



Fighting for Waterway Rights in California

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“Earth Jurisprudence: Building Theory and Practice”
Griffith University, Brisbane, Australia
September 17, 2011

What's the Problem?



Testing for toxic algae *Microcystis aeruginosa*
Photo by Klamath Salmon Media Collaborative

- Continued waterway degradation
- Pollution continues, with synergistic impacts
- Water “rights” allocated to far more water than exists

California's Unquenched Thirst



Dry Scott River bed dampened by river-fed sprinklers, Summer 2009
Photo by Erica Terence

- Diversions are drying up California rivers
- Bay-Delta Estuary, largest on West Coast of North America, is collapsing
- Chinook salmon, Delta smelt threatened with extinction, along with predators (whales)

New Waterway Threat: California's Climate



Sunset Beach, Orange County, CA, 2010
Photo by Steve Shinn

- By end of the century:
 - 60-80% of Sierra snowpack projected to be gone
 - Sea level will rise by five feet or more
- Saltwater intrusion into groundwater
- Threats to Delta's aging levees, below sea level
- Increasing struggle for reliable water supplies

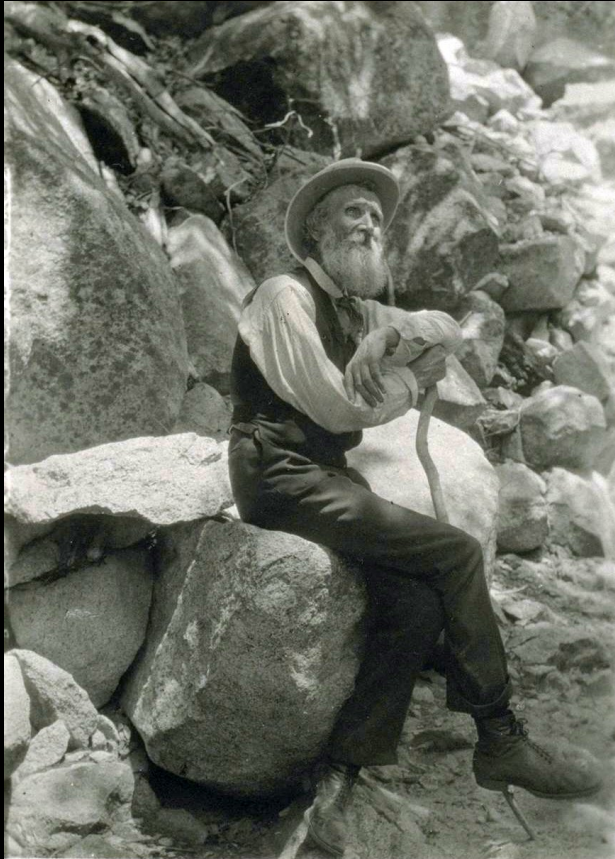
Limits of Current Environmental Laws



Cuyahoga River on Fire, Ohio 1952
Photo by James Thomas, Cleveland St. Univ.

- Environmental laws developed late 1960s-early 1970s out of oil spills, river fires, DDT, dead lakes
- Intent: Identify goals to protect environment; hold polluters to them
- Impact: Legalized pollution and water diversions, with slower but continued degradation

Fundamental Flaw of Modern Environmental Laws



John Muir
Wikimedia Commons

- Flaw: “Humans over Nature” foundation; inconsistent with interconnectedness with the natural world
- Gifford Pinchot defined U.S. conservation ethic as the “art of producing from the forest whatever it can yield for the service of man”
- Contrast John Muir: “When we try to pick out anything by itself, we find it hitched to everything else in the universe”

Fundamental Flaw (cont'd)



- Laws fail to challenge us to assess and moderate our “wants” in light of ecosystem “needs”
- Results:
 - Flawed solutions (e.g., massive ocean desalination plants over conservation)
 - Pushback on endangered species (e.g., Delta smelt)
 - Waterways diverted to dust

