WHOSE WATER? OURS

Clearing Fallacies about Implementing Common Rights

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"Hold the waters in the hands of the people."
- John Wesley Powell

Cato once observed that "A wise man can learn more from a fool than a fool can learn from a wise man." That ancient wisdom may explain a lot today about the continued viability of higher education in America. I hope it may also motivate you to attend to what follows, even if I begin by calling foolish and false what you've been told is wise and true. Be patient: like Harry Truman's economist, I have two hands. Wait for the one you like better.

Once I was young and foolish and made many promises. I learned they are easy to make and hard to keep, so I turned to forecasts. Those are also easy to make, but hard to abide when they turn wrong. Next I tried prescribing public policy. That is safe if the advisee is in Tierra del Fuego, and you in the sanctuary of a U.S. academy or bank. The going gets rougher as you diagnose and prescribe closer to home and offend the local Chamber of Commerce or water establishment: these bite back.

Growing old and more cautious I sought safer outlets. To get a grip on the conservative side of water issues, I bought a small irrigated farm with a senior claim on the Santa Ana River. A second outlet is to name and refute fallacies, the theme of the present paper. This is good fun, and fair and relevant when you hear and read these fallacies daily. It is also constructive. These fallacies, some of them spread by special pleaders *ex parte*, muddy the waters and darken the light needed to implement common rights, draft better water legislation, and raise the general welfare.

The late Senator Albert Beveridge of Indiana was retired by the voters in 1922[1]. Thereafter, he mellowed into being a scholar and biographer. In these years he wrote "You know, I've learned in the Widener Library at Harvard that most of what I was taught as a boy in Indiana is pure bunk." That is also true of much that we ordinarily read and hear about water. I am giving you a list of things I submit are pure bunk, or mostly so. My first points may seem radical, but stay your judgment, I have many free-market thoughts coming "on the other hand."

FALLACIES CLOUDING THE WATER

1. "Water rights are real property"

Wrong! To begin, "right" is wrong. A right is something like free speech, possessed by everyone. The only water rights, properly speaking, are common. Blackstone wrote, "... water is a movable, wandering thing, and must of necessity continue common by the law of nature; ..." (cited in Roy Huffman, p.38). Private water interests are claims, licenses, permits, holdings, reservations, privileges, or possessory interests. Water is the property of the states.[2]

Most private water claims are licenses, at least in the 17 western states. As Law Professor James L. Huffman says (James Huffman, 1989), most state constitutions read that the water of a state belongs to the state (on behalf of the people of the state). Professor Ralph Johnson cited a phrase to that effect from the Washington Water Code. In California it is Water Code Section

[1]His offense was proposing a national sales tax. Like his fellow-retiree, Oregon's Congressman Al Ullman, he learned too late the voters disagree.

[2]There are issues among states, and between states and the United States. Here we confine our attention to one state.

102: "All water within the State is the property of the people of the State, ...". The 1879 Constitution declared, "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature, ..." (Article I, Sec 21).

Rarely, one finds a pure ray of light like this: "It does not seem to me that water use in this country ever rose above the dignity of a mere privilege over which the state had complete control" (Oregon Chief Justice McBride, *In re Hood River*, 1924, 190-91). More generally, there is a good deal of paltering on the matter. Legal opinions seldom stop with the bottom line. Putting the best light on it, circumstances alter cases; putting a worse light, there is a good deal of double talking in order to secure licensees the benefits of owning property without the obligations.

When you dig, however, it comes out like this. A water license has about the same standing as the privilege some airlines had (before deregulation) to occupy certain airport gates and time slots; the privilege of a cab to work the streets of New York after securing a medallion; a license from the FCC to use a specified frequency; or a grazing permit on Federal lands. It is like the old Oregon and California Railroad land grant which was revested when the grantee failed to perform. It is subject to *conditions*, and to *forfeiture* for failure to meet same.

The evidence is, you do not find water licenses recorded along with title deeds to real property. More important, you rarely find them on the property tax rolls.[3] Seldom have you heard a licensee demand to be taxed because he holds real property. He may, if pressed, tell you the water right is taxed indirectly through the value of taxable real property it serves.[4] There is no more than a half-truth there. The untrue half is that unused and misused water reservations (the standard case in California) do not much raise the value of any land anywhere, and are not taxed at all, directly or in-.

Lawyers habitually intone "property" when describing water permits, especially their clients'. This is ceremonial and tendentious, to bolster the particular case. The magic word is used in some court decisions: it is also a group shibboleth, to bolster all clients' cases against all the outside, unlicensed public. Call it a class bias. After all, most lawyers get in this field to represent licensees. Generally, their dual interest is to make permits seem solid and "real" property, except when the subject is property taxation, or moving the place of use: at these points the permits collapse into something else. The resulting double-talk has been deplored in Gaffney, 1962.[5]

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[3]There are exceptions, too trivial to pursue here. The legal ambiguity is betrayed when some licenses are taxed as personal, others as real property.

[4]The legal concept of "appurtenancy" is used to this end. Water rights are said to be "appurtenant" to the lands they serve, meaning they disappear into the land and are not listed separately for taxation. However when the owner wants to sell water separately from land, appurtenancy is no problem (Hutchins, 1956). Appurtenancy is a supple term that is used a) To give landowners preferential claims on water; b) To bolster the standing of water claims under color of real property; c) To protect water claims from taxation; d) and finally to let surplus water claims be moved around and cashed out.

[5]Wells Hutchins, given to equivocation, published a pamphlet on water law for California farmers in which boldface headings read "Water Rights are Real Estate," but the following text says no such thing (Hutchins, 1956b). His full-dress book of the same year even allows (after heavy digging) that the 1928 Amendment to the California Constitution *limits* water claims previously considered property, and these limits "apply to the use of all water under

The upshot is that The Legislature has more latent power than most of us imagine. As electors and citizens our hands are not tied, just our minds. So much the more honor to law professors like James Huffman, Harrison Dunning and Joseph Sax, who help lay citizens know their latent powers over water permits (Huffman, 1989; Dunning, 1982; Sax, 1990[6]).

2. "Real Property is Sacred and Untouchable"

Wrong! Suppose this lay writer and the Oregon Chief Justice were in error, and water permits were real property. That would just be out of the frying pan, into the fire. What does "real" mean, applied to property or estate? "Real" is an elided English form of the French "*regal*," taken into English when English kings spoke French. Real property is The King's. We threw out kings in 1783, but not the regal powers. Rather, we transferred those powers to our state governments, appropriately naming them "sovereign." By succession, real property means government property!

Every landowner is a tenant of the king or his successors in interest. The very word "own" comes from "owe." An owner is one who owes. What he owed historically was fealty to his sovereign. That used to mean bending the knee, kissing the royal foot, swearing allegiance, and showing up on demand to smite the enemy. It has evolved into servitudes like eminent domain, the police power, the public trust doctrine, and *the tax power*. We will return to the last.

These concepts are basic to the common law which, as Professor Huffman points out, has been brought into every U.S. state constitution (save Louisiana's). Moses was not just whistling Dixie when he quoted The Lord as saying "The land shall not be sold forever; for the land is mine, and ye are strangers and sojourners with me." Chief Seattle would have approved. So would Brigham Young, who founded the once-independent nation of Deseret on that principle.[7]

Moses and Brigham Young were also speaking just as William the Norman spoke after he conquered England, except that William was not also a theocrat. "You hold title to this land from me; observe my rules." That is the law we have inherited; that is how the system works. In one form or another it is found around the world, except in the minds of abstract economic theorists like those of the Chicago School. These philosophers construct systems from introspectively derived axioms, turning away from the historical origins and conditions of the absolute property rights they preach.

That doesn't imply state power must be used autocratically. There was never so ardent a democrat as John Wesley Powell, army officer and Federal bureaucrat, who said "Furnish the

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whatever right ..." (Hutchins, 1956a, p.19). "... the appropriator may take the surplus without giving compensation" (*op. cit.*, p.18). Those are not attributes of property.

[6]The peroration of Sax's scholarly, documented treatise is quite stirring, as though inspired by Moses, Tolstoy and Henry George.

[7]"No man can ever buy land here, for no one has any land to sell. But every man shall have his land measured out to him, which he must cultivate in order to keep it. Besides, there shall be no private ownership of the streams that come out of the canyons, nor the timber that grows on the hills. These belong to the people: all the people." Brigham Young, cited in Roy Huffman, p.42.

people with institutions of justice, and let them do the work for themselves" (Powell, "Institutions for the Arid Lands" 113, cit. Worster p.140). That will do as our text.

3. "You cannot take real property without compensation"

Wrong! Whoever said that has not been following zoning law. As a rule of thumb, zoning can take away as much as 85% (Professor Sax says 90%) of the use value of land before it is declared an unconstitutional "taking" of property. The owner must be left with some "economically viable" use, meaning almost any use whose revenues exceed expenses, however small the net gain.

Rent control, too, is consistently upheld. In a current case the court ruled that rent control helps tenants, and the fact "That rent control may unduly disadvantage others, ... do(es) not affect the constitutionality of the rent control law." (Egelko, 1991)

As to other property, well! No one has yet been compensated for losing the fruits of his sweated brow to the IRS, at rates which once soared as high as 90% in the top bracket. Let's put a lid on loose and wishful preaching about absolute property rights that never existed. Property is not an end in itself; it is a means of getting resources put to their best use for the general good. To secure that end, property rights are instituted among men, deriving their just standing from the consent of the unpropertied. Whenever any form of property becomes destructive of that end, it is the right of the people to alter or to abolish it, and to institute new principles most likely to effect their safety and happiness.

Consent of the unpropertied? That means property must work for the benefit of all, not just those who own property. But abolish property!? That is a red flag indeed, but note I said *alter* or abolish, and it is our own *Declaration of Independence* I am paraphrasing.[8] Like Jefferson, I generally prefer alter to abolish: "abolishing" something is nihilistic until we know what we want to replace it with. The point is, we have many degrees of freedom as citizens; we are not bound body and soul by decisions made, or allegedly made, in the past.

4. "The cost of water is passed through to consumers in higher prices"

Wrong! Prices are determined by supply and demand, not cost. If you sell in a national or world market, or even a competitive local market, you are a price-taker, not a maker. You can't pass cost hikes on to consumers; you have to eat them.

In addition, water (like energy) is an unusual kind of input whose high price may actually increase production. It would be easy to assume, using the good old idea of diminishing returns, that dearer water would reduce intensity of land use. It certainly cuts water use, but when you pay more for water you often switch to higher-valued crops. That is what southern California farming is all about. You substitute capital and labor for water on the same land, and often raise yields per acre. Note that is not just higher yields per acre-foot of *water*, which conventional thinking would predict; that is yields per acre of *land*. Less water per acre may mean more output per acre, an uncommon and momentous relationship.

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[8] *The Declaration* is not part of the Federal Constitution, of course, but its main ideas were put in the California Constitution in 1879. We are dealing here with intrastate issues.

Conversely, when water is cheap you substitute water for labor and capital. Water is such a potent substitute for labor and capital that more water often means lower yields from each acre. I am not sure that farm production economists have ever really faced up to that phenomenon and its implications.

The effect of cheap water may be seen in Fresno, Kings and Tulare Counties, California. Their populations grew by 32% in a decade of dear water, 1940-50. Then they received an influx of cheap water from two Federally subsidized projects: Pine Flat Dam on the Kings River, and the Friant-Kern Canal of the Central Valley Project. What happened then?

For the next 30 years their populations stopped growing and even fell through outmigration (Ballard, p. 30). In Tulare County, 1974, wages and salaries accounted for only 50% of income payments (*California Statistical Abstract*, cit. Ballard, p.28). Farms receiving the Federal water subsidy average 7.2 times larger than other California irrigated farms (calculated by Villarejo, 1986, p.20). By 1980 California's Central Valley contained six of the ten American cities with the highest proportion of people on welfare (*Metropolitan Area Fact Book*, 1984, cit. Villarejo, 1986, p.109). Two of them are Visalia and Fresno.[9] Cheap water has not converted the Great Valley into a beehive, any more than cheap power has converted the Tennessee Valley. Arguably, it has degraded life in the Great Valley.

With dearer water, on the other hand, you use less by controlling it better, switching from primitive furrow irrigation to sprinklers, spitters and drip. This in turn lets you do new things like growing avocadoes on steep hillsides formerly barren, yielding more dollars of product for less water (and in this case on waste land).

You cannot afford to dump high-priced water on barley, or alfalfa, or rice, or irrigated pasture, or any other of these domesticated phreatophytes that guzzle up most of our underpriced water today.[10] A number of fairways and cemeteries would also give way to higher-valued uses.[11]

The above facts point to a fascinating, consequential corollary: you can tax water withdrawals without wrecking the water economy. On the contrary, such taxes (carefully crafted to be constructive) can encourage conservation, getting more bins for the bucket, so to speak, and opening more opportunities for useful labor. Americans are raised on anti-tax slogans

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[9]This is a shift from the dream of "Water, Wealth, Contentment and Health" that was promised *and delivered* to the people of Modesto from 1887 to 1950 or so, when they were struggling and paying to develop their waters. Modesto today is fat and secure - and a third member of the ten highest-welfare cities.

Modesto has delivered water without variable charge from an early date. However, in its earlier days it levied steep land assessments to pay for ambitious dams and canal systems. It was these that kept the landowners hopping. Now the bonds are retired, land yields a surplus that attracts absentee buyers with a lesser propensity to husband land intensively.

[10]Dean's Committee, 1968, p.48.

[11]Such common sense is pretty well obscured by the clumsy, affected apparatus of "production possibility curves" and "frontiers" that micro-economists stylize and imprison their thinking with today; ditto for "Cobb-Douglas functions." Wearing those blinders, economists generally presume that higher input prices must lead to lower output. However, it is a three-factor world. The "product" of cheap water to many farmers is not the increase of yields, but the drop of costs other than water.

masquerading as economic analysis, always presuming taxes destroy good incentives and wreck the economy. Here is a kind of tax that raises revenue while strengthening the economy. This corollary is too good to drop, and is highlighted later.

5. "You can't stop a landowner from pumping on his own land"

Wrong! You can even control his hunting and fishing there, overfly, prohibit and extinguish fires, limit crop acreage, search the home, and arrest the owner for smoking pot. As to pumping, it depends on whether he owns what is under his land. If it is oil, mineral rights are routinely severed from surface rights by sale, reservation or lease. Water can be subject to constraints, too. They are traditionally weaker, but not always, and never necessarily.

Limits on pumping water are not as common or severe as Huey Johnson and I think they should be, but they exist and are growing. In coastal areas, pumping is limited and/or taxed to stop salt water intrusion. Districts that replenish ground water may and do charge those who pump it up again[12]. Further inland, pumping can be stopped to control movement of toxic plumes that destroy valuable aquifers: this is done in the Bunker Hill aquifer under the Santa Ana River, threatened with fouling by toxins from Norton Air Force Base, San Bernardino.

