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## The Role of the Courts in Water Law

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## THE ROLE OF THE COURTS IN WATER LAW

Barton H. Thompson\*

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It is a great privilege to be here this evening. I want to commend the *South Carolina Law Review* for putting together this symposium on some of the major water law issues facing South Carolina and the nation today. The *Law Review* has chosen an important and timely topic. In the western United States we care a great deal about water, and water is something we have spent a lot of time talking about and arguing about for decades. Except for water quality, water issues have been less important historically in the East and Southeast. That is changing in the face of population growth and climate change. The *South Carolina Law Review* is in the vanguard in its recognition of the importance of water to all parts of the nation.

The first thing you should know about me is that water runs in my veins. I come from southern California, specifically Los Angeles. My maternal grandfather; however, came from a region of California called the Owens Valley in the eastern Sierra mountains, about 250 miles northeast of Los Angeles. When Los Angeles outgrew its local water supplies at the turn of the twentieth century, the city decided to import water from the Owens Valley by a gravity-fed aqueduct. Many in the Owens Valley resisted the city's water grab, and the ensuing controversy between Los Angeles and the Owens Valley became the gist for the movie *Chinatown*, a 1978 movie directed by Roman Polansky and starring Jack Nicholson and Faye Dunaway. If you've never watched *Chinatown*, I highly recommend it. Indeed, it is one of the best screenplays ever written—and a great lesson about water.<sup>1</sup>

My grandfather was a farmer in the Owens Valley. If you've seen the movie *Chinatown*, there's a scene where a farmer shoots at Jack Nicholson and tries to chase Nicholson off his property. That character could have been my grandfather. Los Angeles sought to buy my grandfather's land for the water that came with it, but he did not want Los Angeles anywhere near his farm or his water, and so he refused Los Angeles' offer. My grandfather wanted to get out of farming, however, so he sold his land to a neighboring farmer. Unfortunately, it turned out that the particular farmer was a front for the city of Los Angeles,

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1. Two other movies that I highly recommend are *The Winning of Barbara Worth*, a 1926 silent movie and Gary Cooper's first starring role, and *The Milagro Beanfield War*, a 1988 movie directed by Robert Redford.

and Los Angeles ended up getting his water anyway. My grandfather in some ways still got the last laugh because he took the money he had received for the farm, moved to Los Angeles, and began subdividing land using the Owens Valley water that Los Angeles had grabbed and was bringing down to Los Angeles.

Looking beyond my family's personal saga, Los Angeles' water-import scheme provides important lessons about water. Without the water, Los Angeles' growth would have been limited. With the water, Los Angeles developed the area known as the San Fernando Valley. An area of 260 square miles, the Valley supports a population of almost two million people and a thriving economy. From this perspective, importing water has been an economic success story. But in moving water from the Owens Valley down to Los Angeles, severely harmed the environment of the Owens Valley and stunted its growth. Owens Lake, which was near my grandfather's property, today is largely just a salt pond and has been a major source of dust storms. The important question that the Owens Valley raises is how we can develop water—in the western United States, and in the United States as a whole—in a way that can achieve the type of economic growth that Los Angeles accomplished but that is environmentally sustainable in the long run.

Tonight, I want to look at the role of the courts in helping us to solve the multiple water challenges that the nation faces. We spend far less time than we once did, both in the water area and in the environmental area more generally, talking about the role of courts. A lot of the discussion in the literature and at the conferences focuses instead on statutes and the role of administrative agencies. Courts make an appearance only as the entities that interpret statutes and makes sure that administrative agencies implement and enforce the statutes. The focus is primarily on legislative action and administrative discretion, with courts playing only a secondary role.

I want to challenge that view tonight. And I will do so by employing several "case studies" to examine the potential role for courts in the water field. In solving the grand water challenges that we face today, what is the role of courts in eliminating that "water law-ggedness" that is the subject of this conference? My tentative conclusion is that courts can and should play a critical role in solving many of the water challenges that we face today, but that courts have done less than they are capable of accomplishing in recent years, compared to what they did fifty, sixty, or a hundred years ago.

## I. FOUR GRAND WATER CHALLENGES

Let me start, for those of you not very familiar with water, with a brief overview of some of the things that are wrong with our water system today in the United States. I'm going to address only four challenges. I could go on for days talking about all the problems in the water field; this is a field that needs tremendous help from young lawyers like you. But for purposes of this evening, I will limit myself to just four.

