

AGAINST THE CURRENT: FOUR DECADES IN WATER LAW AND POLICY

BY

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I was born within a couple hundred yards of the Missouri River in Fort Benton, Montana. I grew up a couple hundred miles upstream on Sourdough Creek, which flows into the East Gallatin River, and then into the Gallatin River which joins the Madison and Jefferson Rivers to form the Missouri. The fishing in Sourdough Creek was always good. One summer my mom and I pulled over 200 trout from Sourdough. We ate everyone one of them. No catch and release for us.

Dr. Roland Renne, who was president of Montana State College and later ran for governor as a Democrat, gave me permission to fish on his farm. I think I had an exclusive franchise, so the fishing was particularly good there. I supported him for governor, but he lost, so I became a Republican and went back to fishing. Sometimes I would walk a quarter mile across the valley to Spring Creek, a smaller stream with bigger fish for some reason—probably a combination of fewer fishermen and better food supply for the fish.

I don't know how the fishing is today in Sourdough, but I still fish Bridger Creek on the other side of Bozeman and never come home empty handed. Still no catch and release for me. There's nothing like fresh trout for breakfast.

My Dad was an agricultural economist at Montana State College. He grew up on a dry land wheat ranch ten miles south of the Great Falls of the Missouri River. His dad, whose name was James Lloyd Huffman (which explains the Roman numeral II on my birth certificate and passport), grew up in Rileysville, Virginia, and homesteaded in Montana in 1910.

I drove truck during harvest and helped with seeding in late summer. In a good year they might get forty bushels to the acre, but some years they only got ten. There were only 480 acres (320 homesteaded and 160 leased) and half of that was in summer fallow and a bit more was lost to alkali.

Maybe that's why my Dad's specialty was irrigation and water policy. He wrote a book about it, *Irrigation Development and Public Water Policy*, published in 1953.¹ Along the way he served as Head of the Agricultural Economics Department, Director of the Water Resources Research Center, Dean of Agriculture and Director of Experiment Stations, and Vice President

¹ ROY E. HUFFMAN, *IRRIGATION DEVELOPMENT AND PUBLIC WATER POLICY* (1953).

for Research at Montana State. We still go to Bobcat games in his honor—and because we are fans.

My Mom grew up on a farm outside Miles City, Montana. It's a Godforsaken place to be a farmer. One hundred ten degrees is not unusual in August and it's a rare winter when you don't have a week or two at forty degrees below zero.² Average annual precipitation is about thirteen inches,³ but you lose some of that when all the snow is blown off to North Dakota and beyond. With a few thousand acres of leased Bureau of Land Management land and a couple hundred acres of irrigated cropland along the Yellowstone River, you could raise a few cows and almost as many kids.

My granddad on my mother's side emigrated from Switzerland when he was seventeen. He got tired of hauling baskets of eroded dirt back up the steep slopes of the family vineyard in Thal, a small village near Lake Constance. Eventually his parents and three brothers followed him. I guess they got tired of it, too. He preferred irrigating the parched lands of eastern Montana. His technique was simple. After sunset, you turn on the water at the top of the field. You ride your horse to the bottom end of the field, throw down your bedroll, sleep until the water wakes you up, and then move on to the next field.

Summer vacations for the family revolved around the Western Farm Economics meetings hosted each year by a different land-grant school. One summer we went to the American Farm Economics meeting in North Carolina, giving us an introduction to the American East and South, but otherwise we visited western cow colleges—Flagstaff, Corvallis, Fort Collins, Pullman, Davis, Logan, Reno.

Along the way we camped in national parks and visited dams. My Dad liked dams. Sometimes we got there before the dam. I got to see Indians fishing at Celilo Falls. There's a picture my dad took in Mike's salmon book.⁴ But even with the loss of that spectacular Columbia River waterfall, there was no question that dams were a good thing—engineering marvels, like Grand Coulee and Hoover, helping to electrify the country and feed the world.

Like a lot of other people, I never wondered who was paying for all those dams, or what impact they might have on the fish. Not until the Allenspur Dam was proposed for the Yellowstone just south of Livingston, Montana, did it occur to me that sometimes a dam might be a bad idea. I liked fishing in Mill Creek and other tributaries that would disappear, along with a lot of the Paradise Valley, under an Allenspur Reservoir.

