

Water as Property

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I. Introduction

The issue of whether water is or should be characterized as property under the law raises considerable controversy. In the western United States, water is typically viewed as a form of property, while in the east it is not. Whether water *should* be treated as property has been the subject of an extensive body of scholarship. Proponents argue that establishing legally protected, secure private property rights encourages maximum utilization of resources.¹ Also, exclusivity and surety of possession can foster wise investment of labor and stewardship. Conversely, the absence of legally protected interests in property ownership can result in a “tragedy of the commons,” where a public resource is plundered as each selfish (yet economically rational) actor takes steps to promote self-interest with little regard for externalities that deplete or even destroy the resource.²

Opponents assert that water is an essential resource that should not be treated as a commodity. They advocate public ownership and regulation of water resources, arguing that water is unique and therefore should not be subject to profit-motivated management like other natural resources, such as land or minerals, and personal items, such as teacups or jewelry. Their arguments are bolstered with evidence that jurisdictions that recognize private property rights in water, as in the western United States, have not necessarily encouraged conservation but rather have created incentives to overuse the resource.³

This memorandum analyzes whether water is treated as property under current American legal systems, with an emphasis on Nebraska law. It also considers the implications of treating water as property. The analysis focuses on surface water, but the utilization of groundwater resources raises many of the same issues and concerns.⁴

II. Water is a Unique Public Trust Resource

In systems built on English common law, surface water is viewed as a type of “public trust” resource, where the sovereign retains rights and responsibilities to protect the resource for the public. The public trust doctrine, which traces its pedigree to Roman law, recognizes that water is an essential resource upon which entire societies depend for survival.⁵ As such, tidal and navigable waterways, shorelines and stream beds “should not be held exclusively in private hands, but should be open to the public or at least subject to what Roman law called the ‘*jus publicum*’: the ‘public right.’”⁶ Although the doctrine was adopted in the United States through the incorporation of English common law, there is “an astonishingly universal regard for communal values in water worldwide.”⁷ A review of Asian, African, Islamic, Latin American, and Native American laws indicates that the headwaters of the public trust doctrine “arise in rivulets from all reaches of the basin that holds the societies of the world.”⁸

The public trust doctrine has enjoyed modern staying power through the work of legal scholars and judicial opinions at both the federal and state level.⁹ Courts have referenced the doctrine in granting public access for navigation and fishing,¹⁰ and, in some cases, in recognizing the right of the public to preserve its waters to support fish and wildlife species.¹¹

According to Professor Joseph Sax, who has written frequently on the nature of property rights, the uniqueness of water is universally recognized:

The roots of private property have 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.¹²

Thus, in theory, water should be looked upon as something no one can own exclusively, as the interests of the public and the state, acting in the public interest, create an additional layer to consider in resolving conflicts over the use and allocation of water.¹³

In the eastern United States, the public trust doctrine underlies the law of “reasonable use,” where riparian land owners have usufructuary rights to water that flows through or past their land but are liable for monetary damages or injunctive relief if they deplete the natural flow in a way that harms downstream users.¹⁴ In the west, the public trust doctrine is frequently cited by state courts, but it has rarely been utilized as a significant curb on private rights in water by imposing limitations on wasteful or otherwise harmful uses. In a path-breaking opinion, the Supreme Court of California indicated a willingness to impose the doctrine on appropriators in *National Audubon Society v. Superior Court* (the Mono Lake case), when it stated that:

The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores; *it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.*¹⁵

As a result, in California, the state water board must consider the public trust in making decisions on the application for, or transfer of, water rights.¹⁶ In spite of the court’s bold language, however, the Mono Lake decision has had relatively little impact on the use and exploitation of water resources in the west under the prior appropriation doctrine, described below. The case is frequently cited, but other states have not fully embraced it as precedent.¹⁷

III. Property Rights in Water Can Exacerbate Waste

In a marked deviation from the English common law of riparianism, the western United States embraced a doctrine known as prior appropriation. Although water is still viewed as a unique type of public resource, private property rights to use water are legally protected in state constitutions, statutes and caselaw. For example, the Colorado constitution states that “the right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.”¹⁸ Yet another provision of that state’s constitution provides that water is “the property of the state, and the same is dedicated to the use of the people of the state, subject to appropriation. . . .”¹⁹ Nebraska’s constitution is somewhat similar, with an important distinction: “The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied *except when such denial is demanded by the public interest.*”²⁰

