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Case Notes

Instream Values Find Harbor in *Bean Lake III*, Drown in Prior Appropriation

Alex C. Sienkiewicz*

Few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use...the private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

-Justice Oliver Wendell Holmes:
Hudson County Water Co. v. McCarter (1908)¹

PREFACE

In the twentieth century water withdrawals to offstream uses, including farms, industry and homes, increased tenfold. Streamflows have dropped as a result of such activities, while demand for instream water relating to recreation and water quality has increased.² Montana's communities, human and ecological, depend upon the water resource. This dependence should be fully reflected in laws governing use of water resources. Montana water law, which governs water use, is based on prior appropriation. This doctrine grants permanent property rights to private water users.³ A water right gives one legal standing to appropriate water for a particular use.⁴ Many holders of water rights pay nothing for the water itself, while industrial

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1. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908).

2. T.C. Brown, *Past and Freshwater Use in the United States*, USDA Forest Service General Technical Report RMRS -GTR-39, 47 (Fort Collins, Colo. 1995).

3. Sarah F. Bates, David H. Getches, Lawrence J. Macdonnell, Charles F. Wilkinson, *Searching Out the Headwaters Change and Rediscovery in Western Water Policy* 146 (Island Press 1993).

4. Mary Ellen Wolfe, *A Landowner's Guide to Western Water Rights* 17 (2d ed., Roberts Rinehart Publishers 1996).

scale participants in federal reclamation projects may pay a modest fee reflecting a considerable subsidy.⁵ Because the right to appropriate water is transferable through sale or lease, it holds significant economic value.⁶

The volume in any particular body of water is finite. It is thus possible that the entire volume of water in a river, stream or lake may be allocated to appropriators at any given period in time, leaving none for non diversionary public uses. Reallocation can occur as water rights are bought, sold and leased. Such rights may also lapse due to non use or misuse by right holders.⁷ If a water right lapses, it then comes available for the next appropriator in line. Western water rights are not based on ownership of land abutting a source but rather, on the active appropriation and application of the water to beneficial use.⁸ A water right may be retained so long as one appropriates the specified volume of water and puts it to beneficial, non wasteful use.⁹ The waterways of Montana are too numerous to monitor continually. Thus, in order to enforce volume allocations, appropriators often engage in self enforcement or mutual coercion. Through these mechanisms, the water of the state is meted out.

The prior appropriation doctrine grants priority to senior water right holders: *first in time, first in right*. A senior water right holder is entitled to appropriate a specified volume before junior right holders may appropriate. This volume is based on a number of factors, including the use to which the water will be put, effect on prior appropriators, whether or not there is unappropriated water within the source, and other factors relating to competing human uses for the water resource.¹⁰ If a watercourse is fully allocated to senior right holders, then junior holders must do without the resource. So too must citizens who would make use of the water *in situ* for economic, recreational or other purposes. If non appropriating citizens must forego use of an over subscribed stock of water, it follows that fish, wildlife and ecological communities are likely to lose the resource as well.

I. INTRODUCTION

In 2002, the Supreme Court of Montana published the *Bean Lake III* opinion (*In re the Adjudication of the Existing Water Rights to the Use of All the Water, Both Surface and Underground, within the Missouri River Drainage Area, Including All Tributaries of the Missouri River in Broad-*

5. Bates, *supra* n. 3, at 134.

6. Wolfe, *supra* n. 3, at 113.

7. Water rights may lapse if they are not used, or if the use is determined by the Montana District Court (including the Water Court)/Department of Natural Resources and Conservation (DNRC) to be non-beneficial. *Id.* at 49.

8. *Id.* at 147.

9. Water right specifications such as allowable volume vary with supply and demand and are determined by the Montana District Court (including the Water Court) and the Department of Natural Resources and Conservation). *Id.* at 112-113.

10. *Id.* at 112-113.

water, Cascade, Jefferson and Lewis and Clark Counties, Montana (Basin 411)).¹¹ *Bean Lake III* takes steps to mitigate an imprecise body of jurisprudence by establishing fish, wildlife and recreation based uses as beneficial; while also holding that diversion of water is not a required element of beneficial use. Although *Bean Lake III* grants ecological values standing to compete with consumptive uses, the holding is merely permissive and will not soon change wasteful patterns of water extraction for extraction's sake. The case is thus a common law quick fix to one of many negative side effects of the prior appropriation doctrine.

Although *Bean Lake* clarifies *beneficial use* and *appropriation*, the holding establishes no affirmative incentives for water appropriators to conserve the resource, which is extracted to the detriment of ecological, recreational and associated market and non market values.