First, one of the most important challenges, linking back to the story of my grandfather, is that our current water system is unsustainable. In many parts of the country, we are diminishing our future water supply. Surface waterways, such as rivers, creeks, and lakes, are renewable resources. Even if we use all the water from a river or creek in a year, we are going to get more water next year in that river or creek. But there is a major source of water in the United States that is depletable: groundwater. Groundwater actually supplies about a third of all the water that we utilize in the United States today, and our use of groundwater in the United States is increasing.<sup>2</sup> Because most groundwater aquifers are recharged each year from overlying precipitation, we can take that amount of groundwater out each year without depleting the aquifer. But if you exceed that “safe yield” of an aquifer, you begin to overdraft that aquifer, and the amount of water available in the aquifer in the future will actually begin to drop. Unfortunately, we are overdrafting aquifers in the United States to an incredible extent. If you take the total amount of water that we are overdrafting from our aquifers, the amount we are taking out of our aquifers in excess of what is replenished on a yearly basis, at the end of this century, it will total all the water that is in the Great Lakes.<sup>3</sup>

Imagine if we began diverting water from the Great Lakes today at such a pace that, at the end of the century, the Great Lakes were dry. We would be horrified, and people would justly complain that we were not using the Great Lakes sustainably. This is what we are doing today with our groundwater. The water that we are overdrafting is an immense amount of water, and it is water that will not be available for future generations. As we overdraft our aquifers, the water in the aquifers at some point fall to a level that is so low that it is no longer economically viable to take any groundwater out. To the degree that a local community is relying on that particular groundwater aquifer for its population and economy, that particular community can wither and die.

One of the best illustrations I know of is a community in Texas called Happy, Texas. (By the way, there is another great movie that I would recommend that you see called *Happy, Texas*. The movie is not about the water, but it’s a great comedy.) Happy, Texas, is named Happy because it used to be a place that had so much groundwater that of the land was littered with natural springs. When cowboys were on cattle drives, they would be happy when they got to these springs because of all the water that was available to their cattle. Over time, Happy, Texas, developed as a major agricultural area, based largely on the available groundwater. Happy, Texas, had several Happy banks, it had many Happy diners, and it had Happy hotels; it even had a Happy cinema. Today, unfortunately, Happy, Texas, is largely a ghost town because it drew

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2. See BARTON H. THOMPSON, JR., ET AL., *LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* 10–11 (5th ed. 2012) (stating that groundwater withdrawals have increased by nearly 10% in the last quarter of a century, and that groundwater supplies nearly half of the U.S. population’s drinking water and constitutes 24% of freshwater used).

3. FRITS VAN DER LEEDEN ET AL., *THE WATER ENCYCLOPEDIA* 188–200 (1990).

down on the groundwater to such a degree that the agricultural community that relied upon that particular groundwater is no longer viable in the way it was at one time.<sup>4</sup>

In some coastal areas of the nation, communities can lose use of their groundwater aquifers even faster. If a groundwater aquifer is perched up against the ocean, overdrafting the aquifer can draw in salt water from the ocean and ruin the usefulness of the aquifer for domestic, agricultural, and other purposes. This is a problem known as “salt water intrusion.”<sup>5</sup> As regions draw down too much on an aquifer, the overdrafting can also reduce the amount of water available in hydrologically interconnected rivers and streams, reducing the amount of surface water available to local users. So a major reason that water use is unsustainable in many regions of the nation is that those regions are overdrafting and depleting their groundwater.

Another reason that our current water system is unsustainable is because of the environmental impacts from our excessive use of surface water. I once made a bet, and I still have not lost the bet, that if you name any river in the United States from which major withdrawals of water are made, I will find an endangered freshwater species in that river. Most of the time the species will already be listed as endangered or threatened. If it is not, there will be a species in that river that qualifies to be listed as endangered or threatened. As we withdraw more and more water from our rivers and streams, and as we make more and more hydrologic modifications like dams, our actions ultimately will have a significant impact on the fish and other wildlife reliant upon those rivers and streams.

Peter Moyle, a biologist at the University of California at Davis, has been surveying the condition of native fish species in California for many years. If you go back to 1974, over half of all of the fish species in California were stable.<sup>6</sup> They were not declining; they were not at risk. Today, less than twenty percent of our native fish species in California are actually stable.<sup>7</sup> Two major

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4. See, e.g., Charles Laurence, *US Farmers Fear the Return of the Dust Bowl*, THE TELEGRAPH, Mar. 7, 2011, <http://www.telegraph.co.uk/news/earth/8359076/US-farmers-fear-the-return-of-the-Dust-Bowl.html> (stating that Main Street of Happy, Texas, is shuttered except for the Happy National Bank, the cinema has closed, and Happy’s problem is that it ran out of water for farming); see also Scott Tong, *In Texas, water may be free, but it’s not forever*, MARKETPLACE: SUSTAINABILITY (Aug. 10, 2012, 9:50), <http://www.marketplace.org/topics/sustainability/texas-water-may-be-free-its-not-forever> (interviewing a farmer in Happy, Texas, who reported that Main Street stores boarded up decades ago due to drilled wells running out of water).

