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RIGHTS OF THE WATERWAY

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Tucked into a notable report by California's top scientists, lawyers, and policymakers is a striking recommendation: fix California's ongoing water challenges through "endangered species triage"[1] in the face of competing water uses. To drive the point home, the report criticizes the U.S. Endangered Species Act for failing to include a "provision for allowing species to go extinct,"[2] a provision the authors opined was necessary to allow for "aggregate species recovery."

Putting aside for the moment the remarkable hubris of assuming that we can accurately predict which species are essential to "aggregate species recovery," and tabling the much larger moral implications of deliberately playing God, how did our top minds get to the "solution" of eliminating species in order to save them?

Such recommendations in fact flow from a fundamentally flawed world-view that is destroying ecosystems, preventing needed reform, and potentially taking us down a path that will lead to scrabbling for the remnants of a once-beautiful and flourishing world. Specifically, our current environment laws derive from an operative – and faulty – perspective that water, land, forests, air, soil, and wildlife are "resources" or "wealth" to be owned, extracted, manipulated and controlled for human benefit.

This world-view took hold in our environmental policies at the turn of the 20th century, when the first chief of the U.S. Forest Service, Gifford Pinchot, attempted to characterize the fast-growing nation's conservation ethic as the "controlled" use of natural "resources."[3] Pinchot's contemporary and rival, John Muir, provided eloquent counter-arguments that recognized and respected our integration with the natural world:

> When we try to pick out anything by itself, we find it hitched to everything else in the universe. One fancies a heart like our own must be beating in every crystal and cell . . . [4]

> The sun shines not on us but in us. The rivers flow not past, but through us . . . . [5]

Muir's observations reflected centuries of indigenous wisdom and traditions. California's own native peoples understood their environment to have an intrinsic value of its own, and saw nature as "neither the enemy nor simply a means to an end or a commodity to be exploited for wealth or power."[6] Many indigenous groups believed that plants, animals, springs and trees could think and feel.[7] As one modern-day California tribal leader explains, "the salmon are our relatives, are sacred, and necessary for the continuation of life."[8] The

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[1] Public Policy Institute of California, "Managing California's Water: From Conflict to Reconciliation," p. 6 (Feb. 2011) (PPIC Report), available at: http://www.ppic.org/main/publication.asp?i=944.

[2] *Id*. at 250.

[3] Pinchot, Gifford, *The Training of a Forester (*J.B. Lippincott Co., Philadelphia, 1914).

[4] Muir, John, "Mount Hoffman and Lake Tenaya," *My First Summer in the Sierra* (Houghton Mifflin Co., Boston and New York, 1911).

[5] Muir, John, "Mountain Thoughts," *John of the Mountains: The Unpublished Journals of John Muir*, Linnie Marsh Wolfe, ed. (Univ. of Wisconsin Press, Madison, 1979).

[6] Hundley, Norris, Jr., *The Great Thirst*, pp. 1-2 (University of California Press, Berkeley, 2001).

[7] *Id*. at 4.

[8] Gary Mulcahy, Winnemem Wintu Tribe, in "Judge Tosses Biological Opinion for Salmon and Steelhead in California," *Earthjustice Press Release* (April 16, 2008), available at:

concept of private rights in the use of water was unknown. Water was essential to life, and it could not be bartered or sold.[9]

The tension between these two policy approaches – Pinchot's view of conservation policy as a strategy for "controlled" use of the environment, and Muir's conservation ethic of healthy, functioning ecosystems respected for their own existence –fell in Pinchot's favor. Today, Pinchot's tenet of human superiority over a servile environment is so ingrained in our national consciousness that we rarely notice, let alone challenge, it. But it is indeed merely an assumption, one that we can change to our collective advantage.

We have built our modern environmental laws on Pinchot's utilitarian foundation, structuring them to allow for our continued, destructive use of the natural world to suit our desires. We have set up an elaborate network of permits and regulations to "control" uses, slowing the associated environmental decline only just enough to avoid inconvenient, short-term, human impacts. We chose to make the ecosystems' needs, and the impacts of our collective long-term desires, mere afterthoughts.

By ignoring the reality that the natural world is an extension of our own bodies, we have dismissed to our growing detriment an alternative vision: one of laws that fundamentally respect the natural world, and that recognize the world as an integrated whole, of which the human race is just one part.

