Dean, "can law which specifically states that changes can be made operate to block changes?" That is an odd question for a jurist to raise, when every reasonably skeptical layman observes that the pious protestations of one law are often subverted by others. Need one mention more than the 15th Amendment?

I will not repeat here the relevant passages of my Kaweah study. They are available to whosoever wishes to consult that work. But I would take the occasion to add one more point, which overlaps some of the others as well.

California law and practice have long let municipalities (a term which includes irrigation districts) reserve future waters, exempt from the general requirement of due diligence, in anticipation of alleged greater needs. Many of these needs have never materialized, and probably never will--witness San Francisco, and the Modesto, Turlock, and Merced Irrigation Districts, among others. But the law does not provide for their selling their claims on surplus reserved waters. To sell something you must own it, and to own a perfected appropriative claim on water you must have put water to beneficial use. Meantime, which may literally be a century or more, the claimant can hardly convey that which is his only upon a condition he has not met. He can, however, and does prevent anyone else's using it.

Obviously the waters most eligible for sale are those that are surplus to their claimants, yet they are the ones most likely to be trapped in this legal limbo. The reserver can release them only by abandonment and forfeiture, which nets him nothing but a sense of philanthropy toward rival municipalities.

In practice many appropriators other than municipalities have also been allowed more water than they can use. Let me cite Dean Trelease to this point: "Early irrigation decrees were often for atrociously large quantities of water, and many of these are still in effect." The Dean also advises us, I think correctly, that forfeiture is "almost impossible of enforcement." So long as these overendowed appropriators lie low and keep still they are unlikely to be bothered. Let them try to sell their surplus, however, and the paternal public feels cheated. The appropriator was given the resource to husband and use, not to sell prodigally for money as Pinocchio sold his school books. The chance that the reserver could convey title that would hold against the swarm of claimants who would then claim priority is dim.

3a. Spillover effects and the transferability of appropriative rights

Dean Trelease's major point seems to be that the economics of spill-over effects are what block transfers of appropriative rights and water company shares in the Kaweah area. He is content to "wonder" rather than commit himself, but if he has a thesis surely it is that.

First, a bit of local hydrology. Spillover effects in the Kaweah area do not consist largely of the return flows the Dean posits. As my study indicates, ground water gradients slope away from the main channels. The spillovers that help other irrigators (and have created severe drainage problems in some areas) are: (a) deep percolation under irrigated fields; (b) conveyance losses which seep underground; and (c) channel seepage above the diversion point. Of these, the law appears to protect only (c) channel seepage, probably on the uneconomic principle that it is more "natural." The law does not protect upstream juniors against increases in channel seepage which result from heavy pumping of wells. The upstream junior must then let more water pass his weir to maintain required flows for downstream seniors.

Second, there are spillover gains as well as losses. The Dean accentuates the losses but overlooks any gains, a failing all too common in his profession (and mine), and calculated to block all but extraordinarily advantageous transfers. He has no comment for my allegation that in the instant case spillover benefits would exceed spillover losses, because of greater reuse of water when applied at higher elevations. And is it not generally to be expected that spillover benefits in areas of shortage would exceed those in areas of surplus? Over-irrigation in the lower Kaweah has in fact created serious drainage problems.

Third, there has been no transfer of an appropriative right in the Kaweah system for decades. The fact speaks volumes.

Fourth, appropriative law does not provide that injured parties shall be compensated when diversion points are moved; rather, it provides that parties shall not be injured. The injured party has not just a damage claim, but a veto worth what the traffic will bear. This puts the water-buyer in the position of a right-of-way agent unarmed with eminent domain. Dean Trelease has elsewhere remarked this weakness in the riparian law: ".... the value of the water right may be the price of buying the riparian's forebearance to enjoin the use, a price which may well be what it is worth to the non-riparian to continue his development. ... the certainty desired by the prospective water user can rarely be obtained from a single seller." Do these words not apply as well to the power of appropriators (and others with vested interest in channel seepage to enjoin moving points of diversion?

Fifth, Dean Trelease wonders if the Kaweah litigants had competent legal advice. Legal (continued on page 9)

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competency is a hard quality to define, but it is an objective fact that the litigants in Tulare Irrigation District v. Lindsay -Strathmore Irrigation District spent between one and two million dollars on legal counsel. Lindsay-Strathmore alone had already spent $671,611 by 1927 and the case dragged on to 1935. The Supreme Court decision of that year left the major issues unresolved and the case might still be at bar had not the litigants gone bankrupt. A large share of the debts were incurred to pay counsel; about as much money was spent on litigation as on construction. If those sacrifices were not enough to buy competent legal advice one may fairly ask to how many citizens that commodity is available?

Finally, a word about the general problem of handling spillover effects. It would be hard to find a public or private decision or transaction without effects on others than the principal parties. In fields other than water, the law wisely refrains from requiring the active parties to come to terms with all the discommoded passive ones, else transactions would cease and society would stagnate. A commodity is not merchantable if not cut clean from the cloying entourage of indirect interests. It would still be desirable to devise means to compensate losers from the gains of winners. It is monstrously impractical to do so in each individual transaction. A workable alternative lies in the tax mechanism. Many indirect gains and losses accrue to individuals in their capacity as landholders. Let the *fisc* therefore rely heavily on *ad valorem* land taxes, keep assessments punctiliously current, and the winners automatically compensate the losers. Progress in this direction would seem to hold forth greater promise than litigating ad infinitum the external costs and gains of every transaction.