5. See *Freshwater-saltwater Interactions along the Atlantic Coast*, U.S. GEOLOGICAL SURVEY, <http://water.usgs.gov/ogw/gwrp/saltwater/salt.html> (last modified Jan. 3, 2013, 20:07:21 EST) (stating that “ground-water pumping can reduce freshwater flow toward coastal discharge areas and cause saltwater to be drawn toward the freshwater zones of the aquifer”).

6. See generally Peter B. Moyle, Jacob V.E. Katz, & Rebecca Quiñones, *Rapid decline of California’s native inland fishes*, CTR. FOR WATERSHED SCI. & DEP’T OF WILDLIFE, FISH AND CONSERVATION BIOLOGY, UNIVERSITY OF CALIFORNIA 9 (Nov. 2010) (discussing the decline of native fish species in California).

7. *Id.*

reasons are the amount of water that we are taking out of our rivers and streams, and the hydrological modification of those rivers and streams. To summarize, the first major water problem that we face in the United States is sustainability, because of both groundwater overdrafting and the environmental impacts of our water withdrawals and modifications.

A second major problem that we have with water management in the United States is that our water management is hopelessly fragmented. To start, water is fragmented geopolitically. Tomorrow, one of the panels will discuss the challenges of interstate water allocation, which is a major issue in the United States because 95 percent of the fresh water that we use in the United States is actually tied in one way or another to an interstate water system.<sup>8</sup> We unfortunately have drawn our geopolitical borders among states in a way that divides up the nation's rivers and streams, and forces us to figure out how much water belongs to each individual state.

Within each state, we divide up water geopolitically even further. There are over a hundred and fifty thousand water suppliers in the United States.<sup>9</sup> That is more water supplying entities than we have elementary, middle, and high schools together.<sup>10</sup> There is no reason why we need this many entities engaged in the supply of water. One of the problems with this type of fragmentation is that, when you have water management divided among thousands of different entities, you end up with distributional fights among the various entities as to who holds exactly what water. Many of these managerial units, moreover, are inefficiently small. Fragmentation undermines opportunities to manage water on a watershed basis. And fragmentation reduces our flexibility to manage water in response to droughts, because regions find it more difficult to work together to share resources and diversify their risks.

Not only have we fragmented our water management system geopolitically, but we have also fragmented it hydrologically. In many states, for example, we still have separate bodies of law for groundwater and surface water. We have also fragmented water management functionally: the federal government, for example, is primarily responsible for water quality, but the states are largely responsible for the allocation of water quantity, even though quantity and quality are interrelated. Water quality issues are really questions of whether and how we should allocate water for waste disposal. Nonetheless, we have fragmented water management into separate regimes for water quality and water quantity.

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8. Noah D. Hall, *Interstate Water Compacts and Climate Change Adaptation*, 5 ENVTL. & ENERGY L. & POL'Y J. 237, 239 (2010).

9. U.S. ENVTL. PROT. AGENCY, FACTOIDS: DRINKING WATER AND GROUND WATER STATISTICS FOR 2009, 3 (2009).

10. See *Fast Facts*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=84> (last visited Mar. 1, 2015) (reporting the number of public educational institutions in the U.S. to be around 99,000 institutions for 2010–2011); see also Melissa S. Kearney et al., *In Times of Drought: Nine Economic Facts about Water in the United States*, THE HAMILTON PROJECT 14 (Oct. 2014), [http://www.hamiltonproject.org/files/downloads\\_and\\_links/nine\\_economic\\_facts\\_about\\_us\\_water\\_final.pdf](http://www.hamiltonproject.org/files/downloads_and_links/nine_economic_facts_about_us_water_final.pdf).

So this is the second problem water problem facing the United States—the problem of having hopelessly fragmented our water management.

A third major problem is that water management in the United States is “terminally inertial,” by which I mean that nothing happens very quickly. I used to joke to my water law class that, if you took my notes when I studied water law in 1973 and compared them to what I talk about to my students today, there is no difference. The water issues that existed back then are the same water issues that we have today. We have never gotten around to actually solving them. Not only does little really happen in solving policy problems, but we also have a very low level of technological innovation in the water field. Things happen very slowly in policy; things happen very slowly in new technology.

I recently studied water innovation compared to innovation in the energy and telecommunications sectors.<sup>11</sup> You can guess how innovation in water looks compared to innovation in telecommunications. To put it simply, there is no such thing as the iPhone in the water sector. Compared to the energy sector, water innovation has always been much lower. But the gap between energy innovation and water innovation has grown dramatically in recent years. Measure innovation however you want to measure it, whether by outputs (such as the number of patents) or inputs (such as venture capital investments), energy innovation far outstrips water innovation. Innovation in energy technologies such as solar power and wind power has increased geometrically, while the amount of technological innovation in the water field has flat lined.<sup>12</sup> So, this is a third major problem: we just are not getting the amount of innovation that you would expect in an industry that is responsible for our most crucial natural resource.