The California water report's proposed "reform" of "endangered species triage" demonstrates how flawed legal foundations, set in place long ago, will come home to roost. Indeed, not only endangered species, but also humans have inevitably become part of the "triage" process, a fact the California water report notably omits.

For example, clean water today bypasses many poorer California communities, forcing families to buy bottled water with limited funds in order to avoid illness and even death by drinking from the tap.[10] The ethical system underlying a water "reform" process that chooses which species will live or die parallels one that requires underprivileged communities to choose between purchasing clean water or food. Without genuine reform based on legitimate assumptions about our place in the world, this triage process will continue to spread within the natural world and outward to more humans.

In other words, if we decide it is acceptable select which other species may share the world's water, we set up an ethical structure that will lead to denying water to our own. Indeed, it already has.

What steps, then, do we need to take to evolve our water laws to recognize and respect our intimately interconnected relationships with the natural world? A more in-depth examination of water law in California and the Great Lakes helps illustrate the types of reforms that are needed.

California water law recognizes private rights in the use of water,[11] but only indirectly addresses the need for healthy, clean flows, through such mechanisms as pollution[12] and water use[13] permits. Water use permits are regularly issued with little awareness of the amount of water already being used or diverted, and with little regard for ecosystem impacts. State estimates indicate, for instance, that California has allocated formal, private rights to more than eight times the water

http://earthjustice.org/news/press/2008/judge-tosses-biological-opinion-for-salmon-and-steelhead-in-california.

[9] *Id*. at 25.

[10] U.C. Davis, "Addressing Nitrate in California's Drinking Water" (March 2012), available at: http://groundwaternitrate.ucdavis.edu; Pacific Institute, "The Human Costs of Nitrate-Contaminated Drinking Water in the San Joaquin Valley" (March 2011), available at: http://www.pacinst.org/reports/nitrate_contamination/nitrate_contamination.pdf.

[11] *See, e.g.*, Cal. Water Code, Division 2, Parts 1-3.

[12] *See* California Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000 *et seq*.

[13] *See, e.g.*, Cal. Constitution Art. X, § 2; Cal. Water Code § 275.

that actually exists in the vast Bay-Delta Estuary.[14] Meanwhile, the basic water needs of rivers, estuaries and other aquatic ecosystems go unrecognized. As a result, the integrity of California's water systems is increasingly dependent on last-gasp applications of the U.S. Endangered Species Act, followed by predictably fierce political pushback that draws a bulls-eye on affected species.

By contrast, the Great Lakes Water Compact acknowledges the need for "protecting and restoring the hydrologic and ecosystem integrity of the [Great Lakes] Basin,"[15] and provides stronger tools for water management than in California. Unlike California, the Compact broadly requires data collection on "the location, type, quantity, and use of [water] resources and . . . of Withdrawals, Diversions and Consumptive Uses."[16] The Compact applies collected data to the oversight of new and increased diversions of water within the Great Lakes Basin.[17] Finally, unlike California, it provides for citizen enforcement.[18]

Despite these improvements over California water law, the Compact unfortunately still lacks language reflecting the deep integration of humans and waterways. Rather than advancing reforms that would recognize and measurably improve on the Basin's right to health, the Compact chooses only to "prevent significant adverse impacts of withdrawals and losses on the Basin's ecosystems and watersheds."[19] In other words, even this innovative Compact fundamentally accepts that ecosystems *must* degrade in order to satisfy human desires. The pace of ecological decline may be slower in the Great Lakes Basin than in California, but the downward trajectory has been set.

It is time to set a different trajectory. The assumption that we may manipulate a servile environment as we choose to maintain a (false) sense of security in our lives is dangerously outmoded. It ignores the wisdom of Muir and indigenous peoples that we are bound to the Earth and that our actions reverberate back on us. We must embrace this reality, and insist on recognizing in law the inherent rights of all of the Earth's ecosystems and creatures to thrive and evolve, just as we claim the same rights for ourselves.

Earth Law Center and other colleagues have been working to advance this doctrine by advocating for formal rights for rivers and other waterways to flow with clean water. Legal water rights currently are assigned only for diversions for human uses in California. As such, ecosystems will ultimately lose every meaningful confrontation because they do not have a seat at the table. To prevent this result, water rights should be assigned to waterways through science-based assessment of the ecosystems' needs. Such water rights should be upheld and enforced by independent legal guardians acting on behalf of the waterways. Fees charged to human users for the privilege of water diversions would pay for these efforts.