“Anti-Delta smelt” rally hat
Available on www.zazzle.com

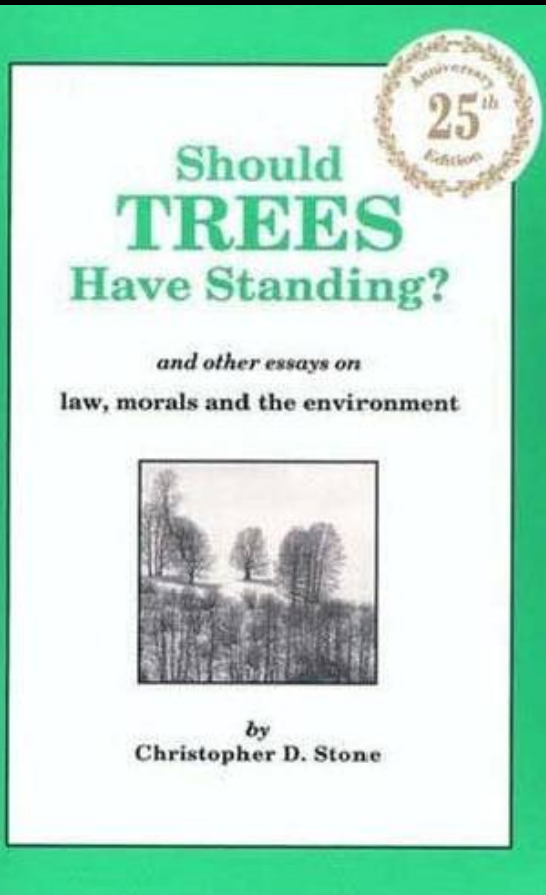
New Path: Laws Reflect Integration of Humans and Natural World



Hydraulic gold mining
California Central Pacific Railroad
History Museum

- We are not inevitably governed by a policy of “dominance over nature”
- For indigenous Californians, ownership of water unheard of; water used with respect
- Spanish brought “dominance over nature,” but shared for “common benefit” of humans
- Gold Rush upended law with “first in time, first in right”; dominance over both other people as well as nature

What Are the Elements of Laws Reflecting Our Integration with the Natural World?



- We must moderate our wants and behavior to reflect needs of natural world; *rights* are key tool
- Rights must be subject to redress by public body
- Entity must have standing to institute legal actions (guardian)
- Redress must be calculated for entity' s own damages
- Relief must run to the benefit of the injured entity

“Nature ... has the right to exist, persist, maintain itself and regenerate its own vital cycles, structure, functions and its evolutionary processes.” Ecuador Constitution, Art. 71, 2007



Steve Wacksman, Boston Globe, July 19, 2009

Legal Rights for Waterways: Local Ordinances



- Local community laws are being passed in U.S. that integrate rights of citizens to self-governance with rights of ecosystems to exist, thrive and evolve
- See www.celdf.org

Example: Pittsburgh, Pennsylvania

- Anti-Gas Drilling Ordinance, adopted by City Council 11/16/10, included the following:

Rights of Natural Communities. Natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems, possess inalienable and fundamental rights to exist and flourish within the City of Pittsburgh. Residents of the City shall possess legal standing to enforce those rights on behalf of those natural communities and ecosystems.

Example: Mt. Shasta, California

Proposed Ordinance: “to assert and secure the right of the people of the City of Mt. Shasta to natural water systems and cycles . . . by not allowing corporations to engage in water withdrawal for export and resale beyond the City of Mt. Shasta . . . and by recognizing and enforcing the rights of residents to defend the rights of natural communities and ecosystems.”

Legal Rights for Waterways: California State Water Rights Laws



Chinook salmon attempts to pass dam.

- Legal water rights currently given only to people, for diversions for human uses (not in-river conservation)
- No water rights held by waterways
- In legal conflicts over uses, there is no seat at table for rivers; language is about “rights”

Establish “Right to Flow”



Water creeps down dry San Joaquin River, 2009

Photo by Josh Uecker

- Process: Use California Constitution’s ban on “waste and unreasonable use” to create water allocations for rivers, and change state law to assign rivers the rights
- Use science to set flows; flow criteria for a healthy Delta already adopted by State Water Board
- Assign state-funded, independent guardians for rights; funded with fees on diversions

Legal Rights for Waterways: U.S. and California Water Quality Laws



Chollas Creek, San Diego
Photo by San Diego Coastkeeper

- Clean Water Act Section 101: “discharge of pollutants . . . eliminated by 1985” *failed* because:
 - Regulatory details allowed pollution as long as did not have a “reasonable potential” to violate standards
 - Standards based on political assessment over science, and politics based on foundation of “humans over nature”
 - Larger system (economics, corporate rights) did not support goal