Montana jurisprudence, in the line of cases leading up to *Bean Lake III*, addressed ambiguously the legal notions of *beneficial use* and *appropriation*.¹² *Bean Lake III* qualifies the prior appropriation doctrine by holding that: 1) instream, non diversionary appropriations for fish and wildlife constitute a beneficial use 2) appropriation does not necessitate diversion of water from its source and 3) the Montana Water Court's comments inserted into five Department of Fish, Wildlife and Parks water right claims were issue statements as opposed to adoptions of formal policy positions.¹³ *Bean Lake III* thus grants public resource management agencies or other stakeholders desiring to reserve instream flows equal standing to compete for water rights with miners, ranchers, hydroelectric operations and other traditional appropriators of water. The holding lacks force where conservation is concerned, however, as most extant water rights will remain extractive in nature.¹⁴ Furthermore, any new appropriations for instream uses will remain inferior to existing extractive rights. It would be naïve to expect a significant proportion of water right holders to act in the interest of ecological and public values by leaving water to its natural course when the common law has heretofore been unclear as to the legal and administrative ramifications of doing so.

As noted, water rights hold a tangible market value, a value that is forfeited when the resource is not put to beneficial use. Because Montana jurisprudence previously conveyed mixed messages as to whether leaving water instream constituted a beneficial use, appropriators' primary incentive was to protect their rights by simply extracting their allocated water

11. *In re the Adjudication of the Existing Water Rights to the Use of All the water, Both Surface and Underground, within the Missouri River Drainage Area, Including All Tributaries of the Missouri River in Broadwater, Cascade, Jefferson and Lewis and Clark Counties, Montana (Basin 411)*, 55 P.3d 396 (Mont. 2002) [hereinafter *Bean Lake III*].

12. *Id.* at 399

13. *Id.* at 407-408

14. Telephone interview with Bruce Farling, Executive Director, Montana Trout Unlimited (January 30, 2004).

whenever possible, as doing so more closely resembled a beneficial use under the prior appropriation doctrine. Should the conservation oriented water right holder choose to change from an extractive to an instream use he would, furthermore, be required to endure some measure of administrative process. In essence, a system historically based upon sustained extraction will not soon be altered by a common law decision that qualifies beneficial use and merely permits a conservation friendly alternative. While clarification (of *beneficial use* and *diversion*) was overdue, *Bean Lake III* relegates to token status the notion that the law should actively deter wasteful extraction of water from the public domain. The case suggests that if public natural resource management agencies sought instream rights in a volume tantamount to senior appropriators' extractive rights, then natural flow regimes might perhaps approach half of their natural levels in any given year.

In Montana, one must obtain a permit in order to draw water from its natural repositories. The permitting system is coupled with traditional notions of prior appropriation. New permit applicants must wait their turn behind senior water right holders until water comes available for use. While thousands of private citizens and business entities enter this process to appropriate water, few enter the process on behalf of instream values. There exist only a few natural resource management agencies in Montana. Their non diversionary claims for instream/habitat purposes comprise 0.35 % (35/100^{ths} of a percent) of all appropriations in the state.¹⁵ The *Bean Lake III* case revived only 26 claims for instream flow reservations out of 206,000 extant claims.¹⁶ These 26 claims were non diversionary and thus might have been construed as invalid under the late confusion surrounding beneficial use. Nonetheless, appropriations for ecological values are now and will likely remain an insignificant minority. Because *Bean Lake III* lacks statutory reinforcement, there exists little incentive for appropriators to follow its lead by leaving unneeded water to its natural course.

The prior(ity) appropriation doctrine, even post *Bean Lake III*, ignores the stark economic, social, political and ecological differences between the American West of the nineteenth century and that of today.¹⁷ The purportedly flexible doctrine has yet to fully adapt to the economic, social and ecological realities of the New West. While *Bean Lake III* grants Montana's public resource management agencies equal standing to compete for water with extant appropriators, the case stands within the anachronistic confines of the prior appropriation doctrine. The prior appropriation doctrine does not address the degree to which holders of water rights are subsidized in their consumption by the non appropriating public. The prior appropriation

15. Stan Bradshaw & Laura Zehmer, *Bean Lake Explained*, Montana Trout Unlimited 1 (2003).

16. *Id.*

17. Terry L. Anderson & Donald R. Leal, *Free Market Environmentalism*, 91 (Palgrave 2001).

doctrine continues to reward those who (or whose progenitors) have capitalized on a public resource first.

Unless one believes that water holds no value—market, intrinsic or otherwise—the institution of prior appropriation fails to reflect water’s true value, and hence, the external costs associated with its diversionary use. Those acquiring appropriation rights receive a public resource at little or no cost: “shut[ting] out large segments of the population, and with them, a set of ideals about how water should be used.”¹⁸ The true costs of this appropriated resource are not reflected in the marketplace when water rights are (& were) allocated. These costs include diminished quality of life, sullied environments, fractured ecosystems as well as accompanying economic and social losses. Granting water appropriators an inherently valuable public good at zero cost is akin to social welfare for people who are neither jobless, nor homeless nor handicapped.¹⁹ *Bean Lake III* represents a step forward within the scheme of prior appropriation, but does not remedy critical, anachronistic aspects of the prior appropriation doctrine.