Sufficient information exists now to assess how much water many California aquatic ecosystems need to maintain health and diversity.[20] We can use such figures to harvest sufficient legal water rights for the affected ecosystems, through such steps as reviewing unexercised "human" water rights, collecting rights for water "unreasonably" or "wastefully" used,[21] conducting new adjudications

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[14] California State Water Resources Control Board (SWRCB), "Water Rights within the Bay/Delta Watershed," pp.3-4 (Sept. 26, 2008), available at: http://deltavision.ca.gov/BlueRibbonTaskForce/Oct2008/Respnose_from_SWRCB.pdf.

[15] Great Lakes-St. Lawrence River Basin Water Resources Compact, Sec. 4.2 (Dec. 13, 2005), available at: http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf.

[16] *Id*., Sec. 4.1.

[17] *Id*., Sec.s 4.8 – 4.12.

[18] *Id*., Sec. 7.3.

[19] *Id*., Sec. 1.3(2)(f).

[20] *See, e.g*., California SWRCB, "Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem," (Aug. 3, 2010), available at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf.

[21] Cal. Constitution Art. X, Sec. 2, and Cal. Water Code § 275 (calling for the prevention of "waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water").

for water use, re-assessing allocation of federal water rights, enhancing conservation, encouraging reuse, and other actions. Formalizing water rights for ecosystems in amounts that meet waterway needs will help ensure that we fully consider and address those needs, plan more effectively overall, and share our water for the maximum benefit of both people and the natural world.

Water law in the Great Lakes can similarly address the rights of ecosystems and their inhabitants to thrive and evolve. For example, a 2001 agreement signed by U.S. and Canadian officials recognized the need to develop "measures of improvement to the waters and water-dependent natural resources of the Great Lakes Basin."[22] They defined "improvement" as ensuring "additional, beneficial, restorative effects to the physical, chemical, and biological integrity of the waters . . . ."[23] Rather than simply slowing inevitable decline in the face of the inexorable human pressure to lay claim to water, these provisions focused on advancing the ecological health of waterways.

Unfortunately, the ensuing Compact failed to include this proposed directive. That decision should be reconsidered. The "improvement" language should be integrated into the Compact along with recognition of waterway rights to healthy, clean flows, which the "improvement" provisions would help implement. Such amendments should apply not only to new withdrawals and diversions, but also to existing water rights, which should be regularly re-evaluated to ensure that they too promote *better* ecological health. Such actions would begin to reverse the downward trend caused by current laws and would enforce the inherent rights of ecosystems and their inhabitants to exist, thrive and evolve.

These reforms do not stop at our environmental laws. Our economic, financial and corporate governance systems similarly arose from a flawed foundational principle of "control over nature." Our governance in general should reflect a deep understanding of our connectedness with the natural world. Because it does not, even environmental laws that fully incorporate respect for the rights of ecosystems may fail when corporate "rights" to "resources" are asserted.

In view of such challenges, Earth Law Center and partners have been working to develop alternative models of governance. For example, the Center worked with the City of Santa Monica, California to develop a "Sustainability Rights Ordinance" that recognizes the enforceable rights of the natural world, and the human right to a healthy environment. In recognition of the growing power of corporations over both the health of the environment and our democratic institutions, the Ordinance, which was adopted unanimously in April 9, 2013,[24] pointedly adds that "corporate entities.... do not enjoy special privileges or powers under the law that subordinate the community's rights to their private interests."

As other communities, states, and nations take up similar initiatives, the foundational premise of our governance systems will start to shift away from relentless destruction and endangered species "triage," and towards sustainable, respectful relationships with the natural world. Along this path, "environmentalism" itself will evolve from one segment of the population acting to safeguard the planet, into a deeply felt awareness in the hearts and minds of all individuals —a consciousness that will guide our lives and lead to choices that benefit all of Earth's inhabitants and systems.

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[22] Great Lakes Charter Annex, Directive # 6 (2001), available at: http://www.cglg.org/projects/water/docs/GreatLakesCharterAnnex.pdf.

[23] *Id*., Definitions.

[24] City of Santa Monica, Ordinance 2421, "City of Santa Monica Sustainability Rights Ordinance" (April 9, 2013), available at: http://qcode.us/codes/santamonica/; http://earthlawcenter.org/static/uploads/documents/Final_SM_Ordinance_signed.pdf (signed and with all adopted Findings).