3b. On the heirloom attitude toward water rights

Dean Trelease opines that "reluctance to sell water rights is not a legal factor." Gaffney relates it indirectly to law but the reasoning is "subliminal." That may depend in part on the reader's threshold of perception to the thinking of another discipline. It is common cause for tears and laughter among economists that the public will acquiesce happily in the most outrageous giveways of public property and valuable monopolies to sell liquor, broadcast on Channel x, or drive taxis, until one beneficiary is found selling his privilege for money--then it becomes immoral profiteering. Is it implausible then to suggest that a privileged class tends to develop modes of behavior and expression calculated to minimize this risk? Is it subliminal to relate that to the precarious legal instrument via which public property is given away?

Tell me not that the risk is past that society may reassert its collective ownership. Were that so, it would not be necessary for every other issue of Western Water News to headline "Water Rights in Jeopardy," nor for so many writers on water to volunteer disclaimers of belief in taking without compensation. The ladies do protest too much, methinks. These phenomena in fact betray the deep anxiety felt by licensees over the status of their privileges.

For this anxiety and uncertainty the law must bear its full measure of responsibility. Rather than resolving doubts by clearcut leadership, it stands poised, like Talleyrand, prepared to dodge the tumbrels of either party. Rather than designate water as "public" or "private" the law makes it both, or either. Dean Trelease's statement is characteristic: . . . the appropriator, with the permission of the State, receives a privilege of using the property of the State; a privilege that may be no less property but certainly property of a conditional and permissive kind. The State through a system of administrative machinery sees to it that its property is used wisely and well.

Perhaps now it is my perception that is dull, but to me that verges on doubletalk. If the state is the owner, then the licensees, in the bold Mosaic phrase, are "sojourners and strangers with us," and it only breeds confusion to tell them their licenses are "no less property" and indulge their conceit that they have more than precarious tenancies.

If the state is to remain the owner of water, let it do so in the clean and unambiguous way enunciated by Oregon Chief Justice McBride: ". . . it does not seem to me that it [water use] ever arose in this country above the dignity of a mere privilege, over which the legislature had complete control." Or, if we prefer to pass title to appropriators, let them pay a market price and get a real title, fully alienable and fully taxable as private property. The present precarious status only guarantees continued conflict, confusion, and litigation.

Licenses to appropriate water have distinctive qualities other than precariousness, and I would not impute the heirloom quality exclusively to that. One may find the above reasoning subliminal and still observe that the heirloom attitude attaches not to water as such but to water rights, the legal instrument the law has forged for claiming the use of water. Put water in a bottle or metered pipe, and people buy and sell it with a good deal less sentiment than they attach to their houses or golf club memberships. But once create a legal obstacle course which obstructs transfers, and you begin to endow water rights with the essential heirloom quality, which is irreplaceability. Thenceforward the process is cumulative: because water is hard to replace people cling to surplus water, which makes water harder to replace, and so on.

To find attitudes resembling the heirloom attitude toward appropriative licenses one need rather look to similar legal instruments. The obvious parallel is with land titles, especially in areas and ages where these are closely held, lightly taxed and encumbered with barriers to transfer. Water rights are on their way to becoming the paralyzing *mnortmain* of the modern west.

4. On the lawyers' responsibility for the law

There was no need for Dean Trelease to defend his profession for it was not under attack except as the shoe might fit. Particular laws, yes, but not law. (Continued on page 10)

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But so long as he raises the subject I do not believe that the legal profession, which has a unique authority over law, can ask absolution from a unique responsibility for it. It is true that lawyers have no monopoly on either power or folly, and the will of the majority is often illadvised. But this "will of the majority" is a shapeless humor that filters through several layers of lawyers before crystallizing into effective law. Legislators are mostly lawyers; they use legal counsel to draft bills before they pass, and Attorneys General to explain them afterwards. They have a weakness for leaving key decisions for their colleagues on the bench, and much of water law is purely judge-made.

It is fitting that we should endow a lawgiving caste with some special powers. Without leadership "the people" is a headless monster. It is also fitting that lawgivers harken to the will of the public, but what public? The Dean's "quite a few irrigators" are a minute and biased interest group. One of the best reasons for giving lawyers so much discretion is the protection they can afford us against the clamor of privilege groups that so often sways legislatures. When lawyers think they hear the will of the majority in these strident and demanding voices they are on the verge of forfeiting one of the important functions that warrants their prerogatives.

To summarize my differences with Dean Trelease and those to whom he lends support, their economizing instincts are good, but they are too easily satisfied. If a driblet trickles in an economical direction through the baffles of water law, that is enough to show forth the law's goodness. If responses lag for decades behind the stimuli of demand, the important thing is that movement is in the right direction.

I maintain on the other hand the system is not good enough. At first blush that seems to be a difference of degree only, but it evolves into a difference of kind. Had we but world enough and time, we might patiently finance generations of legal talent tracing down formulae to reconcile economics and law. But when the law frustrates an optimal adjustment of resources to meet demands, time's winged chariot drawing near at 5 or 10 percent per annum spurs us on to entertain less attractive alternatives. Economic pressures build up until one of these poorer choices is taken, irreversibly, at great cost, to the permanent preclusion of the optimal adjustment. These poorer choices are often ponderous interregional transfers, so slow in gestation and so overwhelming in volume as to pose serious problems of developmental instability. But on that, the upshot of my thesis, Dean Trelease offers no comment.

I agree with Dean Trelease that Americans have bumbled many things, and America is great, but I question if the one caused the other. It is not bumbles and fumbles, but recoveries that make a nation great. The unbumbling of our water law is not likely if the good-enough-for-Grandpa school prevails.

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