II. FACTS

Bean Lake III came to fruition primarily due to tensions between the Montana Department of Fish, Wildlife and Parks (DFWP) and the Montana Water Court (though *amicus curiae* were numerous). In *Bean Lake III*, DFWP successfully appealed a Water Court ruling that denied five pre 1973 water right claims within the Missouri River Basin.²⁰ In response to DFWP’s appeal, the Water Court urged the Montana Supreme Court to dismiss the appeal on a procedural flaw or in the alternative, to convert it to a petition for supervisory control.²¹ The Montana Supreme Court chose the latter alternative.²² In *Bean Lake III* DFWP asserted that the beneficial use to which they would put the water under claim was that of fish, wildlife and recreation. However 14 years prior to *Bean Lake III*, the Water Court’s *In re Dearborn Drainage Area* decision (hereinafter *Bean Lake I*), denied DFWP similar claims based on fish, wildlife and recreation because these claims were non diversionary.²³

On dismissing the Montana Stockgrowers Association’s request for attorneys fees from *Bean lake I*, the Montana Supreme Court upheld the Water Court’s denial of fish, wildlife and recreation based claims (hereinafter:

18. Bates, *supra* n. 3, at 7.

19. *Id.* at 134.

20. *Bean Lake III*, 55 P.3d at 398, 407.

21. *Id.* at 398.

22. *Id.*

23. *In re the Adjudication of the Existing Water Rights to the Use of All the water, Both Surface and Underground, within the Dearborn Drainage Area, Including All Tributaries of the Missouri River in Cascade and Lewis and Clark Counties, Montana*, 766 P.2d 228, 230 (Mont. 1988) [hereinafter *Bean Lake I*].

Bean Lake II).²⁴ Thus, in addressing the pivotal issues of what constitutes a beneficial use and whether diversion of water from its source is a necessary element of beneficial use (i.e., a valid appropriation), the *Bean Lake III* Court sought clarification of a seemingly contradictory body of jurisprudence. In assuming supervisory control of *Bean Lake III*, the Montana Supreme Court requested and received several amicus curiae briefs, including submissions from the United States, the Montana Stockgrowers Association, and the Montana State Council of Trout Unlimited.²⁵

The contrasting views manifest in *Bean Lake III* illustrate jurisprudential ambiguities in the common law. In *Bean Lake III*, DFWP attempted to work within then current jurisprudence by basing its fish, wildlife and recreation based water claims on the prior appropriation doctrine's traditional requirement of diversion. That is, they proposed transfer of water from its source to another location. This was consistent with the *Bean Lake I* ruling which held that diversion or capture was an essential element of beneficial use.²⁶ Despite the fact that DFWP's claim in *Bean Lake III* met the diversionary requirement, the Water Court had focused on the ecological and recreational impetus for the claims in its denial, apparently minimizing the significance of diversion.²⁷ In doing so, the court sidestepped the issue of diversion completely. Emphasizing this view, the Water Court consistently inserted into abstracts addressing DFWP's claims a remark (hereinafter: "Bean Lake Remark") stating:

There is a question as to the validity of this claimed right. [In] In [re] the Dearborn Drainage Area..., the Montana Supreme Court stated: "It is clear therefore that under Montana law before 1973, no appropriation right was recognized for recreation, fish and wildlife, except through a Murphy right statute."²⁸

DFWP repeatedly objected to the Bean Lake Remark, requesting its removal from the Water Court's briefs. The Water Court, in response, consistently refused to remove the remark from its documents.²⁹ In addition to objecting to the Bean Lake Remark, DFWP asserted that their 5 pre 1973 claims constituted beneficial uses and by extension, that all fish, wildlife

24. *In the Matter of the Adjudication of the existing rights to the use of all the water, both Surface and Underground within the Dearborn Drainage Area, including all tributaries of the Dearborn River in Cascade and Lewis and Clark Counties, Montana*, 782 P.2d 898 (Mont. 1989) [hereinafter *Bean Lake II*].

25. *Bean Lake III*, 55 P.3d at 397.

26. *Bean Lake I*, 766 P.2d at 236.

27. *Bean Lake III*, 55 P.3d at 397-398.

28. *Id.* at 398. Murphy right statutes are described as follows: "The 1969 Montana Legislature created a procedure by which the Fish and Game Commission could appropriate instream flows for fish, wildlife and recreation purposes on certain designated streams. Section 89-801, RCM (1947)." *Id.* at n. 1, 399.

