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Precious, Worthless, or Immeasurable: The Value and Ethic of Water

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PRECIOUS, WORTHLESS, OR IMMEASURABLE: THE VALUE AND ETHIC OF WATER

by Gabriel Eckstein*

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I. INTRODUCTION

Humanity is absolutely dependent on fresh water. That assertion is beyond reproach and justifies categorizing the intrinsic value of water as priceless or even incalculable. It also serves as the basis for a growing movement that contends water is or should be a human right.¹ Whether the value of water can actually be computed and whether or not a water right exists, it seems undeniable that humanity enjoys, and possibly suffers, an indelible relationship with water to the extent that it defines society's very existence. For without water, life as we know it could not exist.

The relationship between humanity and fresh water is complex, full of subtleties and nuances unseen in humankind's relationship with any other substance except, possibly, fresh air. It defines and influences how individuals, communities, and institutions view and interact with this unique substance from a multitude of perspectives, sometimes complementary but often contradictory. For some, water is an integral component of the natural environment; for others, it is a property right and a commodity that is subject to the free market; still others regard water as a heritage of cultural, religious,

* Gabriel Eckstein is the George W. McCleskey Professor of Water Law and Director of the Center for Water Law & Policy at the Texas Tech University School of Law. He serves as an advisor to the UN Educational, Scientific, and Cultural Organization in their effort to assist the UN International Law Commission draft international principles applicable to transboundary ground water resources. He also is Director of the International Water Law Project at <http://www.InternationalWaterLaw.org>. Special thanks to Chad West and all of the Texas Tech Law Review staff for their tireless and impressive planning and management of the symposium.

1. See SALMAN M. A. SALMAN & SIOBHAN MCINERNEY-LANKFORD, *THE HUMAN RIGHT TO WATER* (2004); Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations It Creates*, 4 NW. U. J. INT'L HUM. RTS. 331 (2005), available at <http://www.law.northwestern.edu/journals/fjhr/v4/n2/3>.

and societal significance. This relationship, however, also works to define how these stakeholders interact with each other in their effort to meet their fresh water goals. All too often, this relationship creates the potential for conflict where water resources are inadequate to meet the desires of all of the various interests.

As a result of these diverse perspectives, coupled with the ever growing global population and demand for fresh water, there are increasing tensions over the availability, accessibility, provision, and protection of water resources around the world. Groups as diverse as water boards, indigenous communities, local and national governments, and corporate actors are vying for various and limited surface waters and ground waters making fresh water an ultimate battle prize. Disputes over fresh water resources in the American West, the Middle East, and elsewhere have pitted farmers against municipalities, businesses against environmentalists, “haves” against “have nots,” and state against state. In the Klamath Basin of Oregon, for example, environmentalists and Native Americans have long challenged farmers and irrigators, as well as the government, for greater instream flows.² In West Texas, oil tycoon Boone Pickens is sparking controversy by seeking to pump water from the Ogallala Aquifer to sell to thirsty cities like Dallas, San Antonio, and El Paso.³ Over the past decade, the United States and Mexico have hotly debated their treaty obligations as they relate to water in the Rio Grande.⁴ And in the eastern Mediterranean, control over and access to scarce water resource has been a major source of friction between Israelis and Palestinians, as well as among their neighbors.⁵

Fundamental to all of these controversies is the diversity of values and ethics that the adversaries ascribe to water. These values and ethics are often at the core of disputes and greatly depend on personal perspectives, national interests, social and economic ideals, cultural, religious, and societal backgrounds, and politics. Moreover, they often serve as the basis for legislative and regulatory action and business decision-making, as well as the justifications for aggravating and resolving controversies over limited fresh water resources.

2. See Jeff Barnard, *Fishermen, Farmers Divided on How to Share Water*, SEATTLE TIMES, Aug. 4, 2003 at B2.

3. See Suzanne Schwartz, *Whiskey Is for Drinking, Water Is for Fighting: A Texas Perspective on the Issues and Pressures Relating to Conflicts Over Water*, 38 TEX. TECH L. REV. 1011 (2006); Jerry Needham, *Water Offers Pour In to San Antonio*, SAN ANTONIO EXPRESS-NEWS, June 22, 2004.