Pumping is routinely stopped to prevent "export" of water from lands overlying an aquifer: California calls that the "correlative rights" doctrine. It is not always well observed, and not often well-advised, but very well established (*Katz v. Walkinshaw*, 1903). If that does not suffice to stop overdraft, pumping is controlled to prorate water among surface owners, and shorten pump lifts (*City of Pasadena v. City of Alhambra*, 1949). Also, pumping wells near streams can be stopped to prevent the indirect diversion of surface water (*Tulare I.D. v. Lindsay-Strathmore I.D.*, 1935). This happens on the alluvial fans that are so common in the west.

A simple solution to half our intractable water problems would be a severance tax on water withdrawals.[13] If you can regulate it you can tax it.[14] A tax, properly gauged, is an economic price charged by the owner of water (the state) for using its property. If Chicago-

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[12]In 1959 already the Orange County Water District, covering 180,000 acres, had been for years levying a "replenishment assessment" or charge on the production of ground water, empowered by State enabling legislation which had been challenged in court, and upheld. The District's enabling legislation dates from 1933. The rate in 1959 was $3.90 per acre-foot; this was its major source of revenue, closely followed by a charge on land. In 1968-69 its pump tax rate was up to $13.30 per acre-foot for urban use. More generally, Water Code Sections 60220 and 55335 enable water replenishment districts anywhere (Crooke; Birdlebough and Wilkins, p.267-68; Weatherford, pp. 1035-36). SB 1391 (1980) authorizes multi-county groundwater management districts that can levy pump taxes and cooperate with Nevada entities (Weatherford, 1038-39).

[13]Such a tax has been proposed by White, p.5; Boulding, p. 91; Brewer, pp. 240-42; Young and Martin; Young, Daubert, and Morel-Seytoux; Billings; Gaffney 1969, 1973, 1977, 1988; and, indirectly, by van Schilfgaarde, p. 114. It is possible it was also proposed by Rand Corporation, cit. Dennis, p.79, but I have not yet confirmed the citation. Possibly there was division among the many Rand people putting out studies. Phelps et al., p.17, seem negative, because the "tax would heavily redistribute wealth away from current water users ... and so "is likely to meet heavy political opposition ..." That is an oddly non-efficiency reason to bear weight in a study otherwise exclusively concerned with and entitled *Efficient Water Use*, but it serves them to dismiss the matter.

[14]Colorado applies such a tax along the S. Platte River, calling it an "augmentation charge." The approach "has operated for several years, ... with little problem or controversy" Young, Daubert and Morel-Seytoux, p.790).

School economists, and allied "new resource economists," were more consistent in their ardor for the price system, and less consistent in their mistrust of legislatures, they would seize upon this application of the price system and boost and perfect it with all their considerable influence and talent.

Whether one chooses taxation or regulation, we must control pumping in some manner if any system of surface control is to work. As Huey Johnson points out, while California rations and conserves surface water, landowners in the arid San Joaquin Valley just punch more and more wells into the aquifers and pump up free water the State and Federal projects keep recharging at high cost. In the drought of 1976-77, 10,000 new wells were drilled in the San Joaquin Valley (Weatherford, p.1031). Thus they play out their destined role in The Great Water Treadmill: subsidized water supply followed by overdraft followed by State rescue projects followed by new overdrafts, etc. ad bankruptcy.

This treadmill got well started in 1913 when Los Angeles tapped the Owens Valley waters to supply free water in the San Fernando Valley. The lands there were timely pre-purchased by insiders before annexation, giving a clue to the forces behind the premature seizures and diversion of water. The episode was dramatized in the cinema *Chinatown*, so the scenario is often now labelled the "Chinatown Syndrome," although key names like Mulholland, Van Nuys, Sherman, Huntington, Otis and Chandler sound distinctly occidental.

It is not just history, the Great Treadmill keeps turning. The Metropolitan Water District of Southern California (MWD) keeps pressing for more water sources, wringing its hands over the drought, preaching domestic conservation and imposing rationing on its old customers - and annexing new desert lands to water. "It's hard for the public to understand how you can annex and talk about a water shortage," is all the comfort offered by Lois Boylan Krieger, MWD Board Chair, as the Board approved another drought-year annexation (Metzler, 1991).[15] A month later she proposed making more water available for farmers (Bankole, 1991). She insists on maintaining a "balancing fund" to subsidize waste by keeping prices low during droughts (Krieger, 1991).

Excess landowners in and around Central Valley Project service areas routinely gain from recharge that others pay for: CVP contracts even "declare that such water shall not be considered as furnished by the project" (Ivanhoe v. McCracken, 1958, p. 296-97). Kern County landowners keep irrigating desert lands, overdrafting, and petitioning Sacramento for "emergency" aid. They even oppose metering city water, fearing that "if cities get slapped with meters, their wells are next." (News Services, 1991.)[16] They nicely summarized their attitude as follows:

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[15]"I weep for you," the Walrus said; "I deeply sympathize." With sobs and tears he sorted out those of the largest size, holding his pocket handkerchief before his streaming eyes.

[16]The Carter Administration sought to avoid a repeat of the treadmill effect in Arizona. It required Arizona to control farm overdraft, as the price of getting the subsidized Central Arizona Project. In result, Arizona water is being urbanized much faster than California water (Peterson, 1986). Earlier, pioneer water economists Robert Young and William Martin had been called bad names at The University of Arizona for recommending the same thing, without Federal billions behind them (Martin and Young, 1967).

> The existence of overdraft in the southern San Joaquin Valley does not indicate an "unmanaged" situation, but only the absence of an adequate supply of supplemental water ... " (Weatherford, p. 1038).

On the other hand, the wild and cottony State of Arizona authorized a pump tax in 1980 (for later implementation), and set about retiring some farmlands to reserve water for higher uses (Dunning, 1982b, pp. 41-43). The pump tax is only at token levels now, but so, once, was the first sales tax. They are relying heavily on direct regulations to promote conservation (Brown and Ingram, pp.23-24). If those quirky individualists can do it, who can call it impolitic anywhere? May we not also anticipate that, once committed to groundwater conservation, they will come to see the advantages of using the price system rather than relying so heavily on direct controls?

6. "Economics is hostile to environmentalism"

Partly wrong, although some economists are guilty as charged. Economics, properly pursued, deals with how best to meet human wants. Recreation, fishing, wildlife, amenities, clean air, pure water, sustained resource supply, watershed protection, good health, and conservation are legitimate human wants. Many economists, I confess, are deaf and blind to such values, and think only of maximizing GNP measured in the brutal old-fashioned way, developed during World War II for war's emergency purposes and never revised. Others, cowed by cow college deans, dare not think at all, and write only of sustaining farm land values: damn the cost to fish, wildlife, and the taxpayers (Knapp and Vaux, Jr., 1982)[17]. The writings of Professors Buchanan and Tullock give a convenient philosophical basis for such an attitude (Buchanan and Tullock, 1975).

Many others, however, are leaders in developing environmental and resource economics. Today wise environmentalists, rather than sniping at all economists, are allying with the last kind. Here are four reasons why environmentalists and economists are natural allies.

A. Economizing is conserving.

Rationalizing water use, the proper aim of economics, is inherently conserving. For example, if we put the Santa Ana River to its highest and best use, it would obviate mega-megatons of water imports, and the associated environmental damage. I myself possess a share of this river, which rises naturally in an area of intense water shortage, yet I waste it. Why? There is only a trivial variable charge. There is a yearly fixed cost, at about $20 per acre-foot for a "standard" amount.[18] The "standard" hasn't changed in a century, and is much more than I properly need.

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[17]The authors, disguising their work as technical economic analysis, actually base their findings on the political premise that no pump tax should be considered unless the result is to raise overlying farm land rents and prices. Their model is tailored to the west side of Kern County, California, province of a few giant landowners whose political power, and militant opposition to metering water use, are legendary. Co-author Henry J. Vaux Jr. was later made Director of the U.C. Water Resources Center, controlling tax-derived research funds: who gets research money, and for what purpose.

[18]The small charges cover expenses of the Gage Canal Co., which delivers in the cheapest old-fashioned way, by gravity, in rotation with other users. The Canal Co. pays nothing at the source for water as such.

Meantime, the State is importing water here at a true social cost of about $2,000 per acre foot, 100 times what I pay (see Section #11, *infra*). If there were a market where I could sell my quota for a tenth of that price I surely would, but there isn't, so I don't. If there were a price at one-tenth of that amount I would not buy, but there isn't, so I do. Thus I, and thousands like me, keep wasting water.

Abuse of local waters in arid areas of high demand, like southern California, results in "hydro-imperialism."[19] The prevailing ethic is mixed-up macho. Conservation is for sissies: Real Men don't conserve water; Real Men prove their potency by preying on powerless people's possessions. The imperialists then improve their prosperity per pushy porkbarrel politics, promoting putatively "public" projects for private profit whereby poor impoverished patsies pay the publicans to provide plenty of pecuniary power to pump the precious potable prize through pipes to provide in perpetuity for potato patches, plus putting greens, pools, ponds, par-fives, parklike prospects, playing places, plazas, impoundments, and riparian playas appurtenant to parcels of property they would purvey to paying guests or permanent purchasers, or hypothecate with paper to be placed with Prudential, or occupy for imputed personal pleasure and pampering their progeny in the parched provinces pilfered from the primitive pastoral Papagos who previously prevailed in these parts proximate to Palm Springs.[20]

B. Subsidy wastes both dollars and ecologies.

Hydro-imperialism is the common enemy of Sierra Clubbers and economists. That is lucky for economists: Sierra Clubbers have more clout. Twenty years ago some porkbarrellers proposed having Congress pay for pumping water a mile up and 1500 miles west from the lower Mississippi River to West Texas, to rescue landowners around Lubbock from the consequences of their overdrafting. It was to be one of The Great Boondoggles.

I laughed when I read ecologists were fighting it to save the habitat of some forgotten dicky-bird, say the "Least Southwestern Shiny-rumped Fleapicker." It seemed funny, and kind of pathetic, to have a few shy bird-nerds, those nostalgic nebbishes, trying to save their archaic, asocial hobby. Didn't they know this was hardball, with billions of real values like dollars at stake, and big, tough, cigar-chomping contractors in charge of crushing rocks and the opposition? I'm not laughing any more: the nerds won! How little I had understood power. Damn the billions, Congress doesn't care, but it jumps for organized ornithologists.

Yes, now I dare come out of the dawn mists, I'm a nerdy old bird-man myself, complete with bird study Merit Badge, and an honorable arrest for trespassing in hot pursuit of, as I recall, an Oven Bird. They told me to put away those childish things that aren't hardheaded and practical (like Economics). Ha! Who's practical now? Ornithologists are winning our battles; we are natural allies.

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[19]Apologies to etymological purists for combining a Greek with a Latin root: I just like the sound of it.

[20]Palm Springs and environs, the Coachella Valley, get water from the Colorado River Aqueduct and store it in their aquifer. The water would otherwise go to Los Angeles and environs, which would then need less from northern California (Warren, 1991).

"You have no right to stop growth," says the hydro-imperialist. I agree, but insist on the counterpart: we have no duty to subsidize growth. Hydro-imperialists and allied land speculators have no right to demand subsidies.

Water supply and flood control and navigation projects, the traditional kinds, are heavily subsidized. Subsidy generates waste almost by definition, in the amount of the subsidy. If it is a subsidy to withdraw water it also creates scarcity of water where nature may have given us plenty. Consider the lower Colorado River. Every major user is subsidized, mostly by Congress. No one pays a dime for water at the source, but everyone gets paid to suck it up and take it home. No wonder there is a shortage. No wonder there are 82 golf courses operating in the Coachella Valley, a Sonoran desert, and 50 more planned. No wonder The U.S. Bureau of Reclamation can't even find takers for water carried to Phoenix in its multi-billion dollar Granite Reef Aqueduct. I could go on, but exhorting Congress not to waste money is scolding sinners in Sodom. Come on, ecologists, find an endangered species!

C. Correct economic analysis prescribes more water for fish.

Twenty years ago a study[21] on the S... River of B.... prescribed sacrificing the fishery to a proposed power project, reasoning as follows. The fishery has no value because it is overcrowded: its "rent has been dissipated by the tragedy of the commons." The value of the catch is only great enough to pay the fishermen. The fishery as such therefore has no residual value; it adds nothing to the total value. Take it away and nothing is lost, net of costs.

That is a profound fallacy. You will have noted it is a way of "dehumanizing" fishermen and assuming away their readjustment costs, but this is not my main point. The fallacy is to say you should remove water from the use in which it is most scarce, precisely because it is scarce. This violates the basic law of diminishing returns (aka variable proportions). It violates good marginal analysis, a bedrock of economics.

My friend the author happened not to be an economist by training, but (alas! for education in economics) some "trained" economists would do the same. He probably got it from one of them. However, the crowding of a resource does not mean it is worthless. Rather, it has become extremely scarce to those crowded onto it, and the *marginal* value of water added to that use is extremely high. In terms of redressing unbalanced factor proportions, it has the same effect as subtracting some fishermen, which the writer would have approved.[22]

[21]The author is a personal friend, whom I decline to name.

[22]The good instinct behind the writer's point was that access to fisheries needs to be limited or otherwise better managed. That much of his work is valid; too bad it took a wrong turn.

D. Correct economic analysis presumes a public trust doctrine.[23]

Another thing *some* economists do right is to acknowledge that "entitlements" - the initial assignments of property rights - have a major effect on the relative bargaining power of different parties. For years, economists would ask, say, canoers what they as individuals would pay to keep a river wild. They got rather low valuations, and duly reported them as the value of recreation. This was an effective defensive strategy for dam builders.

One day it occurred to some unsung genius to invert the question: ask not what canoers would pay for the wild river; ask what the power company would have to pay the canoers to take it away[24]. The second question presumes that canoers, as citizens, already own the wild river. Lawyers Huffman and Johnson have told this Conference, in fact, the citizens do (and not just canoers, but *all* citizens). Professor Joseph Sax (1990) confirms that.

In recent years ecologists have been catching onto this point and rubbing the noses of legislators and bad economists in it. In the current lingo, one arguing *ex parte* the canoers stresses that canoers' WTA (Willingness to Accept) is the relevant dollar value, and it is higher, perhaps much higher, than their WTP (Willingness to Pay). (WTA is also called a "compensation-demanded valuation.") In its basic CERCLA[25] legislation, 1980, the U.S. Congress specified it wanted measurements of WTA, not WTP (Carson & Navarro, 1988, p. 830). Many pollster-theorists fret that "received theory" has "been unable to explain ... the persistently observed differences between WTP and WTA measures." (Cummings et al., 1986 p.41.)[26] Could it be that "received theory" was received damaged?

In defense, black-hat economists are developing a strategy of trivializing the matter by claiming WTP = WTA (Mitchell and Carson, 1981[27]). They follow a Chicago-School guru, Ronald Coase, who has written it doesn't really matter how you assign entitlements so long as it is clear and firm. Then just start the game of "Free Market" and deal: everything works out for

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[23]In *Ivanhoe* the USSC rejected the doctrine that the state holds water in trust specifically for excess landowners, opining instead that "The project was designed to benefit people, not land" (357 *U.S.* 296). In *Sporhase* it rejected the use of trust doctrine to stop interstate transfers. I do not presume to enter the technical side of the law of trusts, but neither decision seems to have inhibited the flowering in the 1980s of the *public* trust doctrine to protect instream uses. In all three instances, the courts seem to be sorting things out as well as I could ask.