29. *Id.* at 398-399.

and recreation related uses entailing diversion were valid under pre 1973 law.³⁰ The Bean Lake Remark and the Water Court's denial of diversionary fish, wildlife and recreation based claims prompted DFWP's appeal of that decision. These events punctuated the ambiguity and confusion surrounding the concepts of beneficial use and diversion, to which the Montana Supreme Court had contributed by upholding the Water Court's ruling in *Bean Lake I*.

III. ARGUMENTS OF PARTIES

The Montana Water Court, in its *Bean Lake III* denial of DFWP's claims, asserted that the Bean Lake Remark was merely an issue statement, and did not constitute a formal policy stance adopted by the Water Court.³¹ Furthermore, the Water Court argued that DFWP's appeal to the Montana Supreme Court should be denied for failing to comply with deadlines delineated by claims examination rules.³² The Water Court also suggested that its denial of DFWP's claims was consistent with *Bean Lake I*:

[The] Supreme Court's Bean Lake decision did, in fact, conclude that pre July 1973 Montana water law does not recognize diverted rights for recreation, fish and wildlife.³³

Beyond its arguments regarding claims examination rules and precedent set by *Bean Lake I*, the Water Court's alternative pleading perhaps bespeaks confusion regarding the fundamental issues of beneficial use and diversion. The Montana Supreme Court itself acknowledged that *Bean Lake I* is "no model of clarity."³⁴ While the Montana Supreme Court acknowledged the Water Court's valid argument as to claims examination rules, Justice Leaphart's majority opinion harkens back to *Bean Lake I*, noting the importance of sorting out the complex issues at hand for the sake of resolving confusion, promoting judicial economy and the efficient process of water claims.³⁵

Implicit in the Montana Supreme Court's accepting supervisory control is a sense of accountability in their ill considered affirmation of the Water Court's ruling in *Bean Lake I* (with *Bean Lake II*).³⁶ *Bean Lake III* thus sought clarification and remediation of the Supreme Court's erroneous holding in *Bean Lake I*. While the prior appropriation doctrine has been in place for more than 125 years, all parties would likely concur that in the past few decades Montana jurisprudence has not reconciled societal values

30. *Id.* at 397.

31. *Id.* at 398-399.

32. *Id.* at 398.

33. Br. of Respt., ¶ 27, *Bean Lake III*, 55 P.3d 396 (2002).

34. *Bean Lake III*, 55 P.3d at 400.

35. *Id.* at 398.

36. *Id.*

relating to fish, wildlife and recreation with the customary values of mining, stock watering, agriculture and other traditional appropriations around which the doctrine originally developed.³⁷

A. Majority Reasoning

In *Bean Lake III* the Montana Supreme Court held erroneous the *Bean Lake I* ruling that under Montana law no appropriation right was recognized for recreation, fish and wildlife except through Murphy right appropriations.³⁸ In justifying this decision, the Court looked to the historical context of the prior appropriation doctrine, noting that it grew out of a culture of mining and westward expansion.³⁹ The common law elements of valid appropriation are: intent, notice, diversion and application to beneficial use.⁴⁰ Montana however, "in accordance with the flexibility of the prior appropriation doctrine," grants water rights primarily on the basis of application to a beneficial use.⁴¹ The Court's majority opinion notes that beneficial use is the "touchstone of the prior appropriation doctrine."⁴²

The Montana Supreme Court noted that *Bean Lake I*, in its holding that no appropriation right was recognized for fish, wildlife and recreation, was incompatible with the precedent on which it was based. In particular the Court cited the Montana cases: *Osnes Livestock Co. v. Warren* (1936) and *Paradise Rainbows v. Fish and Game Commission* (1966).⁴³ The *Bean Lake III* Court asserted that the *Bean Lake I* Court had altogether ignored *Osnes* and misread *Paradise Rainbows*.⁴⁴

In addressing the touchstone issues of beneficial use and diversion, the *Osnes* Court held that a senior water right claim, even if based on a recreational/fish and wildlife related use, such as a fish pond or swimming pool, would have priority over a subsequent, valid water right claim.⁴⁵ Nonetheless, the *Bean Lake I* Court failed to address *Osnes*.⁴⁶ Like *Osnes*, the *Paradise Rainbows* Court reinforced recreational and ecological applications, such as fish ponds, as valid and beneficial uses. The *Paradise Rainbows* decision upheld such beneficial uses so long as they were diversionary. The *Bean Lake III* Court thus asserted that the Water Court erroneously overlooked directly analogous precedent relating to diversionary claims based on fish, wildlife and recreation when it denied DFWP's 5 pre 1973 claims.⁴⁷

37. *Id.* at 399.

38. *Id.* at 400. For information regarding Murphy right appropriations, *see supra*, n. 27.

39. *Id.* at 399.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Osnes Livestock Co. v. Warren*, 62 P.2d 206 (Mont. 1936); *Paradise Rainbows v. Fish and Game Commission*, 421 P.2d 717 (Mont. 1966).