Prior appropriation arose during the late 1800s as a way to maximize the use of a scarce resource in the arid west and to promote settlement and economic development.²¹ Common wisdom has it that western courts simply followed the customs of the mining camps in the use and allocation of water, but the underlying objectives were almost certainly more complex. The Colorado Supreme Court recently observed that “[t]he roots of Colorado water law reside in the agrarian, populist efforts of miners and farmers to resist speculative investment that would corner the water resource to the exclusion of actual users settling into the territory. . . . Colorado’s provisions reflect the anti-monopolistic undergirding of this state’s water law.”²²

The prior appropriation regime, often described as “first in time, first in right,” served as a simple way to determine who got water, how much he or she got, and when. The measure of a right to use water is quantified by how much the actor diverts for “beneficial use.”²³ Beneficial use includes domestic, agricultural and industrial activities. Although wasteful uses are not beneficial, definitions of “waste” are generally quite lenient and laws prohibiting waste are rarely enforced.²⁴

Over-appropriation has become an almost insurmountable problem in many watersheds of the west.²⁵ “Far from being efficient in free-market economic terms, prior appropriation is highly wasteful.”²⁶ Meanwhile, far from accomplishing conservation, by encouraging individuals to use water for maximum beneficial uses, prior appropriation has promoted rapid depletion of the resource and, in some cases, the collapse of riparian communities. The requirement that water be diverted and put to conventional beneficial uses tends to ignore ecological priorities, such as instream values like fisheries and recreation, by perpetuating the idea that any water left in the stream is effectively wasted.²⁷ Additional facets of prior appropriation, including abandonment and forfeiture, force water right holders into a “use it or lose it” mindset.²⁸ These elements of the prior appropriation system penalize water rights holders for conservation or innovation and motivate water right holders to hoard and use as much water as possible.²⁹ Prior appropriation in its pure form, then, leaves little room for conservation or recognition of other collective societal values, such as instream flows, ecosystem management or recreation, and does little to encourage sustainable water management.³⁰

Perhaps signaling an emerging trend in water law, in its 2005 opinion in *Spear T. Ranch v. Knaub*, the Nebraska Supreme Court explicitly acknowledged that “[a] right to appropriate surface water . . . is not an ownership of property. Instead, the water is viewed as a public want and the appropriation is a right to use the water.”³¹ Likewise, Nebraska’s groundwater resources are publicly owned and are not subject to private ownership: “The protected right of landowners is the right to the use of the ground water, and does not reach the ownership of the water itself.”³² The legislative and executive branches of the state have taken steps to promote sustainable management of its surface and groundwater resources through the enactment and implementation of LB 962 (2004) and other measures, some of which might not have been possible if Nebraska viewed water rights as inviolate property rights.³³

IV. Proposals for Reform: Markets and Other Notions

In order to rectify the shortcomings of prior appropriation, advocates for reform have called for greater flexibility in legal doctrines governing the use and conservation of water, rather than rigid individual property rights.³⁴ Regardless of the nature of any given reform proposal, a change in the status quo will meet vehement resistance from water users.

A few of the more radical proposals call for dismantling the prior appropriation doctrine altogether.³⁵ If water is treated as property under state law, however, such a reform would raise the specter of a government “taking”, which would likely require compensation under the U.S. Constitution.³⁶ Short of outright dismemberment, imposing greater restrictions on water use through governmental regulation to protect imperiled species or water quality can be effective in promoting conservation, but appropriators may respond with “takings” claims in this instance as well. In *Tulare Lake v. U.S.*, the federal claims court awarded irrigators some \$20 million when the Bureau of Reclamation curtailed contract allowances to provide flow for endangered species.³⁷ Arguably, the *Tulare* court erred in failing to address the public trust as an inherent limitation on title, the exercise of which would not be a taking.³⁸ The public trust theory as a defense to a taking claim may be sound but it is virtually untested, and legislators and agencies have been fearful of pushing its limits.³⁹

Short of dismantling prior appropriation altogether, a less drastic reform option may be to redefine the concept of “beneficial use” to promote conservation and inhibit excessive use and to better reflect emerging societal values.⁴⁰ For example, by statute, many western states, including Nebraska, now recognize instream uses like fisheries as beneficial.⁴¹