The final major problem in the water field is that water managers are frequently more focused on “claiming” than on “creating.” Throughout the United States, there are often opportunities to manage water systems more efficiently and to meet a greater number of needs with the same amount of water, through conservation, the trading of water, timing of use, and water storage. Yet most of the time, you find water managers worried about how to claim as much water as possible, rather than about how we can actually increase the overall usefulness of the water resources that we have. Water managers are focused much more on claiming water than on creating new value.

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11. NEWSHA AJAMI, BARTON H. THOMPSON, JR. & DAVID VICTOR, THE HAMILTON PROJECT: THE PATH TO WATER INNOVATION 9–10 (2014), *available at* [https://www.hamiltonproject.org/files/downloads\\_and\\_links\\_/path\\_to\\_water\\_innovation\\_thompson\\_paper\\_final.pdf](https://www.hamiltonproject.org/files/downloads_and_links_/path_to_water_innovation_thompson_paper_final.pdf).

12. *Id.* at 9, Figs. 2, 10.

## II. THE ROLE OF THE COURTS

Having outlined some of the major water challenges facing the United States today, I want to turn to the role of the courts. Can they play a useful role in overcoming our water challenges? On some issues, unfortunately, the bottom line is that the courts really have little or no role to play. Courts, for example, are unlikely to help overcome the challenge of local fragmentation. Where a local region has seven different water suppliers, there is very little the courts are going to be able to do about that. I have tried to figure out a good legal theory for challenging local fragmentation, but I have yet to figure one out. Similarly, it is probably unlikely that courts are going to be able to do much to advance technological innovation.

In fact, there is good reason to question the court's value in addressing many water issues. Courts frequently have little, if any, expertise in the water field. By the very nature of litigation, the court's involvement is episodic and piecemeal. Courts have limited resources to use to resolve water issues. Given all of these limitations, one might suspect that maybe there is a good reason that the literature and conferences focus more on statutes and administrative agencies today than on courts. Maybe the courts do not have a significant role that they can actually play. But I actually think there is reason to believe that the courts could be of immense value in some of the settings I have mentioned. What I want to do in the remainder of my talk is to investigate what the potential role of courts is—what role can courts play and what should the courts be doing.

To investigate this issue, I will talk about five cases, or sets of cases, and the role – for good or bad – that courts played. In my view, three of the cases that I will discuss are success stories. The other two cases are counterfactuals, where I believe that the courts did not get it right but could have played an immensely valuable role if they had thought about the issues a little bit more closely and taken a different tack.

The first case example deals with interstate allocation of water, an issue that the panel tomorrow will discuss in more detail. The case I want to discuss is *Arizona v. California*,<sup>13</sup> a decision of the United States Supreme Court in 1963 that allocated the waters of the Colorado River among the three lower basin states of Arizona, California, and Nevada. For those of you not familiar with the water field, interstate disputes, and that includes interstate disputes over water, go to the United States Supreme Court. The United States Supreme Court has original jurisdiction over such cases and therefore is the body that is ultimately responsible for resolving how interstate rivers will be managed. *Arizona v. California* is a landmark in this area. It was the largest, and in many ways the most important, interstate water dispute in the history of the United States. And the Supreme Court reached a brilliant result, but it reached that result by an erroneous rationale.

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13. *Arizona v. California*, 373 U.S. 546 (1963).



When the Supreme Court hears a case in which multiple states are fighting over the water of an interstate river, it typically will engage in what is known as “equitable apportionment.” The Court will decide how much water from the interstate waterway each of the states deserves as a matter of equity. Historically, the rule in the western United States was that equitable apportionment would be done largely on the basis of prior appropriation.<sup>14</sup> If you were the first state to start taking water out of an interstate waterway, you would get more of the river’s water than a state that came along later.

In *Arizona v. California*, the Supreme Court could have resolved the dispute among the lower basin states of the Colorado River as a matter of equitable apportionment. It could have decided how much water each of the lower basin states were entitled to as a matter of equity. The Supreme Court, however, felt uncomfortable actually using equitable apportionment and, so, rather than equitably apportioning the water of the Colorado River, the United States Supreme Court decided that Congress had actually already apportioned the water of the Colorado River.<sup>15</sup> The Court concluded that Congress had already decided how to allocate the waters of the lower basin of the Colorado River in the 1929 Boulder Canyon Project Act,<sup>16</sup> an act that allowed the construction of dams on the lower portion of the Colorado River.