44. *Bean Lake III*, 55 P.3d at 399.

45. *Osnes*, 62 P.2d at 214.

46. 55 P.3d at 399.

47. *Id.* at 400.

The *Bean Lake III* Court further noted the Montana Constitution's explicit recognition of recreation as a beneficial use.⁴⁸ "The majority of briefs submitted in [*Bean Lake III*] concur that the *Bean Lake I* decision is fraught with inconsistencies." To this effect, the *Bean Lake I* Court acknowledged that:

Article IX, Section 3, of the 1972 Montana Constitution recognized recreation as a beneficial use and accepted 'as given that the activities of DFWP in stocking Bean Lake [and] maintaining the fishery resource[...] coupled with the general public use of Bean Lake for the purpose of recreation, wildlife and fishing constituted a beneficial use of the waters within the meaning of the prior appropriation doctrine.'⁴⁹

Curiously, the tenor of this language excerpted from the *Bean Lake I* opinion directly undermines that Court's holding which states:

It is clear therefore that under Montana Law before 1973, no appropriation right was recognized for recreation, fish and wildlife except through a Murphy right statute.⁵⁰

Such ambiguity contributed to the tensions pervading the *Bean Lake III* case. Based on the contradictory language in *Bean Lake I*, the *Bean Lake III* Court was unable to determine the basis for denial of DFWP's water claims in *Bean Lake I*. The decision lacked sufficient analysis of appropriation. Rather, reasoned the *Bean Lake III* Court, *Bean Lake I* focused on the erroneous presumption that Montana did not recognize fish, wildlife and recreation as beneficial uses (prior to 1973). The *Bean Lake I* decision was thus unclear as to whether DFWP's claims were denied because of their non-diversionary nature or for reasons relating to the other common law elements of appropriation such as intent, notice or application to beneficial use.⁵¹

The Montana Supreme Court in its *Bean Lake III* decision recognized fish, wildlife and recreation as beneficial uses of the water resource. With regard to the *Bean Lake I* Court's ambiguity as to whether or not diversion of water from its source is a requisite element of beneficial use, the Court issued a pithy summation of its reasoning:

Common sense rebels against a rigid diversion requirement that would refuse to recognize an acknowledged beneficial use simply because application to the use does not require

48. *Id.*

49. *Id.* (citing *Bean Lake I*, 766 P.2d at 234, 236).

50. 766 P.2d at 236.

51. 55 P.3d at 401.

removal from and depletion of the water source. In accordance with the [prior appropriation] doctrine's flexibility, we find that diversion is not a physical necessity of application to a beneficial use.⁵²

Diversion, reasoned the Court had been used in prior cases to prove intent, a requisite element of appropriation. Nevertheless, while diversion is sufficient to prove intent, it is not necessary to divert in order to show intent.⁵³ In response to the dissent's assertion that addressing non diversionary claims exceeded germane issues, the majority defended its elucidation by noting that the issue of diversion was the crux of the confusion engendered by *Bean Lake I*.⁵⁴ Diversion, therefore lay at the heart of the claims underlying both *Bean Lake* cases.

B. Dissent Reasoning

The dissent concurred with the majority opinion to the degree that *Bean Lake I* stated erroneously that recreation does not constitute a beneficial use under the prior appropriation doctrine. Thus, the Court unanimously agreed that the *Bean Lake I* Court's invalidation of all pre 1973 recreation, fish and wildlife based claims (even those satisfying all elements of the prior appropriation doctrine) was erroneous. The divergence of opinion between the majority and the dissent related to the concept of diversion or capture.⁵⁵

Although the dissent concurred with the majority on the pre 1973 claims, it disagreed on the issue of diversion. The two vote dissent also rejected the five vote majority's assertion that the prior appropriation doctrine has historically been flexible. To illustrate this point, the dissent explained that the prior appropriation doctrine developed around custom, principally that of miners and settlers of the late nineteenth century. In citing *Murray v. Tingley* (1897), the dissent noted that diverting water from a stream by digging a ditch or otherwise tapping the stream constituted a valid appropriation of water.⁵⁶ Further, the dissent cited other cases (from 1900, 1912 and 1922) illustrative of early mining custom and the historic requirement of diversion.⁵⁷ In citing pre statehood territorial statutes specifying application of "the customs of early settlers," the dissent iterated the notion that diversion has historically been a requirement.⁵⁸ While it did not cite exclusively to antiquated decisions, the dissent did argue that the methods by which water could be appropriated have remained essentially unchanged since

52. *Id.*

53. *Id.* at 402.

54. *Id.* at 401.

55. *Id.* at 408 (Rice, J. & Gray, C.J., concurring in part and dissenting in part).

56. *Id.* at 409 (Rice, J. & Gray, C.J., concurring in part and dissenting in part).