But I maintained a balanced view on the subject of dams. After all, how could Mike Blumm and I float the Deschutes River in late August without the

² Weather Channel, *Monthly Averages for Miles City, MT*, <http://www.weather.com/weather/wxclimatology/monthly/graph/USMT0229> (last visited Feb. 6, 2012).

³ U.S. Climate Data, *Climate - Miles City - Montana*, <http://www.usclimatedata.com/climate.php?location=USMT0229> (last visited Feb. 6, 2012).

⁴ MICHAEL C. BLUMM, *SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON* 55 (2002).

benefit of Pelton Dam? This spring we were lucky—4000 cubic feet per second in the Owyhee River in the first week of June.⁵ But that was unusual, maybe a record. With a dam upstream from Rome Junction we could run that river all summer every year, and leave our fleece jackets and mittens at home.

It's probably no coincidence that I ended up teaching water law and writing about water law and policy. I suspect my background gave me a different perspective than most others in the field, or maybe I just like going against the current. I wrote about a lot of other things, including chicken law⁶ and earthquake law⁷, but I seemed always to drift back to water.

My first significant water project, in the late 1970s, was a massive four-state study of different approaches to instream flow maintenance.⁸ Like most of those dams we visited in my youth, the study was funded by the government.

About that same time I got interested in what economics had to teach us about water allocation and the effects of existing water laws and policies. I worked with people like Herb Stovener at Oregon State and Terry Anderson and John Baden at what was then the Political Economy Research Center in Montana. Although I had resisted the free market theories of Ronald Coase, Harold Demsetz, and Dick Posner during my days as a student at the University of Chicago, learning about the endless inefficiencies resulting from the misallocation of water resources, along with many other failed natural resource policies, persuaded me that they were right after all.

I came to understand that many of those dams I had visited in my youth could not be justified in economic terms. They did make the desert bloom, but the farmers growing the crops could never have afforded to pay the real cost of supplying the water. And I'm not even thinking about the environmental costs. Include those costs in the calculus and even more big dams turn out to be economic losers.

Here my Dad, a good New Deal Democrat, would say "Now just wait a minute, Jim." What about the multiplier effect of public investment in resource development? We've heard a version of that one a lot over the past

⁵ Ouzel Outfitters, *Owyhee River Update*, (Mar. 22, 2011), available at <http://www.oregonrafting.com/assets/sites/1/UserFiles/File/pdf/OwyheeUpdate322.pdf>.

⁶ James L. Huffman, *Chicken Law in an Eggshell: Part III—A Dissenting Note*, 16 ENVTL. L. 761 (1986).

⁷ *E.g.*, James L. Huffman, Professor of Law, Lewis & Clark Law School, Presentation at the UNESCO Conference in Paris, France: Government Liability for the External Costs of Earthquake Prediction (Apr. 5, 1979).

⁸ 1 JAMES L. HUFFMAN ET AL., THE ALLOCATION OF WATER TO INSTREAM FLOWS: A COMPARATIVE STUDY OF POLICY MAKING AND TECHNICAL INFORMATION IN THE STATES OF COLORADO, IDAHO, MONTANA AND WASHINGTON (1980); 2 JAMES L. HUFFMAN ET AL., THE ALLOCATION OF WATER TO INSTREAM FLOWS: COLORADO WATER RESOURCES MANAGEMENT (1980); 3 JAMES L. HUFFMAN ET AL., THE ALLOCATION OF WATER TO INSTREAM FLOWS: IDAHO WATER RESOURCES MANAGEMENT (1980); 4 JAMES L. HUFFMAN ET AL., THE ALLOCATION OF WATER TO INSTREAM FLOWS: MONTANA WATER RESOURCES MANAGEMENT (1980); 5 JAMES L. HUFFMAN ET AL., THE ALLOCATION OF WATER TO INSTREAM FLOWS: WASHINGTON WATER RESOURCES MANAGEMENT (1980).

two years. In his book, Dad wrote: "Public investment in resource development has been likened to the casting of a stone into a pool of water with ripples spreading out toward the edge of the pool."⁹ If only it were so simple. The water metaphor is nice, but there's scant evidence for much of a multiplier. Mostly it turns out to be simple wealth redistribution. But Dad was an optimist about our ability to distinguish public from private interest. He was confident we could keep the rent seekers at bay, though I don't think the term "rent seeking" was even part of his vocabulary.