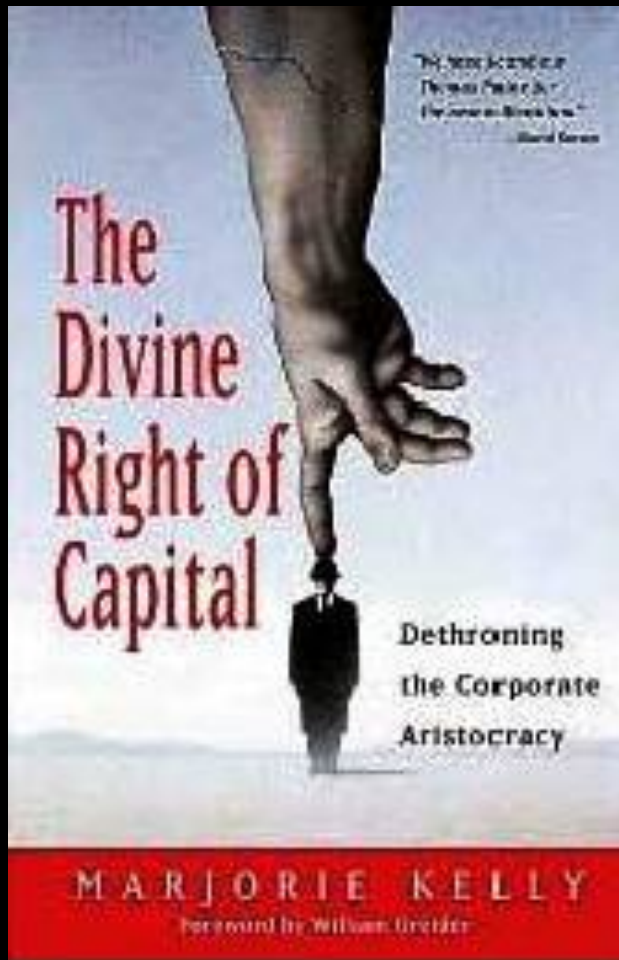
Establish “Right to Be Clean”



Fitzgerald Marine Reserve and Area of Special Biological Significance
Photo by Linda Sheehan

- Process: change U.S., CA law to allocate *right*, held by waterways, to be free from pollution, with right enforced by independent guardians
- Review standards for water quality through lens of clean water, not human wants
- Bundle with “right to flow” to create waterway right to be healthy, thrive and evolve

Other Essential Steps: Fix Impediments to Progress



- Corporations are *required* to maximize profit; *will* act to detriment of environment
- Balance sheets recognize only costs of regulations; change accounting standards
- Government subsidizes many harmful behaviors; change focus

Embrace Earth Ethics through New Decisionmaking Criteria

- Establish criteria for sound decisionmaking
- *Uywa* – Quechuan concept of “reciprocal nurturance” – recognizes relationships among humans, natural world
- California tribes: “*The salmon are our relatives, are sacred, and necessary for the continuation of life.*”
Establish overlay with *cultural use rights* to improve protections
- Wingspread Precautionary Principle – take precautionary measures even if cause and effect not fully established
- UN World Charter for Nature – “when potential adverse effects are not fully understood, activities should not proceed”

Build Integrated Science Campaign



Water quality testing
Photo by Klamath Riverkeeper

- Demand objective, transparent, publicly accessible science
- Demand accessible, real-time monitoring data
 - both water quality and water use (type and quantity, surface water and groundwater)
- Use science and data to show integration of humans and ecosystems; address cumulative impacts
- Evolve rights and remedies based on new science

Use Technology and Innovation to Show What Is Possible



Stormwater captured with vegetated swales; U.S. EPA

- Show how legal rights for ecosystems can be achieved in practice with new approaches that respect nature
- “Low-impact development,” water recycling, localized agricultural practices, wastewater treatment ...
- Support “green” R & D

Summary



California Forest Sprite
Photo by Linda Sheehan

- We made choices in law, ethics, economics, science, and technology
- We can choose differently for ourselves, our children and the Earth
- Law has always evolved over time; it is not static
- We must encourage and guide the evolution of law to embrace our interconnectedness with the natural world

Thank you.



California Brown Pelicans

Photo by Pete Nichols

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