[24]The genii in question may have been Orris Herfindahl and Allen Kneese. They certainly make the point clearly in Herfindahl and Kneese, 1965, rpt. 1974, p.287.

[25]Comprehensive Environmental Response, Compensation and Liability Act.

[26]For those who require impenetrable Greek scriptures, Michael Hanemann (1991) has tried valiantly to torture "received theory" into fitting both the facts and the standards of opaque pedantry now required for publication in the AER. One can only admire his refusal to follow Carson/Mitchell, who sweep unwanted facts out with the trash. I doubt, however, if received theory warrants the respect and close attention he gives it. Rather, he unintentionally demonstrates how clumsy and stilted this theory is as compared to the simple common sense which has somehow survived in him in spite of his training.

[27]In the 1981 work they find the difference is only 1%. They cite this approvingly, 1989, pp. 32-33.

the best. Resources end up allocated the same, no matter who starts the game with all the chips, because WTP = WTA.[28]

Bunk! You are not surprised, even in our mobile, commercial society, when someone says "My home is not for sale. I will not sell at any price, don't call again." She can take that attitude when she holds the initial entitlement. You would be amazed to hear anyone say "I will pay any price." There are many documented instances of a person swearing under oath his land is worth no more than $X for tax assessment purposes, and soon thereafter swearing again it is worth $15X when being condemned for a park or other public use, because he wouldn't sell it for less.

"Modern" micro-economics, dominated by followers of Coase, is a throwback to the old Manchester School, some of whose members carried Adam Smith far beyond Smith's language or spirit. They prescribed "free trade in land" as the solution to all resource problems - free trade beginning with entitlements inherited from millenia of conquest, corruption, aristocracy, confiscations, negligence, covin and fraud.

In this narrow view, everything is for sale; everyone has his price; all values are determined at the margin; etc. Facts are forced to fit that theology. One Coasian, Richard Carson of San Diego, works the northwest Pacific Coast these days polling folks. (In econo-newspeak, he is "applying the contingent valuation method," or CV, because the questions are hypothetical.) The purpose is to put a value on environmental damages.

One review faulted "the high rate of unusable responses." (Fischhoff, p.287.)[29] Why "unusable"? Carson has written that he throws out WTA answers when they exceed WTP answers by more than 5% (Mitchell and Carson, 1981, 1988; see also Mitchell and Carson, 1989, pp. 32-34, 226[30]). Modern Economic Science has no time for wrong answers: Shred and Trash![31] Sometimes over 50% of the responses are "invalid." They don't fit the Coase model; they must

[28]For a flagrant example of the genre see Wahl, p.130. Economists today are trained to toss this off without thinking, and even come to believe it themselves.

[29]Reviewer Fischhoff continued, "they still fall far short of the standards acceptable to research professionals."

[30]Mitchell and Carson are turbid, Protean, and digressive, all three: a challenge to decipher! You have to put together their thesis by splicing together different passages. It comes down to this, however. High-valued answers to WTA questions are an "artifact," and not "meaningful." "WTP and WTA *should* be within 5% of each other ..." pp. 22-23 (emphasis supplied). To say "I want an extremely large ... amount of compensation for agreeing to this" is a "protest answer." 50% or more of all answers are often "protest" answers. These answers are "outliers." p.34. "Outliers" may be removed, either outright or by using statistical gimmicks that have the effect of discounting them. p.226.

[31]The case is something like that of NASA's Goddard Space Flight Center and why they missed detecting the ozone hole before Farman found it in 1985. "Their instruments had recorded the losses (of ozone), but the computer interpreting the results had been programmed to ignore readings that deviated so far from normal" (*BW*, 22 July 91, p.10).

be, in Carson/Mitchell's phrases, "methodological artifacts," or "outliers," or "protest responses," or "aberrations."[32]

If so, aborigines are aberrational. Consider Indian tribes with Treaty Rights to fish. Their WTP for those rights is minimal, partly because their *ability* to pay (ATP) is minimal. In addition, the mere hypothesis they are the ones who must pay implies they are impoverished and cannot pay anything.

On the other hand, their WTA presumes their Treaty Rights are valid and they are in control. In their culture, traditional land rights rank high relative to money. They have seen people squander money and be ruined. Land is not squanderable: by nature, it never wears out, especially the way they use it.

Land has more than marginal value to them because they have just one way of life, based on fishing. Substitution of other lands is not part of their ethic. Their religion is also a factor: must our rationality make them renounce that, too? It is entirely believable they mean it when they say they will not sell "at any price." They may be unreasonable, but that's the point: ownership lets you be as unreasonable as you please.[33] We notice mainly when it is someone else, especially someone different.[34]

Politics and institutions are involved: Treaty Rights are the most valuable mode of holding property there can be. They enjoy legal supremacy as high as The Constitution itself (Article VI, Section 2), preempting contracts and ordinary legislation. All those, and other important institutional and sociological considerations are outside the "perfect-markets" ambit of Carson and his sometime co-author R.C. Mitchell.[35]

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[32]It is a sad note that Mitchell and Carson, writing for RFF, seem to be undercutting the public-minded approach pioneered at RFF by Herfindahl and Kneese, 1965, cited earlier. In 1965, RFF operated under an unrestricted Ford Foundation grant. Those were the days. This is now: "In 1989 RFF received increased support from the corporate sector for the third consecutive year. This growing support illustrates an appreciation ... for the role RFF plays in ... environmental policymaking." (RFF *Annual Report*, 1989, p.45.) The list of supporters includes most of the major oil and utility polluters that CERCLA is designed to control. RFF personnel have worked for EPRI, the major utility industry think tank.

[33]This explains why conservative theorists feel threatened by survey findings that WTA>>WTP. Their criterion for acceptable policy changes is based on Pareto's clever notion that you mustn't deprive one rich landowner, even to help a thousand starving orphans, because you can't compare their subjective feelings. This originated as a bulwark of inherited property against redistribution, and has become standard with private-property economists. When, however, we acknowledge common birthrights to a clean environment, the shoe is on the other foot. Now you can't pollute anyone's air or water because the victims own it. They own *Prroppitty*, and can be as unreasonable as John Jacob Astor. This explains the busy-ness of theorists seeking to plug the dike.

[34]Another large group to consider are the rural Hispanics of the southwest, who put a high value on preserving their communities. A survey in Taos and Questa, N.M., found 80.6% were "Opposed and don't want to sell." Only 6.1% answered yes to "Would sell if price is right" (Brown and Ingram, p.79). We are talking here about very poor people and very expensive water.

[35]Interestingly, Mitchell is a sociologist, and Carson a political scientist. Is this a case of converts becoming more Roman than the Romans?

Indians are an extreme case, but most of us have a streak of their psychology. Not many generations back we share the same kind of culture, a dependence on traditional lands we held in common, in implied trust for our descendants. These traditions are still part of the cultural subconscious, and affect current attitudes. Yet they are totally disregarded in mechanical-type formal micro modeling (except perhaps as tautological "revealed preferences").[36]

So, a pox on economists who belittle the question of entitlements. Such economists deserve the scorn and paranoia[37] they evoke in environmentalists. The proper answer to them is, "If entitlement doesn't matter, give it all to me: then let's talk." That smokes them out.[38] At the same time, give a break to other economists who are on your side. We need all the help we can get.

7. "Water conservation begins at home"

Wrong! Charity and consciousness-raising begin at home, but cutting domestic water use is mostly tokenism and guilt-tripping. Put bricks in the toilet tank, they say; shower with a friend, drink less water, drain your pool, wear clothes that reek, use paper plates, drive a dirty car, never hose the front walk, and so on.

In Solvang, a tourist trap near Santa Barbara, a sign on the restaurant table says they don't serve water unless you ask. This is by request of the local water conservation authority. Be a good citizen; do your part; help the victims of drought; (order from the bar, instead.)

Bunk! Solvang is surrounded by sleek horses, playthings of the prodigal, chomping happily on irrigated pasture. There is a vast luxury golfing resort. On the back of a paper doily I calculated how many glasses of water it takes to irrigate a golf course. One acre-foot is about 4.5 million glasses of water. One acre of grass drinks some 6 acre-feet/year, or 27 million glasses. One golf course is 200 acres or more, needing over 5.5 billion glasses a year. That is what a lawyer might call the "incorporeal hereditament" of a golf course. Go ahead, drink your water without guilt, you're as good as a horse or a golf ball.

Most "domestic" water use is not in-house at all, it is watering lawns. Most water use is not urban at all, but farm use. Most farm use is not in labor-intensive, job-making crops like berries, tomatoes or fruits, but in low-yield uses like alfalfa, irrigated pasture and rice. Huey

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[36]It was 1974 when a survey first showed WTA>>WTP, "in contradiction to received theory (i.e. Coase)." This sent dozens of professors scurrying with torture implements to make the data confess otherwise and save Coase. Mitchell and Carson faithfully slog through a long literature survey, apparently impartially, but in the end find ways to stick with WTP after all (1989, pp. 37-38).

[37]Some paranoia may be in order. According to Carson and Navarro (p. 830), Congress wanted measurements of WTA for CERCLA, but the U.S.D.I. overrode Congress and used WTP because of the "admitted difficulty by economists of measuring WTA ..." That seems to say that some economic consultants actually overrode the Congress of the United States by snowing them with technicalities!

[38]Indeed, it cuts at the root of the Pareto concept that is used as a bulwark against challenges to concentrated private property. According to Pareto, nothing may be changed if anyone is injured, unless that person be compensated. Only win-win changes are allowed, beginning from the status quo. The influence of rent-takers has gradually worked this idea into the center of economic theory.

Johnson points out you can, indeed, save significant shares of in-house water putting bricks in the toilet tank, in spite of what a minuscule share of total water use that is. It gives you some idea of what a loose water economy we have, and how really non-radical are the adjustments needed to overcome a water shortage.[39]

If you're still worried, consider the California "Water Bank" experience. In 1990, after five years of drought, the State bought surplus waters from "water farmers" on the Yuba River in the Northern Sierra and offered its free service as broker and wheeler to move it south to droughted desperate growers. Some prospective customers then said "Thanks, but no thanks," leaving the "Bank" with water it cannot sell at cost.[40] The fact is, demand for farm water is highly "elastic" (price-sensitive), because so much is now being wasted. It can and would be spared any time we see the light and put a price on it.

8. "Water is too important to be left to the market"

Wrong! Yes, I have read Dickens with appreciation. I have seen *Les Mis*, and got the point hearing Threnadier sing "Master of the House." I have been rooked and cheated a few times - who hasn't? But what have you found that works better than the market?

Real estate, which is even more basic than water, has been allocated by the market for a long time. It's not the most efficient market we have; I am a severe critic and ardent proposer of reforms. However it *does* work, even in its present crippled form, better than anything known in Cuba or Russia. Lois Krieger, Board Chairman of MWD, has said that water markets would never work, your "water is here today and gone tomorrow." Now she is in the market herself, trying to buy water from the Imperial Irrigation District. We all can learn, sometimes by force of circumstance.

However, she articulated a common anxiety. "You can't trust the market because it may take away your water and never give it back!" If you can't get it back, it's not a market. The market looks like a one-way street, only leading away, to those who are used to getting things for nothing. Ante-bellum southeastern slave-owners felt that way: "A labor market will never work, the workers won't be here unless you own them." Of course they won't be here if you won't pay them. Likewise, water won't be yours unless you pay what it's worth, year after year, like your other bills. That's what markets are all about; that is how they will shift our waters to more productive uses.

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[39]Young and Martin (1967) demonstrated this long ago in Arizona, showing the average product of water to be 60 times higher in industry than in sorghum. Professor Young, ahead of his times, shook the dust of Arizona from his feet. Arizona later had to accept his ideas under duress: it was the price of getting the Central Arizona Project built with Federal funds.

The California Department of Water Resources published even more extreme differences in 1980 (cit. Walker and Storper, 1982, 186).

[40]As of August 20, 1991, all southern California reservoirs are brimming; water is being dumped for ground storage at bargain winter rates. MWD may even have to let some of its Colorado River entitlement pass by, from lack of storage! This is after 5 years of drought (Muir, 1991).

In 1972 *Newsweek* had an issue headed "Are we running out of everything?" Panic! Raisins were short, coffee was short, even toilet paper was short. These minor shortages were left to the market so responsible public officials could focus their rare talents on the really important one: energy. Within a few weeks hoarders disgorged raisins, coffee and toilet paper, shortages disappeared and were forgotten. The shortage that lasted was energy, the one that was too important to leave to the market. The market really is pretty good at handling shortages.

9. "The market can solve all problems"

Wrong! I warned you I have two hands. Dearly as I love the market, it has limits. Here I discuss four of them.

A. Some human rights are unalienable.

You may not pledge your body for debt. You may not sell a child, or pledge its body for debt, or leave your debts to the child (unless attached to assets you leave).

If you may not sell a child, may you sell the common rights of a child, rights bequeathed to you by earlier generations? May we collectively sell the common rights of all children, or pledge them for debts, or let them be taken away through our negligence or ignorance? Here we are on contestable ground. The Nation has been hocking its future tax revenues to service a soaring debt. The debt is a lien on children's future taxable incomes. If individuals refuse to pay, they can be jailed. In this way, we have been indeed selling our children's bodies to cover our debts.

Putting it that way, it looks like bad policy, but the guilty deed is done. To atone, I suggest we begin now protecting whatever other birthrights we can leave future generations. What common birthrights belong to all infants? Water belongs to the states, as trustees for all citizens.[41] I construe that to mean the states are trustees for the rights of every helpless child born to pay future taxes.

That may be a right of access, where feasible. Increasingly, open access is not feasible. As Merrill English points out, access must often be limited in order to manage the resource efficiently. Historically, this has often been the occasion to extinguish common rights, as happened in England during the enclosure movements. It need not be so, however. We need merely replace the common right of access with a state duty to collect revenues, and use them to serve common public needs.

A right of revenue means a state would charge people for withdrawing its water to use on private lands, instead of subsidizing them to do it, as now. It would "turn Negabucks into Megabucks" for state treasuries. Not only would the price raise revenue, it would promote efficient water use: two major birds with one stone. Has anyone even suggested another policy to achieve so much at one stroke?

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[41]The notion that states hold water in trust just for landowners was stingingly rejected by the USSC in Ivanhoe v. McCracken, 357 *U.S.* 275, 1958.