4. More recently, the dispute resulted in a complaint being filed by seventeen water districts in southern Texas against Mexico under Chapter Eleven of the North American Free Trade Agreement. The complaint alleges that Mexico violated a 1944 treaty between the two countries by failing to deliver the requisite amount of water into the Rio Grande via tributaries in its territory. Phil Magers, *Angry Texas Farmers Sue Mexico*, THE WASH. TIMES, Aug. 30, 2004.

5. Greg LaMotte, *Water Becoming More Precious Than Oil in Arab World*, Voice of Am., Mar. 21, 2005, available at <http://www.politicsol.com/news/2005/03-21-water-becoming-more-precious-than-oil-in-arab-world.html>.

This Article introduces and briefly explores some of the topics related to the value and ethics of water that were considered at the symposium, *Precious, Worthless, or Immeasurable: The Value and Ethic of Water*. The Symposium, which took place November 2-4, 2006, at the Texas Tech University School of Law in Lubbock, Texas, featured a diverse assemblage of experts from around the United States and abroad who explored the subtleties and nuances of the value and ethics of water. The purpose of the Symposium was to consider how this precious liquid is valued, assessed, and perceived with regard to law and regulations, economics and commerce, people and communities, culture and religion, and others aspects of society that are impacted by water. While far from a comprehensive analysis of the subject matter, this Article considers some of these topics as an introduction to these proceedings of the symposium.

II. THE VALUE OF WATER

Water can be, and is, valued in a multitude of ways. Valuation of water can be a personal assessment of its importance to human and nonhuman life, an exercise of belief related to traditions and history, or even an economic analysis. Although this is not a comprehensive list of methodologies for water valuation, it suffices to say that the process of valuing water is highly dependent on how the one conducting the valuation perceives water. Factors that can influence how water is perceived, and therefore valued, may include: perspectives on life and the value of life itself; social and economic ideals; cultural, religious, and societal backgrounds and proclivities; and even politics.

A. Anthropocentric Perspective

To some, the value of water is directly related to its irreplaceability as a fundamental component of life. Proponents of this anthropocentric perspective believe water has an intrinsic value that is incalculable and therefore is beyond valuation. Clearly, this position is grounded in the belief that life itself, at least human life, is sacrosanct and that the valuation of life is inappropriate if not completely impossible. Just as the buying and selling of people is regarded by most as an inconceivable evil, so is the valuation of the substance that is so necessary for creating and sustaining life. The anthropocentric perspective is often at the base of arguments for the human right to water.⁶

6. See SALMAN & MCINERNEY-LANKFORD, *supra* note 1; Hardberger, *supra* note 1.

B. Ecocentric Perspective

In a similar vein, water is regarded by some as an intrinsic component of the natural environment with a value that also is incalculable. In contrast with the above anthropocentric notion of the inviolability of human life, water's value to the environment is grounded in an ecocentric perspective of life such that humanity is but a component of the natural environment, and the life of all creatures, including but not limited to humans, is inviolable. Nonetheless, as the principle source of sustenance for that life, under the ecocentric point of view, water is likewise regarded as sacrosanct and incapable of valuation.

C. Cultural or Traditional Perspective

A third means of valuing water is dependent on individual or collective beliefs of water as having a value greater than mere economic calculation and different than that of the intrinsic value of water for life. This distinct notion of valuation is typically related to a system of beliefs based on cultural, social, religious, or historical custom. The value of water becomes incalculable, at least in the economic sense, by its very nature as being abstract and ethereal and built on a foundation of tradition, social norms, or faith. Moreover, water is incapable of valuation because it is regarded as a blessing rather than a commodity. In some communities, water is considered the lifeblood of the Earth that should not be exploited or extracted to excess lest the Earth be injured or killed. In others, water is sacrosanct to the extent that it is a gift of the Creator, a gift that cannot be withheld from anyone in need. Still in others, water defines the culture to the extent that it characterizes a people's identity, religious beliefs, ceremonial practices, and daily life. In most of these cases, water is regarded as an absolute necessity, not merely to maintain individual life, but as a means of maintaining the life of the people.⁷

D. Economic or Market Perspective

In sharp contrast to each of the above approaches is the economic or market approach to valuing water resources. Under this approach, water is deemed a commodity, considered purely for its economic potentials and subject to market forces. Thus, water can be bought, sold, and owned and the value of water is dependant on supply and demand. Where fresh water resources are plentiful and easily accessible, water should be inexpensive.