But it was part of my vocabulary from the day I set foot on the University of Chicago campus. Milton Friedman, George Stigler, Robert Lucas, the aforementioned Ronald Coase, and Harold Demsetz all taught of the centrality of rent seeking to public choice economic theory. Though I wasn't an instant convert, soon I could see rent seekers everywhere in public life, though all spoke the language of the public interest.

So when I looked at those dams for a second time, I could see the taxpayer dollars flowing in as the rents were diverted downstream. I could understand why multi-use water project proposals fared best. Irrigation, flood control, recreation, hydropower, wildlife habitat, urban water supplies—all of this added up to a winning political alliance. The West, in particular, is dotted with dams built at the behest of these allied rent seekers.

So now Mike is thinking that the Darth Vader of the public trust¹⁰ doctrine has finally seen the light and is going to lead the charge on dam removal. Well, not quite. Sunk costs are sunk costs. We can excoriate our predecessors for stupidity and worse, but the only costs we can avoid and benefits we can gain are those that will occur in the future. The dams are as much a part of the landscape today as their absence was a century ago. No doubt some should come down, but the fact that a dam should not have been built is not persuasive evidence that it should be removed today.

But enough about dams. As the big picture started coming into focus, I saw the beauty of market theory, the reality of market failures, and rent seekers, speaking the language of the public interest, everywhere. I also saw that most others in the legal academy were looking at very different pictures.

Many saw a simple picture of right and wrong. For them, economics was a distraction from the moral choices inherent in resource use and environmental protection. Those willing to understand and employ the tools of economics saw self-interested private resource users imposing external costs on the general public, with government regulation and ownership internalizing costs and providing for the public interest. To be sure they, too, saw the damage wrought by rent seekers—special interests they called them—but they held an undying confidence that we will get it right next time.

⁹ HUFFMAN, *supra* note 1, at 212.

¹⁰ See Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 597 n.108 (1989) ("Professor Huffman's frequent criticisms of the public trust . . . have earned him the reputation of being the Darth Vader of the public trust.").

An interesting thing about the two pictures informed by economics is that the folks who see the world one way usually conclude that the other world view is simpler, and more ideological, than it is—more like the black and white (or is it green and brown) view of the environmental moralists. The picture I see includes moral considerations and market failures, but my critics seldom acknowledge that I recognize a need to correct for market and institutional failures, or to be concerned about the disproportionately affected. I can't begin to tell you how many times I have been accused of believing that the market solves all resource allocation challenges. Never said it. Not even once. But I do believe markets are a powerful and underutilized social tool.

In my writing I moved on to water marketing¹¹—a no brainer for one with my views. What's that you say? They're desalinating seawater in Santa Barbara at a cost of \$2000 an acre-foot while farmers in the Central Valley are paying a few dollars an acre-foot for project water.¹² That's crazy. A water market will solve that problem overnight, and the environment will be better for doing it.

But resistance to water marketing was fierce. On one side were the farmers whose influence had helped construct a water rights regime that assured cheap water for agriculture. On the other side were those opposed to putting a price on anything as central to human life as water. My view was, and is, if it's so darn important to human life, let's get a price on it that reflects its true value and we will stop growing rice and cotton in the deserts of the Southwest.

Undaunted, I pushed on and wrote about interbasin, interstate, and even international water transfers.¹³ We move a lot of resources around the entire globe from places of abundance to places of scarcity. Why not do the same with water? I once suggested to a Canadian audience that they could make a good profit selling water to the parched folks in Southern California. You would have thought I was advocating the selling of babies or a United States invasion of the great northern dominion. Water is not a commodity, I was told repeatedly. That is a theme that resonates around the world today, while desperately needed water is wasted and polluted because it has no price.

¹¹ R.G. KRAYNICK ET AL., WATER RIGHTS TRANSFERS: A LEGAL, ECONOMIC, AND INFORMATIONAL ANALYSIS OF WATER IN OREGON (1983) (including contributions from James L. Huffman).