B. Water development and distribution are natural monopolies.

Most big water projects are multi-purpose. Dams provide not just water supply but flood control, power drops, navigation improvement, salinity repulsion, fishery protection, flatwater and whitewater recreation, and so on. I don't think even Terry Anderson has figured out how the market coordinates and synchronizes those functions.[42] In a large basin like California's Central Valley, with dozens of streams with benefits from integrated development, the possible gains from valley-wide integration, with "billiard-ball" movement of waters from north to south, are staggering, and have inspired progressive engineers since the 19th Century.[43]

Water moves through pipes and canals. An aqueduct's capacity grows with its cross-section, which grows with the square of its radius. Its capital cost grows with its circumference, which grows with the first power of its radius. It follows that more capacity always means lower cost per unit of capacity, so there is no place for parallel, competing lines.

There is also the legal and spatial matter. Rights-of-way are acquired by eminent domain, imposing a public servitude on the owner. Accordingly, water conveyance and distribution are almost everywhere public, cooperative, or regulated. There is no free market in water conveyance, nor could there be.

Some of those who preach for free markets do so mindlessly overlooking this vital matter. Others, more advanced, give it some thought, and solve it to their satisfaction by denying the relevance of the reasoning above. They note that conveyance lines are getting longer, reaching out farther and higher to find supplies and, at the demand end, doing the same to reach sprawled-out customers. Then they "meld" all costs together (consolidate accounts), and find that more capacity means higher, not lower cost per unit. Presto! Competition, marginal cost pricing and free enterprise are again viable.[44]

Such "melding," however, violates the spirit of marginal analysis on which it relies. Marginal analysis calls for *de*consolidating accounts, looking at increments separately, and distinguishing different effects. These thinkers have failed to distinguish "volume effects" and "distance effects." The effect of greater distance is to raise average costs, true. The effect of greater volume, carried a given distance, or distributed within a given perimeter, is always to lower average costs. It thus remains true that conveyance and distribution are natural monopolies.

Water markets, water "banking," water pricing, and other excellent economic ideas now emerging from a century of suppression, are music to my ears. They will not work, however, just by chanting "The Market Will Provide!" In this church Salvation is by Works, not Faith. There

[42]Water recipients have long supported the multi-purpose concept when construction was active, using it to justify Federal subsidies for flood control and navigation. It is only now, when water management is superseding water development, the multi-purpose concept is being buried, and the conditions for perfect competition are said to prevail.

[43]For brief histories see Taylor, 1949, pp. 228-37, and Kahrl, 1978, *passim.*

[44]Again, these are good friends whom I'd rather not name.

must be a central conveyance agency, regulated in the public interest at a high level of economic and financial sophistication, doing what a market would do if a market would work.

That is not a simple task, yet neither is it an idle dream. It is substantially what the state public utility commissions do for electric power, gas, communications, etc. These commissions are imperfect - what isn't? It takes hard work to keep them honest and capable. My plea is to accept that necessity and get on with it. A battery of dedicated professional lawyers, engineers and economists have been doing so industriously, often capably, sometimes thanklessly, for a century. They need your support.

C. Markets only work when sellers are motivated.

In the 1950s the learned journals were full of sanguine allegations, right out of Dr. Pangloss, about all the water trades taking place. The problems of the past had been solved, the wise men said. Investigation, however, showed their claims to be without substance (Gaffney, 1961).

Among the false prophecies of my youth is that ridding water of legal barriers to alienability would make it merchantable and let the market move it quickly to serve higher needs. With doctrinaire zeal and righteousness I upheld this position in a debate (Gaffney, 1962) with Frank Trelease (1961), a Law Dean, and please a few Chicago-school colleagues in Economics: market freaks were a beleaguered minority then. I wish dear Frank were still with us to know he taught me something.

Now we market freaks are a majority, a condition that lets doctrinaires run wild. I still believe in markets, within reasonable limits. "New Resource Economists" like Terry Anderson are preaching the market without reasonable limits. The pink-slip[45] is the new panacea. Firm up property rights, they say, give out negotiable titles, declare a free market, and let the good times roll (Anderson, 1983).[46]

Water marketing is all the rage. A progressive legislator, Richard Katz (D - Sylmar), reflecting in part the Anderson-RAND viewpoint, carried a statute in 1982 to remove certain ancient legal barriers to selling or leasing water permits[47]. Climbing on the wagon, the Environmental Defense Fund, an activist reforming group, has converted itself into a brokerage, combing the state to negotiate deals. In 1986 a new Katz bill let water transferors use conveyance facilities of public agencies[48].

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[45]Pink slip is California-speak for salable title to an automobile.

[46]Nancy Moore of RAND Corporation is also partial to the pink-slip metaphor. She and her former co-author Charles Phelps, in recent telephone interviews, seem more modest and temperate in their claims, and open to dialogue. However, their basic monograph (Phelps, et al., 1978) seems based on a "hard-line" Chicago-Rochester doctrine. It certainly contains no distributive philosophy other than validating the status quo.

[47]AB 3491. The statute lets water districts act as brokers for individuals, and mandates state agencies to encourage and provide technical help. The State Department of Water Resources has set up a Water Transfers Committee to monitor and help.

[48]AB 2746. See Saliba and Bush, 1987, p.178.

The results, sadly, are meager, considering the pent-up pressures for economical transfers.[49] There are offers and refusals, but a wide gulf between negotiation and consummation. The water market is still no more fluid than glue. Only one of the big, obvious deals has begun to go down, and that partially and haltingly.[50] This is true after five years of drought, with severe crises in Santa Barbara and Marin County, whose ability to pay cash for water is maximal.[51]

Dauntless, Assemblyman Katz has moved a third time, seeking to remove still more obstacles to water sales (Ellis, 1991b; Ellis, 1991c). The latest proposal was to let individuals sell without approval of the water districts that serve them. This tracked a major RAND recommendation (Phelps, et al., 1968). It enjoyed editorial support of the Los Angeles *Times*, ever thirsting.

Marketing is a worthy goal and deserves support. This move, however, savored of *a priori* faith without reasonable limits. The problem is, this change would subvert the integrity of district distribution systems. It would not tap a new artery, but a scatter of capillaries.[52] Actually, some "Mutual Water Companies" already provide long experience with alienable individual shares. It took a constitutional amendment, but irrigation districts can and do buy and hold shares in these companies.

It would be prudent to observe the results. In the Kaweah Delta, this has resulted in a Balkanized, intertwined, overlapping, money-wasting, water-wasting set of distribution lines and service areas that stagger belief, and cry out for rationalization and economy (analyzed in Gaffney, 1961). Frustration over market torpidity could lead to damaging, ill-considered measures. This one died in the Senate Agriculture and Water Committee (one hopes for the right reasons) in mid-August, 1991 (L.A. *Times*, 26 August 91). R.I.P.

The Los Angeles *Times* had already, prematurely, been hailing a new era, but this ignored that water has been alienable, at least after a fashion, for many years already. California Water

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[49]For $180/year one can keep current with *Water Market Update*, Santa Fe.

[50]It now seems likely that Imperial Irrigation District will transfer a small part of its large surplus to MWD. This deal has been in the making for some 40 years, and should probably not be attributed to recent legislation, according to Myron Holburt, representing MWD. The "deal" was made in 1989, but no water is expected actually to be shifted until 1995, (and who knows what may yet glitch it up)(Warren, 1991a). The amount proposed for transfer, 100,000 a.f., is only about 3% of the nearly 4 m.a.f. taken by irrigators on the lower Colorado, California side - more than a token, but just barely.

[51]I refer here to emergency or "spot market" water. As to permanent supplies, they themselves have avoided acquiring them, to stifle unwanted growth. In Santa Barbara in 1989 there was a six-year line-up for water for detached homes; twelve years for multiple units (Evans, p.2).

[52]Water districts have prospered by serving compact blocks of land, thus minimizing conveyance costs (Gaffney, 1969). Forced inclusion of lands in the service perimeter is at the heart of Irrigation District history, economy and success.

Procedures for severing water from specific lands are still so clumsy and uncertain that MWD plans to rely mainly on buying lands outright and idling them, to get their waters (Warren, 1991). This extreme "meat-axe" procedure dates back to 1907: it is how Los Angeles got its Owens Valley waters (Kahrl, 1982; Ostrom). Coupled with Katz' latest bill, it could seriously inflate distribution costs in rural districts.

Code Sections 1700-05 spell out procedures. Citing a 1942 case, Wells Hutchins wrote "The appropriative right is ... separable and alienable from the land to which it became initially appurtenant; ..." (Wright v. Best, 1942, cited in Hutchins, 1977, Vol. III, p.191.) 51 years ago in 1940 the Madera I.D. sold its water "filings" on the San Joaquin River to the U.S. Bureau of Reclamation for the Central Valley Project (Downey, p.6). More generally, galloping urban sprawl in southern California has been watered by continual urbanization of indigenous farm supplies, using condemnation and the legislated domestic priority where necessary.

"Water banking," too, has been around a long time. Irrigation Districts along the Friant-Kern Canal were selling surplus Federal water in the 1950s, with Federal blessing (Maass, 1952). Water filings by the Feds were granted by the State not to certain lands, but "for the use and benefit of said Central Valley Project," to further a "general or coordinated plan ..." (California Farm Bureau, pp. 58, 60). The U.S. Supreme Court upheld the mobility of these filings decisively in 1958 (Ivanhoe v. McCracken). Such pooling and banking was inherent in the ambitious "Marshall Plan," the comprehensive Statewide plan of the 1920s that devolved into the present Central Valley Project. In the 1977 drought there was active banking along the California Aqueduct (ironically, from south to north, and from urban to farm use) (Angelides and Bardach, p.17; Robie, p.49). In 1977 Congress authorized the U.S.B.R. to broker water sales (Robie, p.49; Saliba and Bush, p.113; Wahl, pp. 136-38).

So water has long been legally alienable and transferable, albeit with high hurdles. Something else is obviously wrong, however, and it is this: *the sellers are unmotivated*. Water flows are perpetual; sellers do not feel very urgent. Unmotivated sellers love to negotiate, while every year the demand rises. Real estate brokers understand that well, from costly experience. They learn to screen out unmotivated sellers, who waste everyone's time. The broker's delight, the motivated seller, is an ordinary family moving to Philadelphia, or anyone with surplus land subject to debt and/or property taxes. A *cash drain* is what attracts the attention of any seller and moves him.[53]

Farm water districts are the broker's despair. They are not moving to Philadelphia, even if individuals do. The lands they serve are not moving. Water permits are free of debt (banks don't lend on precarious tenures), and generally *free of property tax*. Districts with surplus waters are like hoarders during an energy crisis, except it is a perpetual condition. Demand keeps growing: why not hold out another few years?

Another factor is nicely put by the PR officer of the Westlands Water District: Rob Leake cited the "general reluctance" of growers to sell water, thereby creating "the perception that there are surpluses ..." (Levin, 1988.) Those with precarious tenures know they are insecure, and tiptoe accordingly[54].

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[53]A common misuse of theory is the notion that people react to opportunity cost as alacritously as to cash costs, because that is what "rational" people "should" do. This belief is a severe case of doctrine overriding observation.

[54]The same point was raised by Mason Gaffney, 1961, pp. 38-40, who called it the "heirloom attitude"; attacked in Trelease, 1961, who called the reasoning "subliminal"; and defended in Gaffney, 1962, who faulted the other's "threshold of perception" and "double-talk" - all in a genteel jousting spirit, of course, like an Oxford luncheon,

Even if a few big deals are finally cut some day, that won't prove much. The real estate market works, such as it does, because there are hundreds of thousands of deeds recorded every year. A good water market would call for the same level of activity; it is nowhere in sight. To change the motivation, and get this market working for the common good, we need some constructive use of property taxation or the equivalent.[55]

D. "Rent-seeking" perverts the market.

Scarce waters, where demand exceeds supply, yield rent. With demand growing, abundant waters where demand is now low are expected to become scarce, and yield future rents. In anticipation, persons and organizations with an eye to future rents are ready to do what is needed today to lay claim to future waters.

"What is needed today," by case law, is to divert water and put it to "beneficial use." This is the prevailing appropriative doctrine of water law, under which no one pays a state to take its water, now or in the future. Rather, one acquires a permit that ripens into something resembling perpetual ownership, by the very process of taking. In practise, "beneficial use" is nominal, a token, an economic bad joke. *Taking* is the essence. Local water boosters call this "foresight," and hail it as first among the cardinal virtues. "Use" may be wasteful, and often is.

This appropriative doctrine is the *locus classicus* of what is now called "rent-seeking," i.e. distorting present investment to secure future rents. The motive is to divert, develop and half-use water before its economic time, to lay claim to its future. Bismarck is often quoted that those who like sausages and laws should not watch them being made. Let us add water licenses to Bismarck's list.

The concept of "prescriptive rights" is even more perverse. Here, ownership is established essentially by "adverse use," i.e. interfering with someone else's use. The taker's beneficial use becomes even more incidental. In 1949 the California Supreme Court triggered a "race to the pump house" (Krieger and Banks, 62) when it proclaimed the doctrine of "mutual prescription" for groundwater basins (*City of Pasadena v. City of Alhambra*, 1949). This "encouraged defensive ground water overdrafting by pumpers in other basins who anticipated ground water adjudication" (Gleason, 709).

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except more conciliatory. The point is also observed independently by Phelps, et al., 1978, p.28.

[55]A water license is not real property, but a privilege. Privileges are less protectable than property. Recall that Congress passed a corporation income tax in 1909 as a license fee for the *privilege* of doing business as a corporation. Congress did this at a time before the 16th Amendment when it could not (practically) tax the income from property. On such nice wordplay do mighty issues turn.

California's tax limit applies only to "real property." This raises the interesting possibility that a tax based on water licenses - privileges - would be exempt from California's tax limit. Where there's a will there's a legal way (Gaffney, 1988).

Another possibility is levying a special benefit assessment on lands with special access to waters. A California court has ruled that benefit assessments are not taxes, and therefore not limited by Proposition 13. (American River Flood Control District v. Board of Supervisors, Sacramento County, 130 Cal Ap. 3d 707, 1982.)

Market fundamentalists tell us to firm up property rights, then let the market work its magic. They blind themselves, as though willfully, to the *process* of firming up. In their faith and anti-statist passion they can think of no process but giveaway to privatize resources.[56] Claims to water are constantly being made, expanded and firmed up, and any giveaway process violates all the virtues a market is supposed to possess. The rule for society is "Waste not, want not"; for prior appropriators and adverse possessors it is rather "Waste today, want not tomorrow."[57]

As we segue toward a market system there is a gray area between older, stationary water licenses and the coming new, portable ones. A class of speculators are moving in to acquire permits from present holders who still value them in their fixed, static, traditional uses. The speculators visualize commercializing the water for distant growing cities or industries, using their political influence to secure needed rights-of-way, and litigation/legislation to modify the water permits to make them more mobile.

This is a new, modified, more sophisticated form of rent-seeking, blended with plain old-fashioned land speculation.[58] It is raising great anxiety and resentment among environmentalists, and others too (Gottlieb, 1988, pp.261-80). It causes many to reject the idea of a market in water, saying "A water market just means a plague of absentee speculators like Maurice Strong and his greedy consortium profaning our native waters with their foreign lucre."