A more politically palatable option may be to work within the current system by using water markets as a method to reallocate water rights from low-value consumptive uses to high value but less traditional uses, such as instream flows for recreation and fisheries.⁴² Some states have experimented with allowing owners to “retire” their water rights temporarily (e.g., during spawning season) without fear of losing them through abandonment or forfeiture.⁴³ Certainty and the protection of reasonable expectations are both necessary for market transactions to take place.⁴⁴ In most jurisdictions, however, a proposal to transfer a water right triggers an intensive investigation into the owners’ past practices, sometimes resulting in forfeiture and loss of all or some of the right.⁴⁵ Moreover, even the most senior appropriator will be prevented from transferring her water right if other appropriators will be harmed as a result of the transfer.⁴⁶ Due to these factors and others that result in high transaction costs, water markets are not yet terribly active in the American west. To the extent that transfers do occur, they typically involve small-scale transactions between users with similar uses at similar locations rather than exports or changes to more socially desirable or efficient uses.⁴⁷ In Nebraska, changes in use are discouraged by a statutory provision that forbids permanent changes between preference categories for domestic uses, agriculture, or industrial purposes.⁴⁸

As a matter of policy, restrictions on water rights and, consequently, water markets are not necessarily unreasonable as they promote equity, distributive justice and conservation. Because of the uniqueness of water and because of potential third-party effects, Joseph Sax concludes that water markets simply “cannot be expected to resemble more conventional markets.”⁴⁹

On the other hand, the riparian “reasonable use” tort-like rules of the eastern United States, with their reliance on judicial enforcement and after-the-fact liability, are no panacea, either. As a result, some eastern states have adopted reforms, via regulations and permit systems, to incorporate some facets of prior appropriation to promote investment and enhance certainty. One common modification is to allow water to be used away from the riparian tract, so that riparian landowners no longer enjoy a monopoly on water. Florida and other eastern states that have adopted some form of “regulated riparianism” delegate broad authority to administrative agencies to oversee the system and ensure that the public trust is protected.⁵⁰

V. Conclusion

When it comes to water, strong property rights do not necessarily solve the tragedy of the commons by preventing misuse. Instead, it appears that, absent substantial government intervention, private property systems do not fully protect this vital, shared resource. Instead, a system of regulated rights, with permits and other enforceable mechanisms, along with market-based incentives and disincentives, such as water banks and fees, will likely prove more useful in managing water resources in a sustainable fashion over the long-term.

¹ For a discussion of this view, see Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, U. Chi. L. Rev. 711, 711-712 (1986) [hereinafter *Comedy*] (citing 2 William Blackstone Commentaries and economist Richard Posner, *ECONOMIC ANALYSIS OF LAW* 28 (2d. ed. 1977)); Carol Rose, *Property as the Keystone Right?*, 71 Notre Dame L. Rev. 329, 330-331, 351 (1996).

² *Id.*; Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

³ See Eric T. Freyfogle, *Water Rights and the Common Wealth*, 26 Env'tl. L. 27, 33-34, 50 (1996) [hereinafter *Common Wealth*]; Eric T. Freyfogle, *The Tragedy of Fragmentation*, 36 Val. U. L. Rev. 307, 307 (2002) [hereinafter *Fragmentation*]; **Part III** of this analysis, *infra*.

⁴ See Chris Lehman, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 Tex. Tech. L. Rev. 101, 126-128 (2004); Dylan O. Drummond, Lynn Ray

Sherman, and Edmond R. McCarthy, Jr., *The Rule of Capture in Texas-Still So Misunderstood After All These Years*, 37 Tex. Tech. L. Rev. 1 (2004).

⁵ Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 Env'tl. L. 473, 473 (1989) [hereinafter *Limits of Private Rights*]; Joseph L. Sax, *Understanding Transfers: Community Rights and the Privatization of Water*, 1 West N.W. 13, 13 (1994) [hereinafter *Community Rights*].

⁶ Rose, *Comedy*, *supra* note 1, at 713. For an in-depth discussion of the development of the public trust doctrine in the U.S., see Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 633-641(1986).

⁷ Erin Ryan, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 Env'tl. L. 477, 478 (2001).

⁸ Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 Env'tl. L. 425, 431 (1989).

⁹ An on-line search on the Westlaw database of American law journals and reviews (JLR) for keywords "Public Trust Doctrine" yielded 1,724 results (June 6, 2006). Professor Rose notes that the doctrine has enjoyed three waves of popularity, the most recent of which was jump-started by Joseph Sax. Rose, *Comedy*, *supra* note 1 at 729-730 (citing Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970)). For citations to caselaw embracing the doctrine, see Eric Pearson, *Illinois Central and the Public Trust Doctrine In State Law*, 15 Va. Env'tl. L. J. 713, 720 n.40 (1996).

¹⁰ See *Martin v. Weddell's Lessee*, 41 U.S. 367 (1842); *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Arkansas v. McIlroy*, 595 S.W.2d 659 (1980).