The reason why *Arizona v. California* was a brilliant result is that, as a result of hooking on to the 1929 Boulder Canyon Project Act, the Supreme Court decided that in periods of shortage, the Department of the Interior that would decide how the water was to be allocated.<sup>17</sup> By focusing on the Boulder Canyon Project Act and giving the Department of the Interior a major role in allocating the waters of the lower basin of the Colorado River, the United States Supreme Court effectively enlisted the federal government as a water master for the Colorado River. In its Court-designated role as water-master for the Colorado River, the Department of the Interior in turn has been able to continue to help resolve the disputes that inevitably arise over interstate rivers.

If the United States Supreme Court in *Arizona v. California* had instead engaged in equitable apportionment and just decided that, okay, California is entitled to this much water, Arizona is entitled to this much water, Nevada is entitled to that much water, those states inevitably would have continued to argue over exactly how they would resolve their various disputes, with little if any help from the United States, and issues would have continued to come back to the United States Supreme Court. Most importantly, my guess is the Colorado River would not be as managed as well as it is today. By awarding the Department of the Interior a role as water master, the United States effectively

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14. See THOMPSON ET AL., *supra* note 1, at 167.

15. *Arizona*, 373 U.S. at 564–65; see also John Patashnik, *Arizona v. California and the Equitable Apportionment of Interstate Waterways*, 56 ARIZ. L. REV. 1, 12–13 (2014) (discussing the Supreme Court’s opinion in this case).

16. Boulder Canyon Project Act, 43 U.S.C. §§ 617–617v (2012).

17. *Arizona*, 373 U.S. at 593.

engaged in institutional reform. It enlisted a new institution in the management of the Colorado River, and in the process, took a very fragmented system and made it a much more holistic system.

*Arizona v. California* was a brilliant result, an early example of institutional reform by a court. The only problem is that the court was totally wrong in its statutory interpretation. Congress had not, in the 1929 Boulder Canyon Project Act, intended to make the Department of the Interior the water master for the Colorado River. Virtually all scholars to look at the legislative history of the 1929 Boulder Canyon Project Act agree that the Supreme Court misconstrued the 1929 Act. But, while wrong in its rationale, the Court did something that has proven very important. It established a new institution that could manage water resources better than the old, fragmented system could. And, most importantly, I think the Supreme Court has the authority, if it wanted to exercise it, to engage in similar institutional reform in other interstate water disputes without having to latch on to and misconstrue Congressional legislation. Unfortunately, the Supreme Court seems to be reticent to actually reach out and do that.

So *Arizona v. California*, at least to me, shows the ability of the Supreme Court, if it wishes to, to engage in effective institutional reform of interstate rivers -- to help solve the problem of fragmentation I talked about earlier. The Supreme Court engaged in institutional reform in *Arizona v. California* by misconstruing a Congressional act, and the Court seems reticent to engage in institutional reform more directly under its general equitable power over interstate rivers. But *Arizona v. California* illustrates one way that courts might be able to solve the fragmentation problem inherent in interstate rivers. More generally, it illustrates the important power of courts to engage in broad institutional reform.

The second case I want to talk, *National Audubon Society v. Superior Court*,<sup>18</sup> takes us in a slightly different direction. For those of you who have taken water law, this is the famous Mono Lake case that the California Supreme Court decided in 1983. What I find interesting about the *National Audubon Society* case is that it demonstrates the ability of courts to “unstick” an area, to take an area in which there institutional and policy inertia and to both open up new opportunities and then furthermore nudge the government along in valuable new directions. *National Audubon Society*, in short, illustrates the courts’ potential role as catalyst and nudge.

A few facts are again useful for those of you who have not taken water law. Mono Lake is in the northern end of the Owens Valley, where my grandfather had his farm. Mark Twain actually talks about Mono Lake in *Roughing It*, one of his best books, which I again recommend.<sup>19</sup> It is a gorgeous lake. It also is a salt lake; water flows into Mono Lake but it does not flow out. And it was a very sustainable lake until Los Angeles, in its never ending quest for water, took

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18. *Nat’l Audubon Soc’y v. Superior Court of Alpine Cnty.*, 658 P.2d 709 (Cal. 1983).

19. MARK TWAIN, *ROUGHING IT* 302 (The Floating Press, 2010).

water not only from my grandfather's farm, but from the feeder streams of Mono Lake.<sup>20</sup> If you know anything about salt lakes, you recognize that if you take water away from the feeder streams of a salt lake that lake will begin to disappear. It will begin to shrink. Los Angeles started taking water out of Mono Lake in the 1920s, and by the time the Mono Lake case arose in the late 1970s, Mono Lake had shrunk considerably, threatening the wildlife that lived or nested in that area and depended upon the lake. Los Angeles, however, said, hey, we have a water right, we got it in the 1920s, and the state confirmed that it was consistent with the public interest. Los Angeles, in short, relied on the status quo, an important legal concept. Los Angeles' argument was strong and was consistent with the inertia that, as I said earlier, dominates in the water field.