7. See Katosha Nakai, *Water: It Always Has Been; It Is; It Will Be—A Cultural Perspective on the Valuation of Water*, 38 TEX. TECH. L. REV. 1027 (2006); William Greenway, *Dominion and Domination: Living Life and Living Earth*, in *symposium proceedings: Precious, Worthless, or Immeasurable: The Value and Ethic of Water*. Center for Water Law & Policy and International Center for Arid & Semi-Arid Land Studies, Texas Tech University (A.C. Corrêa & Gabriel Eckstein, eds. 2006).

Conversely, in places where water is scarce, the value of water would be directly related to what the market will bear. Clearly, this methodology, if applied in its purest sense, conflicts with the prior approaches of valuation to the extent that water becomes available only to those who can pay for it and only in quantities that they can afford. Yet, in terms of valuation, the market approach may be most in harmony with the capitalist-based societies that prevail in most of the world.⁸

To a great extent, the above perspectives are described in absolute terms. Reality, however, is rarely based on absolutes and perspectives are often combined to form unique viewpoints. For example, many environmentalists have adopted a combination of the ecocentric and economic approaches to valuation and created the hybrids of environmental and ecological economics.⁹ Nevertheless, while none of these perspectives can claim to be a definitive approach, it is evident that these perspectives employ disparate and often contradictory methodologies that have the potential for fomenting conflict among the proponents of the respective approaches. This is particularly likely when the water resources assessed are inadequate to meet everyone's wants or needs. The examples of Klamath Basin, West Texas, the U.S.-Mexico border, and the Middle East noted above provide clear illustrations of disparate perspectives and value systems leading to friction among stakeholders.

III. THE ETHIC OF WATER

Ethics pertain to the tacit rules of behavior and consequences that regulate people's lives, activities, and decision making. In a sense, ethics are codes of conduct or prime directives that aid us in determining whether something is right or wrong, good or bad. They are also prescriptive in that they direct people's actions toward what they should or ought to do and which values they should or ought to hold.¹⁰

Water has been the focus of ethics in every corner of the world for millennia. Irrigation, for example, was the developmental cornerstone of numerous communities in Asia, Africa, the Middle East, and elsewhere thousands of years before the industrial revolution. These communities

8. See Andrew Morriss, *Real People, Real Resources, and Real Choices: The Case for Market Valuation of Water*, 38 TEX. TECH L. REV. 973 (2006).

9. See, e.g., James Boyd, *Procurement of Water's Ecosystem Services: An Economic and Ecological Perspective*, in symposium proceedings: Precious, Worthless, or Immeasurable: The Value and Ethic of Water. Center for Water Law & Policy and International Center for Arid & Semi-Arid Land Studies, Texas Tech University (A.C. Corrêa & Gabriel Eckstein, eds. 2006).

10. Harremoës defines ethics "as a socially accepted moral standard as to what you can do and what you cannot do (behaviour ethics) and/or a standard as what damage, pain, loss, poverty, thirst, etc. can be inflicted upon your fellow human beings (consequence ethics)." Poul Harremoës, *Water Ethics—A Substitute for Over-Regulation of a Scarce Resource*, Aug. 16, 2001, at 5, available at <http://www.earthescape.org/p1/ES14403/hap01.pdf> (presented at the Stockholm Water Symposium).

formulated strict moral rules of behavior that governed the use and management of fresh water. Cultures in arid parts of the world, such as Muslim communities, are especially noteworthy for developing allocation priorities for limited water resources.¹¹ Considered collectively, water ethics have served as the foundation upon which every aspect of a society's management of fresh water resources is structured.