¹¹ *National Audubon Society v. Superior Court*, 658 P.2d 709 (1983).

¹² Sax, *Limits of Private Rights*, *supra* note 5, at 482.

¹³ Sax, *Limits of Private Rights*, *supra* note 5, at 478-482; Sax, *Community Rights*, *supra* note 5, at 13; Joseph L. Sax, *The Constitution, Property Rights And the Future of Water Law*, 61 U. Colo. L. Rev. 257, 260, 269-270 (1990) [hereinafter *Future of Water Law*]; Rose, *Comedy*, *supra* note 1, at 713-716.

¹⁴ See Freyfogle, *Common Wealth*, *supra* note 3, at 49.

¹⁵ 658 P.2d at 727 (emphasis added).

¹⁶ *Id.* at 732 (concluding that the state bears a continuing duty of supervision over appropriators of the state's waters in order to protect the public trust).

¹⁷ Reed D. Benson, "The Supreme Court of Science" *Speaks on Water Rights: The National Academy of Sciences Columbia River Report and its Water Policy Implications*, 35 Env'tl. L. 85, 123 n.189 (2005).

¹⁸ Colo. Const. Art. XVI, § 6.

¹⁹ Colo. Const. Art. XVI, § 5 (emphasis added). The Colorado courts have held that water rights are vested, compensable property rights under the state's constitution. *Public Service Co. of Colorado v. F.E.R.C.*, 754 F.2d 1555 (10th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986); *Ackerman v. City of Walsenburg*, 171 Colo. 304, 467 P.2d 267, 270 (1970). Nebraska's constitution has been interpreted differently. See notes 31-33, *infra*, and accompanying text.

²⁰ Neb. Const. Art. XV, § 6 (emphasis added).

²¹ Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 Env'tl. L. 919, 967 (1998).

²² *High Plains A & M, LLC v. Southeastern Colorado Water Conservancy Dist.*, 120 P.3d 710, 719 n.3 (Colo. 2005), citing David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32 Ecol. L.Q. 3, 33, 41, 55-56 (2005).

²³ Neuman, *supra* note 21, at 920.

²⁴ *Id.* at 922, 958-961, 975; Freyfogle, *Common Wealth*, *supra* note 3, at 28. Few uses are recognized as wasteful. Excessively leaky canals have been prohibited in some cases, but the benchmark -- historic, conventional uses and technologies -- forgives many wasteful uses. Neuman, *supra* note 21, at 933-946.

²⁵ Freyfogle, *Common Wealth*, *supra* note 3, at 28; Neuman, *supra* note 21, at 975.

²⁶ Freyfogle, *Common Wealth*, *supra* note 3, at 40, 50.

²⁷ See Sax, *Limits of Private Rights*, *supra* note 5, at 474-475; Sax, *Future of Water Law*, *supra* note 13, at 258.

²⁸ Neuman, *supra* note 21, at 920. Nebraska statutes specify that water rights are forfeited if not used for a five-year period, but provides longer forfeiture periods if non-use is due to circumstances beyond the appropriator's control, participation in acreage reserve programs, and the like. Neb. Rev. Stat. § 46-229.

²⁹ Neuman, *supra* note 21, at 977; Freyfogle, *Common Wealth*, *supra* note 3, at 26, 45.

³⁰ Freyfogle, *Common Wealth*, *supra* note 3, at 28, 32-33, 35, 38-39.

³¹ 269 Neb. 177, 186, 691 N.W.2d 116, 127 (2005) (emphasis added).

³² In re Application U-2, 226 Neb. 594, 605, 413 N.W.2d 290, 298 (1987), citing *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), *rev'd on other grounds*, 458 U.S. 941 (1982). See also *Bamford v. Upper Republican NRD*, 245 Neb. 299, 512 N.W.2d 642 (1992).

³³ Laws 2004, LB 962, Operative date July 16, 2004 (codified in various sections of chapter 46, *inter alia*, of the Nebraska Code).

³⁴ Neuman, *supra* note 21, at 978; Sax, *Limits of Private Rights*, *supra* note 5. See also Lynda L. Butler, *Environmental Water Rights: An Evolving Concept of Public Property*, 9 Va. Envtl. L.J. 323 (1990) (discussing public trust doctrine and recognition of other public values for water). See Lee P. Breckenridge, *Maintaining Instream Flow and Protecting Aquatic Habitat: Promise and Perils on the Path to Regulated Riparianism*, 106 W.Va. L. Rev. 595 (2004).