So what did the California Supreme Court do in the *National Audubon Society* case? The first thing the court ruled was there is no such thing as a vested right to water in the face of the public trust doctrine.<sup>21</sup> All water is subject to a public trust, and even if a state has approved a water right, that water right is always subject to being reopened and reexamined under the public trust doctrine. The court, in essence, "unstuck" the status quote, and it opened up the opportunity to revisit decisions that the state had made earlier. Second, the court said that the state has an obligation to consider the public trust in its management of water resources impacting navigable waterways.<sup>22</sup> That obligation, moreover, includes consideration of the environment. The Court, importantly, did tell the state exactly what it had to decide in the Mono Lake case. It did not tell Los Angeles that it had to cease using water. Although it provided guidance on application of the public trust doctrine, the court ultimately left the application of the trust to Los Angeles' water rights up to the principal California water agency, the California State Water Resources Control Board. In short, the court itself did not determine the ultimate result. It left that up to the expert agency. It recognized that courts are not experts in water resources, so it simply opened opportunities up, created a little bit of momentum, and nudged the state of California in the direction of sustainability by saying that the state had an obligation to consider the public trust and to protect public trust interests, including the environment, when feasible.

The third case that I want to discuss arose out of Texas and deals with the groundwater. It is again a case that you may have studied in water law. It is the 1999 decision of the Texas Supreme Court in *Sipriano v. Great Spring Waters of America*.<sup>23</sup>

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20. See *The Mono Lake Story*, THE MONO LAKE COMMITTEE (2015), <http://www.monolake.org/about/story>; see also Jane Braxton Little, *Mono Lake: Victory over Los Angeles Turns into Local Controversy*, HIGH COUNTRY NEWS, Dec. 8, 1997, <http://www.hcn.org/issues/120/3820>.

21. *Nat'l Audubon*, 658 P.2d at 727.

22. *Id.* at 728.

23. *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75 (Tex. 1999).

If you have studied water law, you know that Texas has long practiced the rule of “absolute ownership,”<sup>24</sup> which permits land owners to pump as much water as they want from any aquifer found underneath their property. If there is groundwater under your land, it is yours. It is, I think, a classically Texan rule. (If there is an extreme rule in the water or property fields, it is often going to be from Texas.) Under the absolute ownership rule, you can pump as much water out of the aquifer as you want. It does not matter whether you are overdrafting the aquifer; it does not matter whether your pumping is drying up all of your neighbors’ wells. Pumping groundwater, no matter what the impact, is your entitlement as a Texan with groundwater underneath your property.<sup>25</sup> Every modern scholar agrees that it is the silliest groundwater rule imaginable, and it leads to totally unsustainable results.

In the 1999 *Sipriano* case, there was a challenge to the absolute ownership rule. The Texas Supreme Court was urged to abandon the absolute ownership rule and move to another rule that might limit or reduce the amount of overdrafting and well interference taking place in Texas. In *Sipriano*, the Texas Supreme Court recognized that the absolute ownership rule does not make any sense, and that it is probably time to abandon the absolute ownership rule.<sup>26</sup> They also appeared to recognize that they have the power, as a common law court, to modify the absolute ownership rule. Courts created the absolute ownership rule and may be in the best position to abolish it. But the Texas Supreme Court decided that they would not modify it in *Sipriano* because the legislature was taking some steps towards encouraging local management of groundwater, and the court wanted to give the legislation an opportunity to play out before the court intervened in this particular area.<sup>27</sup>

I think *Sipriano* was a mistake. The court recognized that the absolute ownership rule was a problem. The court, however, basically bet that the legislative scheme would work. While this might be a reasonable judicial philosophy, it left Texas with an unsustainable common-law system. The effectiveness of the legislation, moreover, rested to a degree on the underlying common law. Local management has not worked that well in Texas since the *Sipriano* case, in part because, since the rule of absolute ownership is the common law rule for groundwater in Texas, land owners who do not like the legislative scheme can try to challenge it on the theory that the legislation interferes with their common law water rights. The Texas Supreme Court would have been better advised to have moved to a different rule that would have supported what the legislature was trying to achieve, while at the same time ensuring that, if the legislative scheme did not work out, at least Texas would not

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24. See *id.* at 75.

25. See *id.*

26. See *id.* at 80 (quoting *Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979)) (implying that there are compelling reasons to change the common law absolute ownership rule).

27. *Id.*

have been stuck with the worst imaginable rule that a state could employ for groundwater.