Water ethics reflect the relative importance water plays in people's lives and provide guidance in decision making related to the use, management, allocation, and protection of fresh water resources. Even the concept and the act of valuation, regardless of methodology, is fundamentally underpinned by notions of good and bad, right and wrong. For example, communities that apportion fresh water based on historical use hold a water ethic that values prior and existing uses. In contrast, those that apportion water based on ownership rules value the property aspects of water. But, both communities value water in relation to what they define as morally appropriate and correct. Thus, the valuation of water is but a function of water ethics in that valuation reflects the evaluator's belief of how water should be managed.

Ethics generally focus on individual conduct. Yet, they are profoundly influenced by societal norms and beliefs. Writing about the related notion of a "land ethic," noted philosopher Aldo Leopold explained that "[a]ll ethics rest upon a single premise: that the individual is a member of a community of interdependent parts."¹² The extent to which that interdependence is taken lies at the core of the question of whether an ethic can be said to cut across diverse cultural, political, economic, religious, and national beliefs and proclivities. Yet, any effort to identify one or more universal water ethics is not an easy task. In fact, recent cases suggest that different societies have distinct viewpoints related to water management issues. For example, in 1992, the International Conference on Water and the Environment formulated a number of recommendations, including the principle that "[w]ater has an economic value in all its competing uses and should be recognized as an economic good."¹³ This portrayal of water as an economic good generated considerable concerns in Islamic countries, which, based on the Koran, regard water as the source of all life and a free gift of God.¹⁴

One starting point in seeking universal water ethics, however, may be in the fact that all individuals, communities, nations, and societies value water. The specific reasons that different societies treasure fresh water may be particularly significant because where common justification can be identified,

11. See Melanne Andromedea Civic, *A Comparative Analysis of the Israeli and Arab Water Law Traditions and Insights for Modern Water Sharing Agreements*, 26 DENV. J. INT'L L. & POL'Y 437 (1998).

12. ALDO LEOPOLD, *The Land Ethic*, in *A SANDY COUNTY ALMANAC* (Oxford Univ. Press 1949).

13. The Dublin Statement on Water and Sustainable Development, Int'l Conference Water & Env't., (Jan. 1992), available at <http://www.unesco.org/science/waterday2000/dublin.htm>.

14. Jerome Delli Priscoli et al., *Overview*, in *WATER AND ETHICS* 8-9 (2004).

it may serve as a basis for articulating shared ethical bases for water valuation. This in turn could evolve into a foundation for further cooperation on managing fresh water resources—especially in a transboundary context.

Possibly the simplest and most obvious universal factor in valuing water relates to the value of water for human life. As noted above, water is absolutely fundamental to human life. It is therefore easy to concede that water is universally valued for its life-giving and life-sustaining qualities. Combined with the broadly accepted notion that human life is of considerable value and should be protected,¹⁵ a water ethic emerges—all human beings should have water in a quantity and quality that ensures and sustains life.¹⁶

While this Article is merely intended as an introduction to the topic of the value and ethic of water, there are other crosscutting water ethics that may be identifiable and that could serve as additional bases for cooperation. These water ethics may pertain to the problems most often associated with water management as related to human health, food production, economic development, and environmental protection. However, the ethics also may pertain to related topics such as the role of women in society, poverty, technology and science, the business of water, natural disasters, and international conflicts. The task now is to identify that common ground and to establish a base from which to work together to address the world's water ills.

IV. CONCLUSION

While the actual volume of water found on earth has been relatively constant for eons, global fresh water resources are being strained as a result of growing populations and demand. This in turn is sparking increasing tensions over the availability, accessibility, provision, and protection of fresh water around the world. Various communities, interest groups, private and public entities, and other stakeholders are vying for increasingly scarcer supplies and generating controversies as a result of disparate and often conflicting notions of how dwindling fresh water resources should be valued, managed, and

15. This statement is qualified using the phrase "broadly accepted notion that human life is of considerable value" because there appears to be some discord on the degree to which, and the conditions under which, human life should be preserved. Consider, for example, the debates surrounding abortion and capital punishment.

16. It is noteworthy that this particular water ethic is of the most basic form and does not address the mechanisms for its realization. Rather, it is a simple statement designed to capture the fundamental and universal notion that everyone—regardless of cultural, religious, political, economic, or other background—values fresh water for sustaining human life. Whether there exists another identifiable water ethic related to the provision of water, however, is a separate matter. Such is the position argued by those who espouse the human right to water. See SALMAN & MCINERNEY-LANKFORD, *supra* note 1; Hardberger, *supra* note 1.

allocated. Accordingly, the potential for conflict at all levels of society continues to increase.