There is a better way. Just as we never had to give away water to get it developed, neither need we give away unearned increments to get water transferred to higher uses. A policy of taxing water withdrawals (as advocated herein), based on the opportunity cost of water, will do the job without giving away the benefits. Of course that does mean our own governments must

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[56]Vernon Smith wants to give away "water deeds" based on histories of pumping; Terry Anderson wants to give them away in proportion to land ownership (Terry Anderson, 1983b, pp. 101-02). The idea of firming up titles by actually *charging* for them seems banned by an invisible taboo.

[57]"... farmers or cities first divert and use water by crude systems. Conservation measures often are delayed until the pinch is on." (Patterson, 1991) In 1962, The Orange County Water District sued every upstream diverter on the Santa Ana. In the 1969 judgement, "each water agency's allotment is based on historical use." (Patterson, 1991.) With that in mind, Riverside Mayor Davison boasted that "Riverside's water use doubled during my term of office" (1941-48). He deemed it an achievement. It minds one of the University Chancellor who boasted his greatest achievement was creating four new Vice-Chancellorships and several Associate Deanships.

[58]This writer believes plain old-fashioned land speculation is a blight on the free market. Some others see it as a wholesome, functional, integral part of the market. The writer's position on this is in the following. "Tax Reform to Release Land." In Marion Clawson (ed.), *Modernizing Urban Land Policy*. Baltimore: Johns Hopkins Press, 1973, pp. 115-52. "Land and Rent in Welfare Economics." In Marion Clawson, Marshall Harriss and Joseph Ackerman (eds.) *Land Economics Research*. Baltimore: The Johns Hopkins University Press, 1962. Pp. 141-67. "The Unwieldy Time-dimension of Space." AJES 20(5):465-81. October 1961. "Land Rent, Taxation and Public Policy." *Papers of the Regional Science Association* Volume 23, 1970. Pp. 141-53. "Privatizing Land without Giveaway." Conference on Social Collection of Rent in the Soviet Union, August 1990, pp. 1-58. Conference papers to be published 1991, Nicolaus Tideman and Adele Wick (eds.) "Economic Aspects of Water Resource Policy." AJES 28(2):131-44 (April, 1969). "Ground Rent and the Allocation of Land among Firms." In Frank Miller (ed.) *Rent Theory, Problems and Practices*. North Central Regional Research Bulletin 139 (University of Missouri Research Bulletin 810). Pp. 30-49; 74-82.

take a hand and assess the market value of water. It's that or the absentee speculators: take your choice. Thus far the choice has gone to the speculators; the results are neither just nor efficient.

10. "Indians are the Untermenschen of America"

Wrong, in part. Indians have many grievances (so do you); we have much to learn from Indian philosophy (and nothing to teach?); the Iroquois may have inspired our Federal system (it's still a moot question, and may be a passing fad); Indians gave us squash, maize, moccasins and potatoes (and tobacco, peyote and cocaine); Indians have dignity and noble bearing (and a high rate of alcoholism); Indians' ancestors were here first (mine were here before yours, though); Indians have treaty rights (I wish I did). All that, and more, I freely grant.

Americans take a dim view of privileges based on ancestry. Should Indians be an exception? The "aborigines" who happened to occupy parts of this land when Europeans arrived were the survivors of earlier and ongoing lethal struggles. They had displaced or were displacing earlier "aborigines." They allied with various Europeans to fight other Indians. They committed their share of atrocities. Their claims would seem no more ethically based than ours.

They have interbred extensively with Europeans and Africans over nearly four centuries, giving a new meaning to "we have met the enemy, and they are us." Can we not meet our moral obligations by taking them into our society as equals? We have, in fact, taken some in as our superiors. The Agua Caliente Band of Cahuilla Indians, for example, own some half of Palm Springs, California, a goodly heritage, where they collect market rents from "Anglo" and other tenants, in the same European tradition the Duke of Bedford applies in Grosvenor Square. That is better treatment than any Africans, or 99% of Europeans receive.

Tom Paine observed in his *Agrarian Justice* that the life of an Indian is a continual holiday compared with the poor of Europe. That was because the Indian enjoyed access to land and a living without paying rent. Indians believed the land is for everyone, a public trust. Chief Seattle's words are often cited. This is an aspect of Indian lore we are taught to revere; it would be ironic to turn it around to justify excluding most of us from the land.

Those who would fight for the underdog should consider the landless in America. The life of some Indians is still a continual holiday, compared to theirs. These landless ones are the true *Untermenschen*. They have nothing to sell but their labor power; they have to make the rent every month in order to have any right even to exist legally (for without occupying space on this Earth, how can anyone exist?); some sleep on sidewalks and under freeways; they are subject to income taxes and payroll taxes, when they are lucky enough to find work, and sales taxes when they buy; they enjoy no inherited lands or other privileges, but only the common rights and duties of all citizens.

As to water, they have no standing in court; they have no ability to put water to beneficial use, and hence to claim water permits that are given away free and with subsidies to those owning land; they have no voting rights in most kinds of water districts, even though said districts are organized under state laws, borrow the sovereign powers of the state, and are tax-

exempt;[59] they generally lack money to sustain court cases. These are the *Untermenschen* that concern me, and I hope you.

Should some Indians, or those claiming to be partly Indian, enjoy special privileges because some of their ancestors got here first? Think what else that implies and entails. The Hurons would demand the return of lands from which they were driven by the Iroquois; the Sioux from the Chippewa; etc. ad inf. Europeans would be ranked in order of their ancestors' arrival. Mayflower descendants might come next in line, along with Hudson Valley Dutch, and Hispanics from St. Augustine and New Mexico. The D.A.R. would be right up there, except they would be upstaged by descendants of Tories who lost their lands to victorious revolutionaries and fled to Britain and Canada. The Daughters of the Confederacy would be heard from, demanding back their ancestors' slaves that were taken from them by force. Irishmen and Germans would be ranked by when their respective ancestors arrived, generally taking priority over Jews and Italians of the next wave.

In California and the rest of the Mexican Cession of 1848, many old Spanish grants, fraudulently or unfairly alienated, would have to be returned. Native Sons and Daughters of the Golden West would get the next priority. Descendants of Brigham Young would pose an interesting problem: is priority patrilineal or matrilineal? Hastening on, Asians from the 19th Century would outrank Okies and Arkies from *The Grapes of Wrath*, who would take priority over Asians and Central American refugees of the 'eighties. The last wave can only join Woodie Guthrie's nice summary of life in the Golden West: "Believe it or not, you won't find it so hot if you ain't got that Do-Re-Mi."

Where would it end, if ever? Is that the kind of society we want? Is it a society at all? Could anyone enjoy quiet title to land anywhere? It seems more likely we should become like East Germany today, with multiple claimants for every parcel of land, and paralysis of production.

The problems are complex and philosophical, but I know a woman of action who, as women will, cut the knot with a stroke. Irene Hickman said "The solution is to give all the land back to the Indians, then tax it properly." Hmmm - think about it.

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[59]In the Irvine Water District of Orange County, California, there were recently 50,000 registered voters of whom only *four* (4) could vote in Water District elections. That is because the Irvine Company owns all the land titles, just leasing land to residents.

A notable exception to this pattern is the "Wright Act" Irrigation District of California. All resident registered voters are eligible to vote in districts organized under this Act. This exception was once the rule. These were the original water districts of the State, a product of the Populist and Progressive eras. Since then the franchise has been progressively narrowed.

The Irvine arrangement was revised in 1979, after heavy citizen pressure and a suit, O'Toole v. Irvine Ranch W.D., by a public action law firm, The Center for Law in the Public Interest. Until recently, however, the trend over decades had been toward lower levels of voter control.

11. "The cost of water is the cost of developing it."

Wrong! It costs $20/acre-foot to develop and distribute the water I get from the Santa Ana River, way down in Southern[60] California. Meantime, the State is wholesaling imported water half a mile from me for ten times as much, $210 per acre-foot. MWD is preparing to reclaim polluted ground water for more than that. The controlling idea is that pure, sweet water rising naturally in this arid region is only worth what it costs to withdraw it from the river. At the source it has no value, and may be lavished and wasted accordingly. It makes more sense to say water at the source has a high value, proven by people's willingness to spend $210/unit to buy other water just like it.

That's what economists call "opportunity cost." The true social cost of withdrawing water is the cost imposed on others by preempting it from them. It is the same as what FERC today calls "avoided cost," i.e. the cost of providing a substitute for what is taken. FERC (Federal Energy Regulatory Commission) has made good use of this concept, making electric utilities buy co-generated power from independent sellers at a price equal to "avoided cost."[61]

That's not the half of avoided cost, however, because State water is heavily subsidized in a dozen ways. Its wholesale price of $210 is way below the high cost of bringing it down here. State water comes from the Feather River, 600 miles north of us, and is pumped over the Tehachapi Mountains. Its true social cost is more like $2,000 per acre-foot, give or take a few hundred.[62] $2,000 is ten times what they charge for it, and 100 times what I pay for my local water.

A variation on this basic theme is to admit water has value at the source, but trivialize it by saying it is the historical purchase price, if any. Those few water holdings that are assessed as taxable property seem to be valued on this basis (LaBahn). This is like saying that Manhattan is worth no more than the $24 Pieter Minuit once paid the Indians for it: case closed.

12. "We don't use water consumptively, but return it to the river."

Half wrong. This is the rice-growers' refrain. They do indeed return part of their extremely heavy withdrawals to the river. (They also lose 3-4 feet per acre to evaporation.)

Carrying this a step farther, any water user could cite the Law of Conservation of Matter, and disclaim using any water at all (or anything else, for that matter). He returns it all to nature. In terms of the Laws of Conservation of matter and energy we consume nothing, we just turn it into garbage. Ah, but that is the point, isn't it: who wants garbage?

To understand the meanings of "use" or "consume" in economics we must think in terms of The Second Law, the law of entropy. The water user adds entropy (chaos, disorganization) to

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[60]Local boosters insist on the capital "S" in Southern California.

[61]The concept of "avoided cost" harks back to Henry George. He wrote that the value of a thing is not the past labor that went into it, but the future labor avoided by owning it (*Science of Political Economy*, p.249).

[62]No one ever could figure it out to the dollar, so cooked are the books. A major effort was made by Alan Post, 1982; a minor one by Mason Gaffney, 1982.

water. He takes in pure water, at high elevation, at a time and place of his choice. He returns less pure water, at lower elevation, at another time and place of his choice, however inconvenient for those below.[63] August water is worth many times September water; rice growers hold August water on their land and release September water.

As to water quality, many return flows are worse than no return at all. Up north, the notoriety of Kesterson says it all. Down south, manure piles around Chino say a lot, too. Abundant groundwater in the Chino Groundwater Basin "is currently untouchable because of poor quality." It is "contaminated with nitrates, byproducts of animal waste and fertilizers from the dairies and other farms in the area." (Salamon, 1991.)[64]

Water users also often preempt water from those above. On many streams the senior permits are downstream. Many fine legal careers have been made as downstream seniors enjoined upstream juniors from diverting water, to be sure a suitable amount reached the downstream intakes. A good deal of valuable elevation is thus dissipated to the benefit of no one.[65]

13. "You can't put a dollar value on a sunset"

Wrong! The market does it all the time, for example in pricing view lots. Putting a value on something simply means weighing it against other things. We do it every time we make a choice. It is a nihilistic cop-out to say we *can't* do it. We have to do it, and do every day in the course of living.

Mistakes are made, as with everything. Progress is a matter of doing it better. Jack Knetsch, now at Simon Fraser, and Marion Clawson, retired from Resources for the Future, have worked out ingenious practical ways to put values on parks, including those with water-based attractions (Clawson and Knetsch, 1966). Let's get on with such constructive efforts, and never be caught dead complaining we can't do something we must do.

14. "Common rights lead to the tragedy of the commons"

Half wrong, and misleading. Garrett Hardin in 1966 wrote as follows: "All men are, by nature, unequal ... man is an animal ... One World is a mirage. ... survival depend(s) on the fragmentation of the species into well-separated populations. ... It might be a matter of ... some sort of caste system, that would permit genetic isolation with geographic unity; ... " (Hardin,

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[63]Power companies, of course, are the greatest consumers of elevation. The tax on water "withdrawals" proposed herein would include a tax on power drops (British Columbia has long raised revenues from such a tax). It has often been alleged that power companies used "pigmy dams" to preempt power drops while underutilizing them (Legislative Analyst, 1957, p.8). If so, the proposed tax, based on putative full development, would prompt such development.

[64]Heaping irony upon manure, these fragrant piles in an urban area result from preferential low assessment of farmland, to enhance the environment.

[65]Consolidated People's Ditch Co. v. Foothill Ditch Co., 1928, cit. Gaffney, 1961. Elevation of water has great value, even if not used to generate power, because it allows free wheeling by gravity.

1966). This early effort, overtly segregationist, reached only a narrow audience whose views were running against a strong tide.

Hardin struck gold, however, with another phrase, "tragedy of the commons." Here the racism and elitism, if any is still intended, has become subliminal, socially acceptable, and liberally correct. Hardin's phrase has become part of the culture. The culture had already possessed Arthur Young's classic epigram, "The magic of property turns sand into gold," from his 18th Century *Travels in France*, but Hardin's new version swept Young down the memory tubes. Coupled with Hardin's companion "lifeboat theorem" (pull up the ladder, no more room aboard), it seemed to justify exclusionary policies at all levels. It sounded the right chord to reconcile genetic isolation with liberalism.

Analytically and economically, however, it does not hit the nail on the head. Overdrafting aquifers is a tragedy, all would agree. Aquifers are not a commons, however: their use is restricted to overlying landowners, on overlying lands. The tragedy of overdraft could also be ascribed to landowners' unconstrained assertion of private property rights. Overuse *per se* is the tragedy. Blaming it on common rights is biased and tendentious.

Asserting common rights need not imply open access and unrestricted use. It is often the opposite. Here are five examples of asserting common rights by restricting use:

1, constraining water use by taxing withdrawals;

2, constraining hunters and fishers by imposing bag limits;

3, constraining pollution of common waters by imposing effluent charges;

4, protecting watersheds by regulating timber harvest practices;

5, protecting swimmers and small boaters by limiting size and power of boats.

Our leading economists like to believe they are "value-free." When they truly become so, they will replace the "tragedy of the commons" with "the tragedy of overuse." The latter phrase is free of class and race bias. Overuse will often be ascribed to *suppressing* common rights, not upholding them.

15. "Water trades are win-win deals"

Partly wrong. There are "win-win" outcomes in water trading, but too many of them are "win-win-lose" outcomes. The losers are the general public who aren't represented. The "win-win" sloganeers unconsciously rule the unlicensed majority out of the game. Of course that is what licensees and their lawyers have always done, but the new win-win evangelist, the Environmental Defense Fund, enjoys tax-exemption supposedly to represent the general public.