¹² Eddie Scher, *Desalination to Dramatically Increase the Cost of Water*, OPEDNEWS.COM, Mar. 27, 2010, <http://www.opednews.com/articles/Desalination-to-Dramatical-by-Eddie-Scher-100324-217.html> (last visited Feb. 6, 2012) (reporting on studies estimating "the cost of desalinated seawater in California will be \$2,000 to \$3,000 or more per acre-foot"); Cong. Budget Office, *The Central Valley Project Improvement Act*, <http://www.cbo.gov/doc.cfm?index=46&type=0&sequence=8> (last visited Feb. 6, 2012) (discussing the tiered water prices).

¹³ E.g., James L. Huffman, *A North American Water Marketing Federation*, in CONTINENTAL WATER MARKETING 145 (Terry L. Anderson ed., 1994).

I have written a lot about property rights and their constitutional protection,¹⁴ or perhaps I should say their very limited constitutional protection. But how else could it be when the guiding principle is that regulation results in a taking when it goes too far. How far is too far depends on which picture you are looking at. Rent seekers think that no regulation goes too far. Rents have to come from somewhere, and often it is hard to get the taxpayers to pony up, yet again, with direct subsidies. If we take some, but not all, from a political minority, we can keep the rents flowing without running afoul of the Fifth Amendment. And when it comes to water rights, well, anything labeled usufructuary can't amount to much of a right anyway. Notwithstanding that most value in most property comes from the right to use it in one way or another.

The idea that water is special, that it necessarily belongs to the public and must therefore be managed by the state or the nation or some version of global governance, has and will do more harm to the resource and to all forms of life on the planet than all the dams and diversions and canals that will ever be built. Yet the trend in this country and across the globe is away from the demonstrated efficiencies of private rights and free markets and toward ever more centralized planning and management. We are constructing a rent seekers dream world.

But I digress. My wife often refers to me as “Professor But See”, as in, “but see Huffman for a contrary point of view.” Nowhere has that been more the case than in citations to my writings on the public trust doctrine.¹⁵ I won't rehearse that quarter century adventure here. Suffice to say that the latest appeal to the doctrine—one that would have our courts declare carbon emissions to be a violation of the public trust—is so unmoored from law and history as to be unrecognizable to those who wrote the legal opinions said to be relied upon in the concoction of this fanciful theory. At this point I am resigned to being a “but see” footnote in modern public trust writing. I only ask that the courts embracing this unfortunate formula for judicial commandeering of the difficult task of resource allocation honestly acknowledge that they are making it up as they go.

Lest you conclude that I have given up the fight and decided to just go along to get along, I'm presently working on a book on water for the Hoover Institution. I promise you it will not be a testimonial to my conversion to the dominant faith of the legal academy.

Twenty years ago, Charles Wilkinson gave a talk here at Lewis & Clark titled, “In Memorium, Prior Appropriation 1848-1991.”¹⁶ His message was crystal clear in the title—Prior Appropriation, a good friend of General Mining Law, was dead. Not many months later I received a letter from Prior Appropriation that I passed on to the editors of *Environmental Law*, where

¹⁴ James L. Huffman, *Judge Plager's "Sea Change" in Regulatory Takings Law*, 6 FORDHAM ENVTL. L.J. 597 (1995).

¹⁵ See, e.g., Eric Pearson, *Illinois Central and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713, 715 n.11 (1996).

¹⁶ Charles F. Wilkinson, *In Memoriam: Prior Appropriation 1848-1991*, 21 ENVTL. L. v (1991).

Charles's piece was published.¹⁷ Permit me to read a couple of concluding paragraphs from Prior's letter, also published in *Environmental Law*:

Well there's a whole lot more I could say 'bout this sumbitch Wilkinson's eulogy, but the truth is that I ain't in very good health and this writin' letters wears on me. And the reason I ain't in very good health is that there's lots o' folks like this Wilkinson sumbitch who's out there misleading people 'bout the idea o' prior appropriation. The idea weren't to make the desert bloom at taxpayer expense. The idea was to make the most o' the water that we got, and it's hard workin' folks lookin' after themselves what's gonna make that happen. There ain't very damn much water out here in the west, so's we need a good system or we're gonna be in big trouble.