Notwithstanding, there is reason for optimism. Despite the controversies and the differences, there is common ground in the form of water ethics that can be identified and that may serve as the basis for averting water conflicts. The identification and recognition of common water ethics by the various stakeholders could serve as a starting point for enhancing water resource management and cooperatively achieving the objectives of all interested parties. Although the notion of water ethics may be new, many of the ethical concepts have existed for generations. What is needed is an effort to identify and articulate the common ethics and embrace them as a tool in the local to global efforts and address water management issues.

V. OVERVIEW OF THE SYMPOSIUM

The symposium *Precious, Worthless, or Immeasurable: The Value and Ethic of Water* was organized by the Texas Tech University Center for Water Law & Policy and the *Texas Tech Law Review*, and was supported by a variety of organizations including the International Center for Arid and Semi-Arid Land Studies. The program was structured to address some of the world's more vexing water issues from the perspective of values and ethics.

The Symposium began with two keynote presentations: Dr. Ron Kaiser¹⁷ on the value of water, and Ms. Maude Barlow¹⁸ on the ethic of water. The program then followed with four panel presentations. The first panel—*Whiskey Is for Drinking, Water Is for Fighting: Conflicts over Water*—explored issues related to water conflicts as they relate to the value and ethic of water and considered possible methods of conflict prevention and resolution. It featured Ms. Suzanne Schwartz,¹⁹ Dr. George William Sherk,²⁰ and Professor Richard K. Paisley.²¹ The second panel—*Precious, Worthless, or Immeasurable: Perspectives on the Valuation of Water*—considered the various means and mechanisms for and perspectives of valuing water.

17. Ron Kaiser is a professor at the Institute of Renewable Natural Resources and the Department of Recreation, Park and Tourism Sciences at Texas A&M University.

18. Maude Barlow is the National Chairperson of The Council of Canadians, Canada's largest citizen's advocacy organization, and the founder of the Blue Planet Project, which works to stop the commodification of the world's water. She is also a Director with the International Forum on Globalization, a San Francisco based research and education institution opposed to economic globalization.

19. Suzanne Schwartz is Program Director for the Public Policy Dispute Resolution Center at University of Texas School of Law and former General Council, Texas Water Development Board.

20. George William Sherk is an Associate Research Professor at the Division of Liberal Arts in International Studies at Colorado School of Mines; Adjunct Professor at University of Denver College of Law; and Associate at International Water Law Research Institute at the University of Dundee in Scotland.

21. Richard Kyle Paisley is the Director of the Dr. Andrew R. Thompson Program of Natural Resources Law and Policy at University of British Columbia's Faculty of Law in Vancouver, Canada.

Panelists included Dr. James Boyd,²² Ms. Katosha Nakai,²³ Dr. William Greenway,²⁴ and Dr. Andrew Morriss.²⁵ The third panel—*A Right of Consequence: Water as a Right*—considered varying perspectives of rights to, and in, fresh water resources focusing on water as a human right, a private property right, and a public right. This panel featured Dr. Salman M.A. Salman,²⁶ Professor Mark Squillace,²⁷ and Dean James Huffman.²⁸ The last panel—*Water For Sale: The Business of Water*—addressed the commodification of water and considered the creation, maintenance, and efficiency of water markets. It featured Mr. Lynn Sherman,²⁹ Mr. Bernard “Skip” Newsom,³⁰ Mr. John Rapier,³¹ Mr. Harry Ott,³² and Mr. Rick van Schoik.³³ The program also included a keynote lecture by Ms. Marilyn O’Leary,³⁴ who presented a case study on *Prevention and Resolution of Conflict over Water Resources*; the screening of the critically acclaimed documentary *Running Dry* followed by a discussion with the film’s writer, producer, and director, Mr. Jim Thebaut;³⁵ and a plenary session featuring nearly all of the Symposium speakers in a roundtable format discussion.