57. *Id.* at 409-411 (Rice, J. & Gray, C.J., concurring in part and dissenting in part) (see: *Toohy v. Campbell*, 24 Mont. 13, 60 P. 396 (1900); *Bailey v. Tintinger*, 45 Mont. 154, 122 P. 575 (1912)).

58. *Id.* at 409-410 (Rice, J. & Gray, C.J., concurring in part and dissenting in part).

1885.⁵⁹ The dissent reasoned that more recent precedent thus adheres to the same strict construction of appropriation established by the mining customs of the nineteenth century.⁶⁰ Further, the dissent claimed that “the Court in large part ignores our century old statutory scheme requiring diversion, preferring instead to focus on our common law history.”⁶¹ A long history of cases was thus evoked, applying the settler-miners’ customs to the economic and social institutions of the present.

IV. ANALYSIS

The whole system is wrong. It is wrong in principle as well as faulty in procedure. It assumes that the establishment of titles to snows on the mountains and the rain falling on public land and the water collected in lakes and rivers, on the use of which the development of the State must in great measure depend, is a private matter. It ignores public interests in a resource upon which the enduring prosperity of communities must rest. It is like A suing B for control of property which belongs to C. Many able attorneys hold that these decreed rights will in time be held invalid because when they were established the public, the real owner of the property, did not have its day in court.

-Elwood Mead: *Irrigation Institutions*⁶²

Sound reasoning undergirds *Bean Lake III*. The holding makes sense legally and intuitively, but falls short of accounting for the innumerable ecological, economic and social losses (past, present and future) suffered under the *Wild West*’s decrepit prior appropriation doctrine. The conflict generated by the case was misspent energy and belies the real world futility of the *Bean Lake III* decision in the New West. Were it backed by carefully crafted statutes designed to extirpate wasteful practices and accommodate true beneficial uses, then *Bean Lake III* would perhaps ameliorate some injuries inflicted by prior appropriation. At present, however, any incentive to conserve water, habitat, species and associated socioeconomic values is *de minimis*. Within a vast arid landscape in which water is akin to the doomed pasture of Hardin’s *Tragedy of the Commons*,⁶³ those fortunate enough to hold appropriation rights (i.e., access) will do as rational self interest and the prior appropriation doctrine would have them do. They will extract the resource until public waterways and the amenities they support have gone the way of Hardin’s open access pasture – and the westslope

59. *Id.* at 410-411 (Rice, J. & Gray, C.J., concurring in part and dissenting in part).

60. *Id.* at 410-412 (Rice, J. & Gray, C.J., concurring in part and dissenting in part).

61. *Id.* at 411-412 (Rice, J. & Gray, C.J., concurring in part and dissenting in part).

62. Bates, *supra* n. 3, at 144.

63. *See*: Garrett Hardin, *Tragedy of the Commons*, 162 *Science*: 1243-1248 (1968).

cutthroat trout.⁶⁴ Though western water is not a *tragedy of the commons* in the strict economic sense, the same ilk of externalities – those benefiting a few while burdening the public – abound.⁶⁵

While sluicing and dredging for valuable minerals or clearing native vegetation from forest, prairie or desert for agriculture may once have comprised the *highest uses* of the land, change continues to act upon western landscape. Once plentiful resources are now scarce and once scarce resource users are now plentiful. The social, economic, and ecological state of the West has changed much during the past 150 years. Dubious is a present day determination of *beneficial use* that is derived from customs of the “[18]49ers” digging for gold in the hills.

Bean Lake III mitigates some flaws of the prior appropriation doctrine by establishing recreation, fish and wildlife values as beneficial uses independent of whether or not water is being diverted from a source. This common sense clarification was overdue and (hypothetically) allows agencies acting in the public interest to reserve water instream to serve recreational and ecological functions. Notably, the decision does not grant non diversionary recreational and ecological values any degree of seniority within the prior appropriation system, but merely imparts equal standing to compete for water rights with other would be appropriators. In this respect the decision bolsters *first in time, first in right* aspects of the prior appropriation doctrine.⁶⁶

Under *Bean Lake III*, fisheries and their associated recreational and ecological applications represent a beneficial use. This signifies a progressive development as it perhaps accounts for the vast quantities of time and money recreators and all manner of citizen spend pursuing their interests on public waterways. Perhaps the holding also accounts for the myriad values Montana’s citizens ascribe to wildlife and habitat.⁶⁷ In these ways, *Bean Lake III* more closely accounts for the true value of the New West’s water. Prior to this ruling, it was unclear whether public agencies desiring to reserve water *in situ* were able to compete with traditional appropriators for rights to use water where it naturally occurred.

Instream reservations are of great value, economic and otherwise. Many citizens ascribe to intact waterways and ecosystems intrinsic value; the mere existence of the intact resource is important to people, even if one

64. See: Michael K. Young, Technical Editor, *Conservation Assessment for Inland Cutthroat Trout*, USDA Forest Service General Technical Report RM-GTR-256, (Fort Collins, Colo. 1995).