³⁵ Jeffrey J. Clayton, *'Here is a Land Where Life is Written in Water': Re-Writing Western Water Law in the 21st Century*, 5 U. Denv. W. L. Rev. 525 (2002). See A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 Nat. Resources J. 769 (2001) (noting arguments for reform).

³⁶ U.S. Const. Amd. V. Note that, if the restriction were to adversely impact transboundary interests, international trade agreements like NAFTA and GATT could also require compensation for affected property and investments. Recently, 17 Texas irrigation districts alleged that Mexico violated NAFTA provisions on National Treatment and Expropriation by having “captured, seized, and diverted to the use of Mexican farmers” an investment (approximately 1,013,056 acre-feet of irrigation water) located in Mexico and owned by the Texas claimants. See NOTICE OF INTENT TO SUBMIT A CLAIM TO ARBITRATION UNDER SECTION B, CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT, available at <http://www.international-economic-law.org/Mexicans/Texas%20Water%20Claims%20Notice%20of%20Intent.pdf> (visited Apr. 16, 2006).

³⁷ 61 Fed.Cl. 624 (2004).

³⁸ See Melinda Harm Benson, *The Tulare Case: Water Rights, The Endangered Species Act, and the Fifth Amendment*, 32 Envtl. L. 551, 571 (2002).

³⁹ Jack H. Archer and Terrance W. Stone, *The Interaction of the Public Trust and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 Vt. L. Rev. 81 (1995). For an overview of takings and water law, see James H. Davenport and Craig Bell, *Governmental Interference With the Use of Water: When Do Unconstitutional "Takings" Occur?*, 9 U. Denv. W. L. Rev. 1 (2005).

⁴⁰ Freyfogle, *Common Wealth*, *supra* note 3, at 42-45; Neuman, *supra* note 21, at 975-76.

⁴¹ See, e.g., Neb. Rev. Stat. § 46-288. See also Zellmer, *The Public Interest Test for Water Appropriations* in this briefing booklet.

⁴² Janet C. Neuman, *The Good, the Bad and the Ugly: The First Ten Years of the Oregon Water Trust*, 83 Neb. L. Rev. 432 (2004); Mary Ann King, *Getting Our Feet Wet: An Introduction to Water Trusts*, 28 Harv. Envtl. L. Rev. 495 (2004). See Lee P. Breckenridge, *Can Fish Own Water?: Envisioning Nonhuman Property in Ecosystems*, 20 J. Land Use & Envtl. L. 293 (2005) (arguing for incorporation of ecological values via instream flow rights).

⁴³ See Neuman, *supra* note 21, at 928-933, 956-958 (discussing Ore.Rev.Stat.Ann. §537.470(3)).

⁴⁴ Robert Glennon, *Water Scarcity, Marketing, and Privatization*, 83 Tex L. Rev. 1873,1885-1889 (2005). See C. Carter Ruml, *The Coase Theorem and Western U.S. Appropriative Water Rights*, 45 Nat. Res. J. 169, 182-183 (2005) (advocating definite water rights and larger-scale water institutions); Julia S. Walters, *Safeguarding Colorado's Water Supply: The New Confluence of Title Insurance and Water Rights Conveyances*, 77 U. Colo. L. Rev. 491 (2006) (discussing water rights title insurance policies).

⁴⁵ See, e.g., Neb. Stat. 46-294 (limiting transfers to rights not subject to termination and to “historic consumptive use”).

⁴⁶ Joseph W. Dellapenna, *Markets for Water: Time to Put the Myth to Rest?*, 131 J. Contemp. Water Res. & Ed. 33, 36-37 (2005).

⁴⁷ Dellapenna, *supra* note 46, at 36-37; NATIONAL RESEARCH COUNCIL, WATER TRANSFERS IN THE WEST: EFFICIENCY, EQUITY, AND THE ENVIRONMENT (1992); Ruml, *supra* note 44, at 169, 174-181.

⁴⁸ See Neb. Rev. Stat. §§ 46-294, 46-204; Neb. Const. Art. XV, § 6.

⁴⁹ Sax, *Community Rights*, *supra* note 5, at 13 (citing NATIONAL RESEARCH COUNCIL, WATER TRANSFERS IN THE WEST: EFFICIENCY, EQUITY, AND THE ENVIRONMENT (1992)).

⁵⁰ See Joseph W. Dellapenna, *Special Challenges to Water Markets in Riparian States*, 21 Ga. St. L. Rev. 305, 315 (2004); Breckenridge, *supra* note 34, at 595.