Following the conclusion of the Symposium, and at the request of many of the attendees, a two-volume proceedings was prepared containing papers by many of the Symposium panelists. The first volume, this one, prepared by the *Texas Tech Law Review*, contains five articles. Dr. Andrew Morriss makes the case for using a market approach for the valuation of fresh water resources. Ms. Suzanne Schwartz writes about the tensions generating conflicts over

22. James Boyd is a Senior Fellow and Director of Natural Resources Division for Resources for the Future in Washington D.C.

23. Katosha Nakai is an associate with Lewis & Roca LLP in Phoenix, Arizona.

24. William Greenway is Associate Professor of Philosophical Theology at Austin Presbyterian Theological Seminary.

25. Andrew Morriss is the Galen J. Roush Professor of Business Law and Regulation and Director of the Center for Business Law and Regulation at Case Western Reserve University School of Law.

26. Salman M. A. Salman is Lead Counsel with the Legal Vice Presidency of The World Bank and is the Bank’s adviser on water law.

27. Mark Squillace is Professor of Law and Director of the Natural Resources Law Center at University of Colorado School of Law in Boulder, Colorado.

28. James Huffman is Dean and Erskine Wood Sr. Professor of Law at Lewis & Clark Law School in Portland, Oregon.

29. Lynn Sherman is with the Winstead Consulting Group in Austin, Texas.

30. Bernard Newsom is a partner with the law firm of Fisher & Newsom, P.C., in Austin, Texas.

31. John Rapier is a shareholder with the law firm of Rapier, Wilson & Wendland, P.C., in Allen, Texas.

32. Harry Ott is the Director of Water Resources for The Coca-Cola Company, in Atlanta, Georgia.

33. Rick van Schoik is the Managing Director of the Southwest Center for Environmental Research & Policy, a consortium of five U.S. and five Mexican Universities based in San Diego, California, and Professor of Environmental Security, Science, and Policy at the International Security and Conflict Resolution Program at San Diego State University.

34. Marilyn O’Leary is the Director of the Utton Transboundary Resources Center at University of New Mexico School of Law.

35. Jim Thebaut is the writer, producer and director of the critically acclaimed documentary “Running Dry,” as well as of many other prominent and socially significant productions.

fresh water resources in Texas and considers the need to forge a more thoughtful and reflective method of conflict resolution. Ms. Katosha Nakai's Article presents a cultural perspective of the value of water using Native American philosophy. Mr. Bernard "Skip" Newsom discusses wholesale water rate and service disputes in Texas and considers the statutory framework governing these controversies and jurisdictional issues presented. Mr. John Rapiere considers the retail water services industry in Texas and recent legislation that may spur competition in the monopolistic system.

The second volume,³⁶ prepared by the International Center for Arid and Semi-Arid Land Studies at Texas Tech University, contains four articles. Professor Richard K. Paisley, with co-author Glen Hearn, writes about governance of international drainage basins and considers best practices and lessons learned, including possible roles for national governments and international donor agencies. In his Article, Dr. James Boyd offers an economic analysis of water resources and describes the ways in which economic analysis forces appreciation of water as an environmental commodity and phenomenon. Dr. William Greenway's Article provides a Christian-based theological approach to the value of water and attempts to tease out the frequently cloaked spiritual and existential dimensions of the discussion. Mr. Rick van Schoik, and co-author, Ms. Anita Milman, evaluate several examples of water management decisions along the U.S.-Mexico border to illustrate the benefits of joint water management strategies and the costs of noncooperation. The second volume also contains summaries of the keynote presentations and panels, which were written with the goal of offering some insight into the issues discussed and to entice the reader to critically consider the topic of the value and ethic of water.

Additional information on the two-volume proceedings, conference materials, and other resources resulting from the Symposium can be found on the website of the Center for Water Law & Policy and the *Texas Tech Law Review*: www.law.ttu.edu/waterlaw.

36. Symposium proceedings: *Precious, Worthless, or Immeasurable: The Value and Ethic of Water*. Center for Water Law & Policy and International Center for Arid & Semi-Arid Land Studies, Texas Tech University (A.C. Corrêa & Gabriel Eckstein, eds. 2006).