65. See: Hardin, *supra* n. 63.

66. In effect, for agencies to establish new instream allocations to benefit the public, they would need to purchase water rights from senior appropriators. Senior appropriators may have received those water rights at zero cost.

67. Ascriptions of value to wildlife and habitat likely transcend political divisions. Some value habitat for the game it provides to hunt, some for the economic benefits it brings, some for resources to be extracted or harvested, some for its mere existence, some for spiritual reasons, some for the opportunity to be enjoyed by subsequent generations of humans, some for aesthetics, some for biodiversity refuge... and so on.

gleans no tangible benefit. Intrinsic values underlie such preferences as those for the preservation of distant landscapes and species considered exotic to North Americans.⁶⁸ Montana's water markets, however, do not account for such values. Importantly, the shortage of those water rights securing instream flows on water courses does not equate to permission from Montana's citizens to subsidize private interests in their use of an inherently public resource. More likely, the dearth of non extractive reservations evinces a belief that policy making institutions would successfully protect public riparian and aquatic resources from depletion and misuse. Within the prior appropriation scheme, this is an overly optimistic assumption.

The meting out of western water rights has long ignored *in situ* recreational and ecological values. Historically, water allocation has also ignored the citizens who hold intrinsic value in a flowing river or intact fishery. As Mead suggested, the non appropriating public never had its day in court, and was not granted equal standing to compete with traditional appropriators for water rights until the *Bean Lake III* decision was issued.⁶⁹

Although *Bean Lake III* grants standing to the public (through government agencies) to compete with traditional appropriators for water, it fails to hold private appropriators accountable for the negative side effects (externalities/external costs) of their consumption. Negative externalities represent those costs imposed, but not borne by the parties to a transaction. To this effect, when an irrigator or cattle operation appropriates water for personal economic endeavors, they perforce remove water from an ecological community. Consequently, ecologies and associated recreational opportunities may suffer. This, in turn, may harm quality of life for some or many. More tangibly, diversion of water from its natural course can prove detrimental to economies based in fisheries, wildlife and outdoor recreation.⁷⁰ The question of whether appropriators should pay for side effects of their appropriation is complex. Appropriators should, however, pay a price approaching the true cost of the water they appropriate, at least with respect to its value to other would be users. In this critical respect, *Bean Lake III* falls

68. For example: that of Congress to preserve the Arctic National Wildlife Refuge as an intact ecosystem. Intrinsic values also underlie contributions made by individuals to distant causes, such as funds to preserve the Siberian Tiger or Black Rhino. While a Montanan may never make it to Alaska, Siberia or Africa, the natural resources of such places may hold great intrinsic value. This is evidenced by the tremendous sums received by nonprofit conservation organizations such as the World Wildlife Fund. See: Gardner Brown & David F. Layton: *A Market Solution for Preserving Biodiversity: The Black Rhino in Endangered Species Protection in the United States. Biological Needs, Political Realities, Economic Choices* (Cambridge University Press, 2002).

69. Bates, *supra* n. 3, at 144.

70. Fisheries problems illustrate well the negative externalities/external costs of oversubscription of water stocks. Many species require clean, cold flows to thrive. When right holders remove water from watercourses, aquatic ecosystems suffer. Reduced flows concentrate pollutants. When water is diverted, habitat is likely degraded and diminished. Aquatic species are thus affected. See Jessica Koteen, et. Al., *Evaluating Benefits and Costs of Changing Water Quality*, USDA Forest Service General Technical Report PNW-GTR-548 (Portland, OR 2002).

short of making significant improvements to western water law. The prior appropriation doctrine's fundamental flaws relating to external costs will be mitigated only by law and policy that takes an affirmative approach.

Economic theory holds that competition for (what is essentially) a scarce resource would determine a price for water in equilibrium with its supply. In the case of the West, this price should be quite high (much greater than zero) given the demand and myriad uses/values of water. It is thus perverse that water rights have been allocated free of charge to senior appropriators, who may extract the resource regularly – free of charge. The supply of fresh water in the West (or perhaps the supply of people) is not the panacea it was when prior appropriation doctrine was developed in the 1800s. Millions of western inhabitants are among competitors for divergent uses of a limited supply of water, not least of which are uses related to instream values. The prior appropriation doctrine's zero cost handouts prevent the market's *invisible hand* from reaching an equilibrium whereby there is real incentive for senior appropriators to conserve, to use only that which one's financial means allow. Thus arises the great resistance exerted by a subsidized class whose subsidy might be rescinded, whose subsidy has morphed into an entitlement. Such subsidy, and its aggressive defense by traditional beneficiaries, ignores the deleterious side effects suffered by the non appropriating, subsidizing public. Thus, *Bean Lake III*, in spite of its auspices, does not remove the subsidies inherent in prior appropriation.