What we're losing is beneficial ownership of water. It is wonderful when and if trading moves water to higher uses. Every economist applauds better allocation of scarce resources as readily as he jerks his knee, and chants "Pareto optimality." As to distribution of the gains, he is taught "don't worry, be happy," only churls quarrel over spoils. However, every sale or trade of existing licenses creates another "innocent purchaser" to legitimize and sanctify the seizure of common property by powerful individuals and the "public" water districts they control. "...

markets reflect and reinforce the existing distribution of water rights and wealth. ... " (Saliba and Bush, p.252).

It is not just common water that is thus traded away; it is subsidies attached to the water: same idea, but more obvious. In December, 1988, the U.S. Interior Department issued a water marketing policy to let recipients of subsidized water from its projects sell the water and keep the profit. The "innocent purchaser" would seem now to have secured a right to be subsidized in perpetuity: he paid for it, didn't he?

The swindle is so obvious you'd think no one had the brass to support it with a straight face. "Because I was robbed yesterday, ... is it ... any reason ... that the robber has acquired a vested right to rob me?" (George, 1879, p.365). Once you deny George's point and buy into the premise that usage creates property, nothing is too absurd, transparent or outrageous to follow. The policy follows the prescription published by The Institute for Contemporary Studies: "the water bank concept protects farmers from losing water they now have, and from paying more money for it" (Angelides and Bardach, p.33).[66]

The uncontrollable urge to give away the store is no longer limited, however, to Colleges of Agriculture or brand-labelled right-wing think tanks. "The policy was hailed by the Environmental Defense Fund, ..." (Levin, 1988). Resources for the Future chimes in, in the wooden postures of scholarly neutrality, "... federally subsidized water supplies have become property rights ... the most effective way to confront the issue of inefficient usage is to recognize those rights .... Rather than attempting to reduce the subsidies embodied in existing contracts, federal policymakers should seek to make the current property interests in federally supplied water more secure and to allow voluntary market trading of the resource among water users" (Wahl, pp. 3, 5).[67]

So this is where it leads, this promising talk about getting government out of the way of the market. To get it out, these writers would make government subsidies the permanent foundation of their system! They would make every boondoggle, every giveaway ever engineered through corrupt Congressmen and supple administrators into a property right.[68] They would bind taxpayers forever to incur costs of $60/af or more to deliver water for $3.50/af to landowners who can resell it for $400/af.[69] Consistently, we may infer they would bind taxpayers also to

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[66]It is to be feared that water researchers with the RAND Corporation may lean this way. (Phelps, Moore and Quinn, 1982; Moore and Quinn, 1984; Moore, 1991). Telephone interviews with Moore and Phelps, July 29-30 1991, indicate their position is not dogmatic, and they are sensitive to the distributive issues raised herein. How sensitive remains to be seen.

[67]Wahl is silent on the standing of those who have been getting water for excess lands in violation of Federal law. His clear implication, however, is in their favor on all points. This is no small matter. For example, Southern Pacific Land Co. owns 81,200 acres in the Westlands Water District alone (Villarejo and Redmond, p.46). Boswell has 24,000 acres. Both these firms have larger holdings elsewhere getting more subsidized water.

[68]Compounding the offense, Wahl wrote this at exactly the time that 40-year contracts on CVP waters were expiring and up for review. The whole point of those contracts, and the strife in 1948 on, and the Ivanhoe decision, was that subsidies were *not* to be perpetual. Congress has waffled since then, but there is no need to encourage them.

[69]This is the main policy pushed in the otherwise scholarly and useful study of Wahl, 1989. He premises it on pp.

subsidize farm price supports and export subsidies, maintain tariffs, cross-subsidize low farm power rates, finance cow-college R&D tailored to big landowners, etc. ad inf. This is the self-contradictory outcome of fundamentalistic rent-worship: the receipt of any state giveaway becomes a sacred cow the taxpayers are obliged to continue feeding and grooming in perpetuity.

Call it hypocritical, call it self-delusory, call it insane, call it anything, but don't overlook the message sent to future rent-seekers. In the name of the market, Angelides and Bardach and Wahl and the leaders of EDF are announcing to the world this policy: "once get your hand in the public treasury, you have established by prior appropriation a right to steal forever, and call it 'property'." Hirshleifer, Milliman and DeHaven, who helped start ideas of water marketing 30 years ago, were not out to sanctify subsidies, nor do I believe they would abide it now.[70] Their objective was to obviate monumental new development projects, not foster more. They would see clearly two points: a) the motive to agitate for new subsidies would be multiplied; b) the state would be rushed to bankruptcy.

An additional subsidy has gotten into the system by substituting water "banking" for water "marketing." It sounds like a distinction without a difference, but what "banking" means in practise is that a State agency buys water at a high price, and risks selling for less or not at all. This is the fate of the California Water Bank today, in spite of both droughts and State deficits. It has found one seller, the Yuba County Water Agency, with a "phenomenal water surplus." The Yuba agency is charging $45/a.f.(Bowman). It is not clear the water will all be sold. Late in August, 1991, after five years of drought, at the peak of seasonal water shortage, MWD is selling bank water at a huge loss, at bargain winter rates, water it contracted for earlier. The water is going into ground storage (Muir). Ground storage is a traditional route whereby small users cross-subsidize large ones (Fellmeth, 1973, 168; Teitz and Walker, 59-67).

"Win-win" has a constructive ring, (and is easier to understand than "Pareto-better," the Economese translation). No amount of happy talk, however, can blot out the basic fiscal truth: *no one taps the Treasury or grabs the public domain without hurting everyone else*. Those who steal public property in the name of the free market are not promoting the market, but exploiting its good name for private monopoly. They are the market's worst enemies: they stigmatize it with their own counterproductive greed, and give arms to its critics. T.R. said it long ago: he wanted to save the rich "from the ruin that they would bring upon themselves if they were permitted to have their way" (cited in Seckler, p.262). Who will save them, and us from them, today? Not, alas, think tanks subsidized to rationalize giveaways.

Water banking is a great idea, in principle. So is implementation of common rights. What we need is a "win-win-win" deal. We can have water banking *and* common rights: make water permits transferable, but only *after* permittees and contractors have paid for what they are

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3,5, repeats the point several times, and concludes with it on p.295.

[70]One may hope that the Rand Corporation will replicate the commendable consistency which I impute (I hope correctly) to Hirshleifer et al. Inauspiciously, Phelps et al. (p.38) show a propensity to vest the subsidies and carry on. However, I nurture a hope that these reasonable people will one day face the issue head on, and take a larger, "systems analysis" view.

getting. First, contractors getting subsidized water from Federal and State projects should pay the full cost of project services, i.e. without subsidy. LeVeen and King, for example, have outlined a workable program for the Bureau of Reclamation (LeVeen and King, 1985, pp. 148 ff.).

Second, the basic privilege of withdrawing rent-bearing water, surface or ground, should be subject to a user charge - a form of revenue enhancement we might as well call taxation. With growing demand and scarcity this, rather than other project costs as conventionally counted, is the pivotal matter. Severance taxes, property taxes, and gains taxes, in combinations of your choice, should do nicely. This way Smith wins, Jones wins, and the public wins (win-win-win).[71]

16. "Private property rights will make the market work; bureaucrats are the obstacle."

Wrong! In the 1940s and 1950s some bureaucrats (those awful people) in the U.S. Bureau of Reclamation tried to implement water pooling along California's Friant-Kern Canal (a facility well suited to it). They were implementing a policy of President Franklin D. Roosevelt, who consistently ordered that "all units of the plan should be fully coordinated on a regional basis" (Maass 1951, p.233 et passim). They promoted the "9(e)" or utility form of contract under which water ownership never vested in the landowner-customer, but only in the seller, who provided it to customers for a price: no pay, no water. Water had to be measured. Water could be exchanged. There was room for periodic review, renegotiation, repricing and reallocation (Graham, 172-90;[72] Taylor, 1949; DeRoos, Chap. 11).

The Bureau's avowed aim was to act like a public utility, so each reservoir and canal "would be operated in coordination with other reservoirs and canals in the comprehensive plan to deliver water to all areas in the most economical manner" (U.S. Bureau of Reclamation, 1949, p. 127; California Farm Bureau Federation, p.62 ff.). The concepts of planning, coordination and integration were not Federal impositions or New Deal innovations, as later alleged, but had originated in California as "The Marshall Plan" in the 1920s, promoted by Robert Bradford Marshall and other private citizens of California, notably Rudolf Spreckels the sugar baron.[73] The disputed 9(e) or utility-type contracts had also originated in California in 1935. The U.S. did not authorize them until four years later. California invited the Feds in to get Federal money.[74]

The Bureau wrote and spoke of "pooling," and "integration," and sending water "to whichever demand develops first." "Conjunctive use" of surface and ground reservoirs was a buzzword. They were, in short, to act on a regional scale the way city water departments act

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[71]U.S. Senator Bill Bradley was promoting a bill that would, as of May 31, 1991, include a gains tax of 25% on transfers. (Ellis, 1991.) What happens to the bill is another question.

[72]For a long bibliography see Graham, p.172, n. 440.

[73]Marshall was a former Colonel in the Engineer Corps who had retired to promote his dream as a private California citizen (Kahrl, 1978, p.51). For a less rosy view of Marshall, and discussion of Spreckels, see Angel, 1944, 60-67.

[74]Later yet, in 1959 California revived utility-type contracts in the Burns-Porter Act and the State Water Plan (Graham, 184-88), coming full circle. The State's position has not been marked by a high degree of philosophical consistency.

locally, and rationalize a Balkanized system. They were doing so only with new waters they developed, leaving existing uses undisturbed and unpriced.[75] They were doing so only as a wholesaler, leaving retailing to existing local districts (Maass, 1952, p.546). The contracting local districts could and did sell surplus contract waters outside their boundaries. Much of it was used for recharge.

Who opposed these market-oriented proposals? Big landowners, invoking Private Property. Apart from acreage limitations, "the principal public attack ... has been focused on the employment of the so-called 9(e) form of contract ..." (Graham, 172; Crampton, 99).[76] Landowner lobbies pushed for undisseverable attachment of specific waters to specific lands. "Appurtenancy" was their slogan.[77] "Pooling" was anathema; "integration" evoked images of communism and miscegenation,[78] and similar overheated reactions. The private landowners' concern was with distribution, not allocation; all they wanted was more.[79] Apparently they read the State's motto as "Bring me Men to Snatch my Mountains." The big landowners advanced "a moral claim to water in proportion to their landholdings, ..." (Taylor, 1955, p.478).

California's U.S. Senator Sheridan Downey was the landowners' leading spokesman. Here is what he demanded in 1947. "... *that the land and water should be joined together, never to be cut asunder*; that the farmers should enjoy in perpetuity the use of the water ...; that when the land is sold, the right to water shall also be sold with it, and that *neither should be sold separately*" (Downey, 1947, pp. 226-27, emphasis supplied). *Ipse dixit*, and *ipse* spoke for Private Property.

An allied writer found "the clue to the bureau's arbitrary and seemingly stupid actions" (as he put it) was its hidden agenda to transfer water to cities. "Sober Californians, however, realize that agriculture is the basis of the state's wealth, and that it must not be jeopardized" (Crampton, 102). In its 1957 Ivanhoe decision (reversed, as discussed below), the California Supreme Court

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[75]In this the Feds were much less radical than the home-grown Marshall Plan, in which the Kings River was fully integrated in 1927 (Jopson and Giannelli, Plate 2). The State Water Code, Section 105, says "... the State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest benefit" (*op. cit.*, p.1).

[76]For a bibliography on 9(e) contracts see Graham, p.172, n.440.

[77]They were invoking Section 8 of the Reclamation Act of 1902 which makes federally supplied water be "appurtenant to the lands irrigated." Big landowners sought to use this to establish permanent ownership in proportion to their holdings. Now they want to sell their surplus waters, that's different (Wahl, p.148). Ironically, the concept of appurtenancy originated with folk-hero John Wesley Powell (Terrell, pp. 198 ff.), whose aim was quite the reverse. Powell was assuming the land would be divided into small tracts, so to him appurtenancy was a way of assuring subdivision of water.

[78]"My water is better than your water, and must be segregated," was the belief.

[79]On the Kings' River, Pine Flat Dam developed new waters never usable before, called "overschedule water." The locals demanded it all (Maass, 1951, p.218). They also demanded full control of all storage space in the reservoir. They also demanded the power drops at Pine Flat and elsewhere (Kings River Water Association, 1950, p.11).

covered unappropriated waters with a right based on landownership, i.e. a new right modeled on the riparian law making water "part and parcel" of the land to which applied (Taylor 1957, p.83).

That does not leave much room for water marketing or banking. It does not support the belief that private property leads to free markets. Rather, it reminds us that the philosophical godparents of free markets, men like Francois Quesnay, A.R.J. Turgot, Adam Smith, David Ricardo, and J.S. Mill, were mostly engaged in fighting landowners who wanted protected markets.

Just so, an earlier spokesman for Private Property, Henry Miller the riparian, had successfully demanded that waters be made "part and parcel" of his riparian lands, letting him monopolize most of the San Joaquin River (Lux v. Haggin, 1886). Just so again, today's landowners want and get farm price supports, preferential tax exemptions, export subsidies, protection against foreign sugar, control of the cow colleges, and subsidized water.[80] By now we should have gotten the picture sharply in focus: Private Property is a distributive, not an allocative arrangement. The owners want their unearned increments first. Then, maybe, a little free competition will do, carefully measured out when it might add to their rents: otherwise not.[81]

Further to frustrate flexible water marketing, Sheridan Downey and the landowners invoked the complaisant Army Corps of Engineers. There was no domestic truce during World War II. The Flood Control Act of 1944 turned over to them several key rivers: the Kings', Kaweah, Tule and Kern, their flows never to be integrated with the San Joaquin or, for that matter, each other (Morgan, pp.70, 404; Kahrl, 1978, p.50; Maass 1951, pp.215-59; Gaffney, 1960; Cooper, p.158). Arthur Maass and Arthur Morgan describe this as "an enormous financial grab."[82] President Franklin D. Roosevelt complained "of the desire of certain large land interests in California to obtain irrigation and other benefits without being subjected to the repayment requirements ..." (Maass, 1951, p.235). Again, allocation and efficiency were sacrificed to promote distributive *in*equity.[83]

There's more; here is the smallest sample. The Kings River Water Association made 15 demands on the Bureau of Reclamation in 1946. #1 was that "*all Kings River water remain within the presently irrigated area*." #4 was that the Kings River remain a *separate entity* from the Central Valley Project (Kaupke, 1957, p.51). In 1956, according to Wahl, they secured

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[80]In 1982 they got the residency requirement repealed; in 1984 they were still working through Congress to force the Bureau to weaken enforcement of repayment provisions (Wahl, pp.149, 66).

[81]A complete survey of political forces would include private power companies, who opposed independently generated and distributed power from public multi-purpose projects, and had spiked State water power development in 1922 and 1924 (Sinclair, 1933, p.43). Their position was clearly anti-competitive.

[82]According to Morgan, the Corps next grabbed Maass, put him on the payroll and silenced him. I have no first-hand opinion on how fair that appraisal is, but Ballard (1980) later finds Maass indulgent toward the Corps and its clientele; Worster finds him "sympathetic toward agribusiness and its values" (Worster, p.255).