Compare *Sipriano* with my fourth illustration, a set of California groundwater cases that arose in the 1950s. In the 1950s, Southern California was overdrafting its coastal aquifers. Recall that I told you earlier that, if you overdraft coastal aquifers, if you pump too much water out of them, you can attract in salt water from the ocean. The salt water contaminates your groundwater, and your groundwater is no longer usable. Southern California communities were facing exactly this problem of saltwater intrusion in the 1950s. As result, they faced a very immediate threat of losing the usability of their groundwater. Various groundwater users brought lawsuits as a consequence in order to try to stop groundwater overdrafting from taking place.<sup>28</sup>

In these cases, the trial courts in Southern California viewed their role as a facilitator—to basically assist the groundwater users themselves to develop institutional frameworks that they could use to protect and then manage their groundwater sustainably over the long run. In these cases, the courts first made sure that all groundwater users were brought in front of them. They then encouraged parties to jointly develop facts about the groundwater aquifers -- for example, how much groundwater is in the aquifers, what is the safe yield of the aquifers, how can you pump them in a way that does not encourage saltwater intrusion. Based on those facts, the courts then encouraged the parties to negotiate a settlement that would create a regime with water masters and ensure the water was used on a sustainable basis. These settlements often included groundwater marketing, so that over time if some groundwater users found water more valuable than others, water could be traded back and forth.

Because inevitably when you have negotiations among hundreds of people, some parties are going to hold out and refuse to settle, the courts also stepped in to help push reasonable settlements through. The courts basically said to the groundwater users that, if there are some hold-outs, come to me with your groundwater settlement and if you can show me that the groundwater settlement is fair to everyone, then I'll impose it as a judgment on everybody. For those of you familiar with oil and gas law, the courts effectively adopted an involuntary unitization approach—if a supermajority of groundwater users come to a fair agreement, a small number of holdouts cannot stand in the way of that agreement. The courts agreed to impose such settlements on all parties, through their ability to issue a judgment in the case, so that groundwater aquifers could be governed by a comprehensive agreement.

As the result of these cases, Southern California enjoys a number of local groundwater management agencies and agreements that were created through local negotiation. All are doing very well today. They are all relatively sustainable. You would not have been able to get as effective of management in

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28. See, e.g., *Orange Cnty. Water Dist. v. City of Riverside*, 343 P.2d 450 (Cal. Dist. Ct. App. 1959).

Southern California if the courts had not been willing to step forward and play a significant role in bringing everyone together in those cases. Once again, by bringing the parties together and forcing everybody into a settlement, the courts helped create new institutions for the management of groundwater.

The final case that I want to discuss is *Tennessee Valley Authority v. Hill*,<sup>29</sup> a 1978 decision of the United States Supreme Court, which again a number of you have probably studied. It is the case that pitted the snail darter against the Tellico Dam. *TVA v. Hill* was the first major Endangered Species Act<sup>30</sup> case to make its way to the United States Supreme Court. The Tennessee Valley Authority was constructing Tellico Dam, which would have destroyed the last free-flowing stretch of the Little Tennessee River.<sup>31</sup> The only problem was that there were snail darters downstream and the snail darters had recently been listed as endangered species. At the time the lawsuit was brought, TVA had already largely completed the dam. In fact, by the time the case got to the Supreme Court, about 95 percent of the dam had already been constructed.<sup>32</sup> So the question was whether Congress really intended to stop a dam from being finished when it was virtually complete because of some silly little snail darters. (During the oral argument, Justice Lewis Powell leaned over the bench and asked Attorney General Griffin Bell, who was arguing the case, what value the snail darter had? Griffin Bell said that it basically did not have any real value to humans; instead, the snail darter was invaluable in itself.<sup>33</sup> Powell leaned further over and inquired whether the snail darter might at least be usable as bait. When Griffin Bell said no, Powell immediately started penning his dissent in the case.<sup>34</sup>)

The majority in *TVA v. Hill* held that Congress meant what it said.<sup>35</sup> Congress thought that endangered species were invaluable, and no matter how complete the dam was when the case was filed, the dam construction had to stop if it threatened the snail darter. I think the majority got the interpretation of the Endangered Species Act correct. I have no doubt about that in my mind.

At the same time, however, I think the Supreme Court got one issue wrong. Most case books that include *Tennessee Valley Authority v. Hill* include only the majority opinion and the dissenting opinion of Justice Powell, which argued that the majority's strict interpretation of the Act was wrong. But there were two dissents in *Hill*—Justice Powell's dissent on the meaning of the Act, and Justice Rehnquist's dissent on the equitable discretion of courts. Justice Rehnquist's

29. *Tenn. Valley Auth. (TVA) v. Hill*, 437 U.S. 153 (1978).

30. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1537 (2012).

31. *See TVA*, 437 U.S. at 153.