The present endangered and threatened listings as well as extirpated anadromous fisheries comprise prominent negative externalities arising (at least in part) from the oversubscription of water stocks. Those who appropriate water help generate these external costs. Such costs, however, are borne primarily by non appropriators. An efficient system would have water appropriators paying for water a price reflecting the supply of water, demand for water, opportunity cost, externalities and other such factors excluded by the prior appropriation doctrine. Thus, water would not be free to the *first in time*, but would be sold at a price approaching its true cost. Proceeds might then be used to allocate water resources for *in situ*, non diversionary values or for those values deemed most appropriate by the public.

Prior to the recognition of recreation and ecological values as a beneficial uses, many anadromous salmonid stocks were extirpated from the Rocky Mountain West.⁷¹ Appropriations of finite stocks of water for other uses, including hydroelectricity production, agriculture and mining, were causal factors in the destruction of many Rocky Mountain salmon and steelhead

71. Many instream/ecological values have deteriorated. Prominent among these are suffering salmonid species. Greenback cutthroat, westslope cutthroat, bull trout and other species are presently endangered or threatened due to habitat degradation and loss. See Michael K. Young, Technical Editor, *Conservation Assessment for Inland Cutthroat Trout*, USDA Forest Service General Technical Report RM-GTR-256, (Fort Collins, Colo. 1995).

runs. In Montana, existing fisheries such as those of the bull trout, Yellowstone and westslope cutthroat trout and that of the arctic grayling are listed as endangered or as species of special concern.⁷² These species declines are symptomatic of the short shrift paid to instream values under contemporary water law. Until instream values are granted serious consideration, such ecological degradation will continue.

Of particular interest to Montana is the \$300 million annual income generated by recreational angling in this state alone.⁷³ It would thus prove inefficient to deprive recreation and ecology based water appropriations equal standing to compete with traditional appropriations. Arguably, such economic benefits warrant reconsideration of the *first in time, first in right* basis of the prior appropriation doctrine in Montana. The prior appropriation based water "market" is flawed not simply because it has traditionally ignored non market/extrinsic values and negative externalities, but because it does not distinguish with regard to the myriad beneficial uses of water. It thus fails to account for public values and the inherent public nature of the resource.

V. CONCLUSION

Water, as a necessary and common medium for community development at every stage of society, has been held subject to perceived societal necessities of the time and circumstances. In that sense water's capacity for full privatization has always been limited. The very terminology of water law reveals that limitation: such terms as beneficial, non-wasteful, navigation, servitude, and public trust all impart an irreducible public claim on water as a public resource, and not merely a private commodity.

-Joseph Sax⁷⁴

Bean Lake III lacks the power to generate significant change. At its essence *Bean Lake III*, by recognizing non diversionary fish, wildlife and recreation based values, speaks to the inherently public nature of water. This recognition is logical, but incomplete. The tensions within the case underlie the historic application of private property rights to a resource that is public in nature. Though the decision moves to grant public values equal standing to compete for water with private interests, it highlights profound

72. Montana Fish, Wildlife and Parks Commission, *Fishing Regulations 2002-2003* 1 (Mont. 2002).

73. Montana Whirling Disease Task Force, *Report and Action Recommendations*, 11 (May 1999). (available at <<http://www.whirlingdisease.org/docs/wdtfreport.pdf>>); The Montana Standard, *Montana Forum*, (Jan. 30, 2003) (available at <<http://www.montanaforum.com/rednews/2002/10/30/build/rivers/waterguest.php?nnn=5>>).

74. Bates, *supra* n. 3 at 149.

flaws within the prior appropriation doctrine. While *Bean Lake III* ensures that the law will not rescind a water right because a holder chooses to apply his rights to instream or conservation related values, it provides no affirmative incentive to conserve. Still driving consumption of water is the *use it or lose it* psychology which drains public streams, rivers and lakes to the detriment of ecological and human communities alike.

Prior appropriation is anachronism. Both the *Bean Lake III* majority and the dissent acknowledge this through the precedent upon which they rely. Prior appropriation is based in a frontier society, economy and ecology. The policies of *first in time* and diversion served their purpose prior to the modern era. They encouraged development of arid, unpopulated regions and coupled well with homesteading policies of hasty land distribution. Today, prior appropriation is improper. It generates profound external costs to be borne by the general populous at the hands of private gain. While in the abstract private gain is auspicious; that which burdens the public with negative externalities is not.

Bean Lake III moves toward acknowledging public values of fish, wildlife and recreation, but the decision works within an obsolete framework. The prior appropriation doctrine should be replaced with a market/policy combination that attaches to the water resource the true costs of its appropriation as well as the public value it represents. Here, it is the government's role to make our water markets more efficient through policy designed to internalize the external costs associated with appropriation of the water resource.