[83]The myth and cliche among standard economists is we must choose between efficiency and equity, but with landowner subsidies like these they have it backwards. Given time and space one could headline and number this as another grand Fallacy.

permanent rights to federal project water "within the boundaries of the contractors' district" (Wahl, p.175). In 1979 they were *still* fighting the Bureau of Reclamation, and their neighbors, going to great lengths to distance themselves from the neighboring Westlands Water District (Leake and Barnes, pp. 19-20). Balkanization was Americanism.

Now, however, the California "water community" is ready to move water around, it is the free market at work. "Everybody wins" with happy faces, because we are to give away unearned increments in the process. Forty years ago, when Federal bureaucrats tried to create a flexible market in water, it was "Communism," "fellow-travelling," and the baleful influence of Henry Wallace and James Roosevelt (Downey, pp. 30, 40, 41, 49, 167). A California trial judge ruled that the Bureau of Reclamation was "Marxian" (Albonico v. Madera I.D., 1951, p.10, cit. Graham p.74, n.236). "What partisan motives, what ideology, what pathological processes, what mysterious political influence ..." moved these sinister people? (Downey, p.49). Could it depend on whose ox was being gored?

There was an ancillary policy, acreage limitation, that also offended big landowners.[84] It is not clear which issue aroused them more, but the two together made the Feds, who had been welcome to subsidize their water supply, their target (Cooper, pp. 154-66). There was nasty snarling[85]. Bureau personnel were "Communists," supported by the *Daily People's World* (Worster, p.251, 254; Downey, p.41; Kirkendall, 1964, pp.200-01). Efforts to pool waters and integrate the system are "... a careful, fully conscious and deliberately planned attempt to bring about in the U.S. the same kind of collectivization they have in Russia" (Kings River Water Association, 1950, p.15). Covering all bases, they add "... Fascism is exactly what we will get" (*op cit*, p.19).[86] Trading on the anti-Federalist bathos helped people forget that full integration of all Sierra rivers was the essence of the California Marshall Plan of the conservative 1920s, approved by the State Legislature.[87]

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[84]John Wesley Powell's idea had been to induce subdivision of land by subdividing water. This idea had been incorporated in the Reclamation Act, 1902. It has never been repealed, although deeply subverted. George Chaffey in 1882 at Etiwanda and Ontario had developed another approach, subdividing land and water at the same time through the device of the mutual water company (Alexander, pp.32-34), dominant in southern California. Mutuals, in spite of the name, are not true coops because voting is based on acreage.

[85]I have discarded the vituperative pamphlets that used to flood the mails. Some of the rasping, grasping spirit is preserved in the following which I have saved. "The Kings River Story," and other headings, *Western Water News*, April, 1957; Chas. Kaupke, 1952, "Summary of Developments of the Pine Flat Project," Fresno: Kings River Water Association; Kings River Water Association, 1951, "The Kings River Primer"; "Contract Cases before the State Supreme Court," *Western Water News*, April 1958.

For a long bibliography of this "literary exchange of unpleasantries" see Graham, 196, n. 528. It begins: "Kaupke Denounces Reclamation Bureau as Communistic and Untrustworthy," and runs on at that level of discourse.

[86]The Kings River Water Association, publisher of those unpleasantries, is organized much like the MWDSC (analyzed below). Power is insulated from the voters in tiers, with an appointed Board weighted to underrepresent populous, democratic irrigation districts (Fresno, Alta and Consolidated) (*op cit*, p.6), and give power to a few big downstream landowners through landowner fronts without any democratic franchise. There is an Executive Committee appointed by the appointed Board, and a powerful watermaster-spokesman at the apex.

[87]Specifically, there was to be a Friant-Kings Canal, serving the lower Kings area from the San Joaquin; and a

Traducement anticipates persecution. The lobbies played very hard ball. The spirit was mean and vindictive, as if to verify Steinbeck's image of Valley growers with pick-handles. A complicit agency, The Bureau of Agricultural Economics in the U.S.D.A., was singled out for attack in Budget Hearings for 1946-47. Its offense was to shelter Marion Clawson, Mary Montgomery, Edwin Wilson and Walter Goldschmidt in its Berkeley office. They had supported the Bureau of Reclamation by conducting landownership surveys and planning studies of the project area, and reporting on the unequal distribution of land to receive project waters (Worster, pp. 245-49). "The upshot of this ... was that Congress made deep cuts in the BAE budget ... With budget cuts resulting from their objectionable work they (Marion Clawson and Mary Montgomery) were dropped by BAE, as was natural" (Downey, p.52). Walter Goldschmidt and Edwin Wilson were also "separated from the Bureau" at this time (Downey, p.256; for Clawson's perspective, v. Clawson, 1987, pp. 150-60; for more on Goldschmidt, see Taylor, 1976).

California sets trends. The McCarthy era followed. Joe McCarthy's local counterpart, Jack Tenney, ran an inquisition in Sacramento[88]. The University made professors sign a loyalty oath. Senator Downey published long *ad hominem* attacks on Richard Boke, Bureau Chief in Sacramento, and caused his salary to be suspended for nine months, a virtual Bill of Attainder that was revoked only upon the surprise election of Harry Truman in 1948 (Taylor, Vol. II, p.193). George Sokolsky and Fulton Lewis, Jr., inflammatory columnists, joined the pack in full cry (Kirkendall, 1966, pp. 223-25). The BAE was never forgiven, and was "disappeared" in 1953. They called it a reorganization. Heads rolled. Careers in the U.S.D.A. and the Bureau of Reclamation were broken or made, survivors cowed.

Even Clawson, a strong man who survived and prospered, became cautious and cynical. Reviewing the matter recently he writes he learned this lesson: "Follow not too closely at the heels of truth, lest she kick your teeth in" (Clawson, 1987, p.160). Donald Worster sees young Clawson as a "devoted New Deal liberal" (Worster, p.245). Sober-sided, scholarly Richard Kirkendall, reviewing Clawson's correspondence in the National Archives, describes him as having been "passionately involved" (Kirkendall, 1964, p.206). Clawson's later career has been productive and creative, but "passionately involved" he has not been. According to Worster, he had "surrendered" as early as 1944 (Worster, p.253), although that did not stay the persecution.[89]He never again touched the region or the issue.[90]

"Kings-Earlimart" Canal tapping Pine Flat and using the elevation thus conserved to carry water south (Jopson and Gianelli, Plate 2).

[88]In Kern County this era may never end. Stuart Pyle, longtime Director of the Kern County Water Agency, once called me "communistic" - me, a Winnetka product who voted for Tom Dewey and his running mate Earl Warren to revive free enterprise! - because I suggested plugging leaks in the California Water Plan delivery system by controlling or taxing pumping.

[89]Worster may be harsh. Clawson was outnumbered, and tried to salvage what he could in a compromise. It didn't work: the opposition refused to sign anyway (*Acreage Limitation*, 1944).

[90]I saw him nearly daily from 1969-73. He did not warm to discussing this topic.

Walter Goldschmidt, too, has prospered, even within the University of California system. He adapted, however, by transferring his studies to Africa, far from the AES[91] and its turf. The tragic Sheridan Downey, ill-starred and self-destructive money-servant,[92] still reached from the grave to inhibit his survivors.

The treatment of Wells Hutchins was friendlier. Hutchins wrote USDA and AES bulletins about the sanctity of property rights in water. His pamphlet on *Irrigation Water Rights in California* (Hutchins, 1954, rpt. 1967) gives the flavor. The title page is gratuitously emblazoned in headline type, WATER RIGHTS ARE PROPERTY RIGHTS, repeated boldly on p.11 in a bright blue frame. The heading on p.11 also says "The water right is real estate," although the text does not support or even mention it. That is the message and the style. The quality is variable: Hutchins was capable of good work.

The waterlords found it useful. "States' Rights" was their theme, and they needed authoritative sacred writings from a known friendly source. After Hutchins reached 65, The California Water Council and the National Reclamation Association asked Secretary Ezra Taft Benson to keep Hutchins on a "retired annuitant" basis, which Benson did (*Western Water News*, February 1958, p.1). Hutchins was kept on the U.S.D.A. payroll 17 more years until his death in 1970, aged 82. It took seven more years for two other writers to complete his *Water Right Laws in the 19 Western States*. The handsome, expensive publication of these three volumes breathes endorsement, legitimacy and approval. Wilson and Clawson's classic BAE study of landownership concentration, in contrast, is cheaply mimeographed, barely legible, and hard to find;[93] Goldschmidt's classic study was suppressed, and had to be published privately.

If you want to credit private property with supporting free markets and fair play, in water, land, outputs, ideas, or promotions and retirements, pause and review this object lesson. Theodore Schultz wrote of it, "To understand the vulnerability of the BAE one has to appreciate the profound unfriendliness which these organized political forces ... feel for agricultural economics research that does not provide the 'right' answers." (Schultz, 1954, p.19.) He had been there, having been bounced from Iowa State University for finding oleo to be as good as butter.

Thus it is that "government" water agencies become really private agencies masquerading as public ones. They enjoy government powers and immunities, but carry water for the private landed establishment. This in turn harks back to the original distribution of landownership, when politicians distributed public lands to private parties on highly political criteria (if corruption and

[91]The AES has long sided with the big owners (Kirkendall, 1964, p. 201; Worster, p.251). The following from another state lays it right out: "...agricultural economists ... have a vested interest in continuing their present relationship with farmer clientele which could be jeopardized if the agricultural economists were viewed by farmers as opposing the interests of farmers" (Scott, Jr., and Chicoine, p.11).

[92]It is tempting to see Downey as the Judas of Upton Sinclair, but that is perhaps too simple. Sinclair (1934) campaigned for *California* reform, explicitly opposing control from Washington. Downey, opposing a Federal agency, was in that limited sense true to Sinclair. Otherwise, Downey does seem to have turned against his earlier professions.

[93]It calls to mind a sagebrush ballad of Clawson's youth, the one about the straight narrow path.

jobbery may be so dignified). Subsequent laws are twisted in application by the political weight of the original beneficiaries and their successors interlocked in power at the apex of the pyramid.[94] They get away with it because the original land grab gives leverage and power to get more, and most people go along to get along, weakly and meekly.[95]

More recently, in 1978 both the Rand Corporation and the Governor's Commission to Review Water Rights Law proposed a few mild and politic controls on waste, and facilitating transfers. Senator Nejedly's proposals in SB 1361 were so mild that DWR even supported them, "but the powerful agricultural and land development interests" - i.e. Private Property - blocked legislation to implement them (Dennis, p.60).

Let us not leave this topic seeming cynical. In 1958 the U.S. Supreme Court, under California's former Governor Earl Warren (R), stunningly reversed the trial and appellate courts, and a divided California Supreme Court, and unanimously ruled that the U.S. Bureau of Reclamation held water in its own right, not in trust for landowners of the contracting districts. If there was any implied or constructive trust, it was on another principle: "The project was designed to benefit people, not land" (Ivanhoe v. McCracken, 357 *U.S.* 275, 1958, 296-97). The 9(e) contracts were valid (*op cit*, 299-300).[96]

Thanks to that decision it is possible to market federal water today (Graham, 172-90).[97] The California Supreme Court, shot down, had to eat humble pie and admit their misuse of the trust doctrine. "(I)t was established that the title of the U.S. was or can be made unlimited" (53 Cal. 2d at 716, cit. Graham 101).

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[94]High-income farm corporations today are not sharply different from the 1930s, while princes and wise men come and go. Some top incomes in the 'thirties went to Limoneira, Corona Foothill, Irvine, Kern County Land, Sutter Basin, Miller and Lux, Calpack (Del Monte), J.G. Boswell, El Tejon, etc. ("California Agricultural Background," 1939, pp. 22851 ff.)

[95]Cf. the limp apology of Angelides and Bardach, pp. 33-39, and Wahl pp. 181-85. To their credit, they at least felt some *need* to rationalize.

[96]Paul Taylor deserved and got credit for anticipating and contributing to the Ivanhoe decision (Taylor 1955, 1957). I will always remember the sight of him hours after the decision, high-stepping along Piedmont Avenue in Berkeley, vindicated at last, bursting with triumph, levitating, as it seemed, above the sidewalk. If ever a man entered heaven on earth, Taylor did that day. Yet ironically his main passion, the 160-acre limitation, continues to be frustrated and subverted in implementation on Federal projects (Villarejo and Redmond, 1988). The State by-passed it completely, proceeding immediately with the westside California Water Project, in the Burns-Porter act of 1959. Edmund G. Brown, the Attorney General who had won Ivanhoe, as Governor Brown turned coat and engineered the CWP sans acreage limitation. What endured was the utility-type contract which the state adopted and uses (Graham, 188-90). Thus, Taylor's battle for acreage limitation ended up saving the legal basis for water marketing.

[97]Graham was a lawyer, at times an adjunct Professor at Boalt. Phelps et al., p.38, do not see it his way. They apparently believe the trust theory still stands, outside the Federal CVP. They cite no legal opinion, however, and lacking that I am staying with Graham, subject to the uncertainty always felt about future court opinions and decisions.

Arguably, it is also the Ivanhoe decision that makes it possible to market State water. In the Burns-Porter Act of 1959, the State's answer to Ivanhoe, the State elected to use utility-type contracts on the 9(e) model (Graham, 188-90).[98]

It is not to despair; rather, let us learn the right lesson for future guidance. Do not look to Private Property to give us free markets. The white hats were a handful of idealistic populist battlers who persevered against ridicule, misunderstanding, indifference, the press, the landed/monied establishment, and daunting odds. We've always suspected democracy depends on such die-hards; "New Resource Economists" need to learn free markets depend on them, too.

17. "Appropriative water licenses are intensely democratic, like squatters' rights. Everyone has had an equal chance to appropriate water, and rights are based on use only."

Wrong! First, you need to have been born long ago, in the right place, of Caucasian parents.[99] A fast draw didn't hurt; neither did low ethics and political connections.

Second, you need to have had land whereon to use the water beneficially: a water license is usually "appurtenant" to specific land.[100] Landownership in the southwest has been highly concentrated from an early time.[101] It remains so in recent times.[102] All three major doctrines of water law (riparian, appropriative, and correlative rights/mutual prescription for ground water) in effect restrict control of water to those with prior landownership.[103]

Third, you need to have had ample front money to appropriate water. Remember, the appropriative rule "first-in-time, first-in-right" motivates rent-seeking. Rent-seeking means

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[98]This does not stop the State contractors from pressing extravagant claims about their contract "rights" to waters never yet delivered, and perhaps never deliverable. Legislators routinely leave many loose ends for some future court to resolve.

[99]Even the progressive Newlands Act of 1902 reads "no Mongolian labor" on work crews. As late as 1924, socially-minded Elwood Mead excluded non-whites from his land settlements at Durham and Delhi (Worster, p.183). Over Hilgard Hall at Berkeley is still inscribed, "To Preserve the Native Values of Rural Life"; an ag professor once told me pointedly what "Native" means to some of the people in the Giannini complex there. The Chinese Exclusion Act, inspired by California's Denis Kearney, was renewed decennially until 1943.