32. *See Endangered Species Committee Hearing*, U.S. DEP'T OF THE INTERIOR, at 26 (Jan. 23, 1979) (statement of Charles Schultze, Chairman of the President's Council of Economic Advisors) (stating that the project was 95% complete at the time).

33. Transcript of Oral Argument at 26, *TVA v. Hill*, 437 U.S. 153 (1978), available at [http://lawdigitalcommons.bc.edu/darter\\_materials/44](http://lawdigitalcommons.bc.edu/darter_materials/44).

34. *See generally TVA*, 437 U.S. at 195 (Powell, J., dissenting).

35. *Id.* at 172–73.

dissent basically said that, while the majority might be right about the interpretation of the Endangered Species Act, courts nonetheless retain equitable discretion when they are being asked to issue an injunction.<sup>36</sup> In Justice Rehnquist's view, courts should be able to continue to exercise their equitable discretion even in statutory cases. While Congress can deprive courts of their equitable discretion, Congress must do so in clear terms, which they had not done in the Endangered Species Act. I think Rehnquist was right in that, and that the Endangered Species Act might be a more effective statutory scheme today if courts had that the equitable discretion that they enjoy in other settings. Because courts retain no equitable discretion, Endangered Species Act cases have been reduced administrative-review cases that are largely disputes over the facts. No one ever talks about whether there might be creative ways in which we might be able to better protect a particular species while also allowing particular actions to go forward.

One of our major water challenges that we face today in California is over the appropriate management of the Sacramento-San Joaquin Delta, which is just inland from San Francisco Bay. Two major river systems come together at the delta and then empty into the ocean at San Francisco Bay. How the delta is managed, and how much water can be pumped from it to ship South to Los Angeles and other regions, are major controversies. The delta is being managed today largely around the endangered delta smelt. The delta smelt resembles that snail darter in many ways, and climate change is likely to kill off the smelt no matter how the delta is managed. The delta is not being managed sustainably today and steps need to be taken to restore its ecological functioning. But because of the narrow focus of the Endangered Species Act, the delta is being managed today for the smelt, which does not necessarily promote overall sustainability. If courts had equitable discretion, courts might be able to force stakeholders to think more creatively about how to create a healthy ecosystem. Absent that discretion, however, courts are reduced to mere reviewers of administrative records. Courts enjoy significant sources of creativity, and one is their power of equitable discretion. By removing it from the Endangered Species Act, the Supreme Court in *TVA v. Hill* may have done the Act a disservice.

### III. CONCLUSION

So what are the lessons of these five cases? Let me quickly run down them, because the evening is getting late. The first is that courts have significant authority through the common law and their equitable powers to both structure and restructure water institutions in ways that can significantly improve water management today.

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36. *Id.* at 211 (Rehnquist, J., dissenting).

The second lesson is the courts that have been successful at this have shared several common qualities. First, they have not been timid. The successful courts have been willing to weigh in on difficult issues and get their hands dirty doing stuff that other courts perhaps would have considered “nonjudicial.”

Second, successful courts have often used the law to open up options rather than to close them down. None of the successful courts that I mentioned earlier dictated specific results or rules. Instead they said to the legislature or administrative agencies, hey, you have a lot of authority to do more than what you are doing right now. And successful courts frequently nudged the government in valuable directions (for example, doing things in a way that is environmentally more sustainable).

Third, successful courts frequently established long-term government regimes that could help resolve new questions and manage water over time. That is what the U.S. Supreme Court did in *Arizona v. California*,<sup>37</sup> and that is what Southern California trial courts did in the groundwater cases of the 1950s.<sup>38</sup>

Finally, what all of these courts did was to seek creative solutions. They realized that what lawsuits should be about is not just claiming, but also creating—trying to put the parties in a better position than they were in before they appeared before the courts. And the courts often enlisted the parties themselves in identifying and developing those very solutions.

For all of these reasons, I am optimistic about the opportunity for courts to play an effective role in improving water management. To do so, however, courts must be willing to step forward and be more aggressive than they have been in recent years in the water field. I know that is not in the nature of most courts. Today, judicial activism has a bad connotation to it. But if courts step forward more than they have over the past several decades and actually look to some of the lessons that prior cases provide, they can help us successfully attack some of the major water challenges that we face today. We need the courts. Our problems in the water field are so severe, so significant, that if the courts do not step forward, I am not optimistic we will be able to solve all of the water problems that we face today on a timely basis.

Thank you very much for allowing me to speak to you this evening. I wish you all the very best in your careers and hope that you all will play a role in ensuring more sustainable water management in the United States.

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37. See generally *Arizona v. California*, 373 U.S. 546 (1963).

38. See, e.g., *Orange Cnty. Water Dist. v. City of Riverside*, 343 P.2d 450 (Cal. Dist. Ct. App. 1959).



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