Well it turns out that we got a heap o' trouble, but it ain't no fault o' mine. I never once argued for gov'ment dam[]s or gov'ment canals or gov'ment anythin'. All I ever stood for was a system o' water rights which gives folks certainty. The priority system ain't perfect, but it's a damn sight better'n anythin' else anybody's come up with. So if these do-gooder, public interest, sumbitchs finally put me in my grave by blaming me for the problems created by a pack o' greedy politicians and fuzzy headed bureaucrats, well I guess they will of got what they deserved.¹⁸

A few years ago I published a piece on land use regulation in *The Green Bag*,¹⁹ co-authored with Jim Brunberg who now makes music and operates Mississippi Studios on the north side of Portland. Like most of what we write, it sank without a trace. But there was one interesting thing about it: It was entirely in verse. In recent years, really since my resignation as Dean of this fine law school, I have taken to writing epic poems for solemn occasions. So, with apologies to Samuel Taylor Coleridge, I will conclude with a modest example, perhaps the first ever written on the subject of water law.

Water, water, everywhere, nor any drop to drink.

How can that be, when every day, gallons drain from the kitchen sink?

And more from toilets that no longer flush and from showers with feeble spray?

Why are there folks all 'round the globe whose only hope is to pray?

That there will be water enough to irrigate crops and quench the livestock thirst,

And water enough to let them believe that their lives have not been cursed.

Water enough for bathing and laundry and maybe a swim, if you please.

¹⁷ James L. Huffman, *Clear The Air*, 21 ENVTL. L. 2253 (1991).

¹⁸ *Id.* at 2257.

¹⁹ James C. Brunberg & James L. Huffman, *A Dialogue on Liberty and Community*, 4 THE GREEN BAG 403 (2004).

Clean enough water for drinking and cooking without fear of dreaded disease.

'Tis often said that the problem is simple, though not easily resolved.

There is lots of water, but too often found where people are less involved.

And most of it's salt, which suits the fish and plants in the ocean space.

But water sweet to the taste and good for the crops is often in the wrong place.

And now they say, with much dismay, that the climate is a changing.

There's lots of models purporting to tell us where the critters will soon be ranging.

And who will get rain that now gets none and where flood will follow drought.

Makes you want to run for the exits, but there is really no way out.

The challenge is just what it's always been when it comes to water supply.

Our choices are few, there's nothing new that's yet to meet the eye.

We can move to the water, or bring it to us, or conserve in what we do.

Folks like the desert as a place to live, so that cuts our options to two.

Moving the water? We know how that's done, and sometimes it's a cinch.

Put it in a canal that runs downhill, and pump it, in a pinch.

But from Canada to California's another deal, it would take a hell of a ditch.

And the Greens will fight cuz it's sure to cause an environmentalist twitch.

So we're left to conserve—to make wise use, if you'll pardon the expression.

Which is simple enough, though it requires the planners to make a modest concession.

That incentives matter to regular folks in choosing what they do.

Though it soothes the soul, it seldom works—appealing to human virtue.

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We can gather them up, stakeholders all, around an enormous table.
But nothing will change, as everyone fights to get the most they are able.
With little regard for existing rights, easily dismissed as undeserved.
While making promises to everyone, especially the underserved.

Yes, we can flounder about, even shout, that water is a special case.
That it's really important to life on the planet, that time has us in a race.
To abandon the old and bring in the new, a world of collaboration.
But there's no escaping the reality of our permanent situation.

Of scarcity here and abundance there, of flood and cloudless sky.
Of water wasted before it's tasted by folks whose throats are dry.
Of people who'll care for what is theirs, but less for that of others.
And even less for that which is left to everybody's druthers.

Not because they're selfish or venal or badly taught in school.
But because they must choose 'tween this and that, and avoid playing the fool.
Incentives matter, it's the world we live in, so we've got to get them right.
And if we do, we'll avoid the waste, and also the political fights.

Wise use is the answer, conservation if you prefer, on that we can all agree.
It's making it happen, that's the tricky part, and making the planners see.
That without clear rights, we're left to fights, the rent seekers will never rest.
That without a price, we have no device for knowing what uses are best.

The market ain't perfect, and it ain't always fair, we can agree on this as well.
There's external costs, and public goods, and monopolists with goods to sell.
But government has limits as water czar, politics will always hold sway.
So when it comes to water, give markets a chance, to provide water enough
every day.