[100]This is a concept and device to assure water is distributed to big landowners, and make a legal fiction of the "principle," often carelessly repeated, that appropriative rights are independent of landownership. Appurtenancy, having served its appropriative purpose, is let lapse when licensees want to cash out their surplus waters. Cf. note 4.

[101]Bryce, II, p. 386; Gates, 1975, 1978; George, 1871; *Large Landholdings*, p.12 et passim; McWilliams, 1939; Taylor, 1979, *passim*; Worster, pp. 98-111; Robinson; Henley, 1969; Zonlight, 1979.

[102]*Acreage Limitation*, pp. 12-13; Wilson and Clawson, 1945; Graham, pp. 109-21; Worster, pp. 243-47, 291-302; De Roos, 1948; Villarejo, 1982; Villarejo, 1986, p.106; Fellmeth, 1973, pp. 3-25, 163-80; Roberts, 1971; The U.S. *Census of Agriculture*; *Landownership Survey*, p.26; Goodall, 1991; Gottlieb and Wolt, pp. 500-509; Taylor, 1979, *passim*.

[103]A water district owns little land itself, but holds water licenses in trust for landowners of the district. Thus water allocation inside the district is proportional to landownership (Dennis, 82, citing Rand Corporation).

investing capital decades before any payout. That means front-money wins, front-money gets, front-money rules.[104]

One commonly reads that the appropriative doctrine originated with the 'Forty-niner miners in the northern Sierra, along with their possessory placer mining claims. That would make it as intensely democratic as squatters' rights. However the history is disputable,[105] the resemblance specious, the analogy false.

Placer mining claims were narrowly limited in space and time. They were just "ten feet square" in the good locations (Robinson, p.137), which were ant-heaps, but without the community spirit. One claimed only as much land as he could work himself, and guard constantly. Chinese squatters were driven away, perhaps killed. It was a nasty, brutish life, fit for the wretched and the reckless. Water claims, in contrast, are limited only by one's lands.

As to time, placer mining claims expired when the mines ran out, usually soon. The idea was to get in and out fast. Water diverted to wash gold would be needed only temporarily. Under these conditions it was plausible for the California Supreme Court in 1855 to invoke a natural rights doctrine, ruling that prior appropriation was fixed by "a universal sense of necessity and propriety."[106] Water was for immediate use, not future rent-taking. John Locke would have approved. Henry George did approve: "... it was by common consent declared that this gold-bearing land should remain common property, of which no one might take more than he could reasonably use, *or hold for a longer time than he continued to use it*" (George, 1879, p.286, my emphasis).

Water, however, flows on forever, yielding rents that grow and grow. Rent-seekers didn't go for the gold, which was toil, strife and hardship, soon exhausting both men and land. True rent-seekers went for the water, and inexhaustible lands to use it on. Long-term rent-taking is not fixed by "a universal sense of necessity and propriety," but is thoroughly anti-Lockeian. It was born in the minds of rent-takers and their apologists, not in the creeks of the Mother Lode country.

How about beneficial use, and "due diligence"? These requirements are laxly enforced, but just to double-bar the gate, State filings have been exempted from due diligence. The State thus reserved waters for its State Water Plan. This Plan, finally authorized and financed in 1960, is specifically designed to carry water for the primary benefit of a minuscule handful of the Lords of Creation owning all the land on the west side of the San Joaquin Valley and Tulare Lake Basin. Any resemblance between this and squatters' rights is only in the peculiar Australian sense.[107]

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[104]To fortify the point, lawyers developed the ancillary doctrine of "relation back." This means water goes not to the rival who can divert it first, but the one who starts building his works first. Think about that incentive structure.

[105]Modern scholarship is finding an older lineage (Anthony Scott, ms in progress; Sax, 1990).

[106]Irwin v. Phillips, 5 Cal. 140, 146 (1855).

[107]Most readers know that in Australia "squatter" means a large land monopolist.

18. "A super-district like the Metropolitan Water District of Southern California will rationalize the system and solve our problems."

Wrong! I was once enamored of this idea, and guilty of pushing it. A large system, professionally administered, would overcome pig-headed Balkanization, set reasonable, cost-justified rates, coordinate, conjoin, and synchronize plans and operations, and maximize the common welfare. Attorney Albert Henley has long argued for "super-districts," and presented his own Santa Clara Valley Water Conservation District as the living proof (Henley, 1957). Leland Graham has argued larger districts can achieve more "pure economic efficiency and a higher degree of equity among ... beneficiaries of what fundamentally is a publicly-owned resource" (Graham, 193-94). It seemed so reasonable, so feasible ... Then I got to know MWD as it really is.

MWD is run by a Board of 50 Directors, representing 27 cities and districts that it serves. These Directors are not elected but appointed, resulting in an "old-boys' club" where some Directors sit for over 30 years. Business is conducted by committees; seniority is a ruling factor. "Not a single member of your board is elected by the people, yet you collectively assert the right to pass on statewide policy" - Governor Pat Brown, 1960. Half the Directors are developers or large landowners; others own engineering or construction firms, or banks that lend to them (Dennis, p.128).

How about the elected officials who appoint the Directors? Those from cities are elected on the basis of "one-person-one-vote." Those from several outlying districts are elected by a land-based franchise: "one-dollar one-vote" - thank you, Sacramento, for delegating the people's sovereign powers to these landowner-owned districts[108]. Control may be completely non-resident. Representatives from landowner-owned districts remain the same from election to election, gaining seniority to dominate the 50-person Board and its ruling committees (Goodall et al., 1978, pp. 97-98. Bradley and Morales, 1981.) "At times the control of public government -- in this case the water district -- by private organizations may be complete." (Goodall, et al., p.98)

Example: when one Lansing Eberling resigned as a Director of the Irvine Ranch Water District, the Irvine Company recommended its Corporate Secretary and Vice President, Warren Fix, to fill the vacancy. The Board then simply appointed Fix. (Hall et al., *Stipulation*, p.7).

Thus a handful of speculative landowners, some living in other countries, have as many votes as millions of city residents. Accordingly, MWDSC preaches water conservation and guilt-tripping to the conscientious middle classes in the cities while it keeps annexing new speculations, and serving new developments with artificial lakes and golf courses. They plunge ahead, heedless of five years of drought, and their own water-conservation jawboning. It is probably no accident that its current Chair, the one who frets that some voters just "do not understand," was appointed a Director of MWD by the Board of the Western Municipal Water

[108]This is done through the California Water District Act (Water Code Sections 34000 *et seq*.) The original water districts in California were "Wright Act" Irrigation Districts. Products of the populist-Georgist era, they were and are controlled by popular vote. Large landowners put through the later Water District Act to fend off popular control.

District of Riverside County, an area dominated by land speculators.[109] Many economists have criticized MWD's persistent refusal to consider any kind of economically rational, cost-justified rate structure.[110]

To give a notion of how this works, consider the Newhall Land Partnership. It holds 123,000 acres, mainly in Los Angeles and Ventura Counties, from Valencia and Magic Mountain west down the Santa Clara Valley of the south toward Piru and Fillmore. The Newhall family controls the public partnership, with 40% of the shares [L.A. *Times*, 3-86, 8-87]. The Newhalls are developing the city of Valencia, but slowly: 7,000 of its 10,000 acres remain undeveloped.

The Newhalls were early, major financial backers of the political campaigns for the 1982 Peripheral Canal bond issue to bring more northern water south[111]. MWD was the front. The purpose of this proposed project was to valorize speculative landholdings on the fringe of the southern megalopolis. They joined in this campaign with other large development interests: the Irvine Company, Southern California Edison, Security Pacific Bank, Rockwell, Mission Viejo (the O'Neills), Bixby Ranch, and Union Oil [L.A. *Times*, 1-80]. Yeager Construction Co. (highways and landholdings) led the campaign in Riverside County.

MWD solicitude for speculative landowners does not stop at its boundaries. It has a history of releasing a large part of its entitlements in California Aqueduct water to a few water districts in Kern County.[112] It has gone along from the start with pricing policies egregiously unfavorable to its own people, to subsidize the Kern County Water Agency (Storper and Walker, 1984). This agency serves lands straddling I-5, owned by a few major oil companies in which MWD Directors have significant interests.[113] Another huge owner is the Chandler family, whose interests include the Los Angeles *Times*, and the vast Tejon Ranch and (part of the) J.G. Boswell

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[109]She was appointed in 1976 to replace her deceased husband, James Krieger. It is no disrespect to his memory, or to her personally, to point up the impropriety of treating public office like family property. It says a lot, however, about the power and mindset of a tight circle who call themselves "Southern California's water community" (MWDSC *Focus*, May, 1990, p.7).

[110]MWD has built up a surplus, or "rate stabilization fund," that it uses to avoid peak-load pricing. It also taps the fund for "interest-free" expansion capital (Krieger, 1991).

[111]Curiously Scott Newhall, then editor of the *San Francisco Chronicle*, had opposed the 1960 California Water Plan, predecessor of the (aborted) Peripheral Canal, "criticizing the southern California penchant for population boosting." (Gottlieb, p.505) It seems probable that Scott Newhall, a respected pro in the ancient center of anti-southern power, had other priorities then. At that time Newhall lands were well outside the urban penumbra. Their traditional citrus empire enjoyed prior claims on the Santa Clara River of the south, and Federal aid building Matilija Dam on Sespe Creek to regulate it.

[112]These Kern County and Tulare Lake Basin landowners are also organized in districts with the land-based franchise, one-dollar one-vote. They favor the "Water Storage District" form. Some of their names are Arvin Edison, Buena Vista, North Kern, Tulare Lake Basin, Rosedale-Rio Bravo, Semitropic, and Wheeler Ridge-Maricopa (Graham, 207-08, n.577). There is not much chance for local residents to assume democratic control of these districts and adopt policies favoring small farmers. The Kings River Water Association is organized in manner analogous to the MWDSC (Kings River Water Association, 1950; Taylor 1949, p. 249).

[113]These interests are disclosed in MWDSC, April 10, 1981, "Answers to Commonly Used Arguments against the Peripheral Canal."

landholdings of the southern and western San Joaquin Valley (Gottlieb and Wolt, pp. 500-509; Villarejo, pp. 3-10).[114] The *Times* spearheaded the Peripheral Canal campaign[115].

That is not to disparage the MWD ideal. It's the practice that is faulty, and the problem is the same as with the U.S. Bureau of Reclamation: landowner domination of what should be a democratic institution. The remedies are the same as those advanced by Progressives like Hiram Johnson (R) and Woodrow Wilson (D): democratic control with professional leadership.

That seems so long ago as to be irrelevant, but I wouldn't despair. What destroyed Progressivism was The Cold War, which really began in 1919 with The Palmer Raids and is only now just ending. This seems a good time to pick up where The Progressives left off. The old bones are stirring. Merrill Goodall's studies have analyzed the problem. The Center for Law in the Public Interest, representing the disenfranchised citizens of Irvine, won its 1979 case forcing reform of voting in Irvine Ranch Water District. It's a matter of marshaling a few troops to win the battles of democracy. As Clarence Darrow said, "Authority is nothing more than what the rich and powerful can put over on the rest of us."

19. "A severance tax on water withdrawals would destroy incentives and hurt the economy"

Wrong! Americans are reared on anti-tax slogans; "down with taxes" is what "economics" means to half the people. Let's pull together and review, however, what we've already said about this. When you pay for water, you often shift to higher-valued crops. You substitute capital and labor for water, raising yields. Thus, we can tax water withdrawals without wrecking the water economy, but getting more bins and bales for the bucket. Here is a kind of tax that raises revenue while strengthening the economy (item 5).

We must control pumping to prevent overdraft, if any system of surface control is to work. A tax is nothing but an economic price charged by the owner of water, the state, to control the use of its property (item 6).

Common rights may be asserted as open access, where that is feasible; or rights of revenue, where efficient management calls for closing access. Not only would the tax-price raise revenue, it would promote conservation and efficient use, turning "Negabucks into Megabucks" for state treasuries and their trustors, the people (item 10,A).

Water markets do not work today because sellers are not strongly motivated. Most sellers are at most weakly motivated because water permits are not subject to any cash drain, and prospective selling prices keep rising indefinitely. To overcome this resistance, we need to

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[114]It would be reasonable to surmise that the *Times*' editorial position is driven mainly by an interest in boosting its circulation. However, Dean Misczynski has shown that a project furthered by the *Times* in 1984 would have had Southern California pay 61% of the cost to get 8% to 13% of the water (Staff Report, *Avocado Grower*, December, 1984, p.10). That seems a dubious way to boost local prosperity and circulation, leading one to imagine other motives like valorizing Kern County landholdings. There is ample precedent from the 1913 "Chinatown" case.

[115]Upon losing, the *Times* showed its pride by running a Conrad cartoon of northern California, whose votes had beaten the project, as a giant male figure spitefully urinating south over the Tehachapis.

subject water licenses to heavy property taxes (or the equivalent) based on their opportunity cost values (item 10,C).

Taxes on water would let water markets work without granting unearned increments to speculators in water rights (item 10, D; item 16).

Taxing water withdrawals is a practical way to express common rights to water under conditions when it is not practical to allow open access (item 15).

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There, then, are 19 fallacies to filter out, and some better ideas to replace them, as you set about implementing common rights to water. Be warned, though, that I have been scolded for speaking out on public policy. Academicians should maintain silence before practical persons, I am told, and never, never give any answer to "Whose Water?" other than "The present property owners, of course." How should one respond?

Academia is not the safe haven of legend; it is penetrated by the jungle. Much of the system has been coopted, with rewards for those who fawn and truckle, and penalties for those with more dignity and dedication. To the extent that academicians are free to tell the truth without running, be glad. Society needs people to honor the memory of John Wesley Powell by acting in his spirit, withdrawing their consent from error and corruption. Being funded by the taxpayers, without compulsion to cater to wealthy patrons, academicians in public institutions have an unusual chance to speak for the public interest.[116] We would be derelict not to.

We all have to work in the system to live. Some also manage to invest in the system, to rise above subsistence. One goes along to get along. However, it's not just the going along that implies consent: it's the compulsion to rationalize and defend going along. Withdrawal of consent has to start in the mind, and be conserved and nurtured there during adversity. The uncoopted mind is your bridge over troubled waters to the rest of the human race. We have to survive, but we don't have to love Big Brother. Revere your mind, don't ever give away your freedom, not even to your material interest. The last is only of the moment, a ripple in the ocean, and is probably adverse to that of your own children. Your free thoughts are for everyone, forever.

"Let us cherish and keep this one part of our lives,

and the rest we're going to find one of these days."[117]

[116]This freedom may not last forever. In recent years, public universities have begun depending on private donors, too. Faculty at one U.C. Campus have been admonished by a vice-Chancellor to placate prospective donors.

[117]Thanks to Peter Yarrow, and to my daughter Ann who taught me this secular hymn.