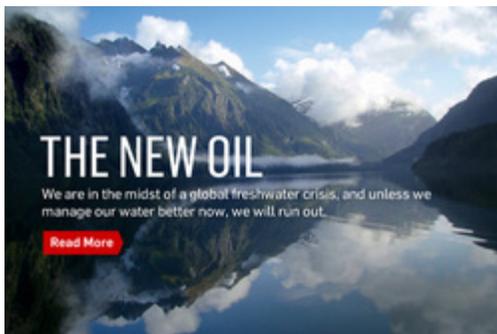




Some Basic Facts And Issues: Water Prospecting and the Ownership and Control of Public Resources

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The United Nations expects demand to outstrip supply by more than 30 percent come 2040. As the crisis worsens, private companies are searching the world to acquire ownership rights to vast stores of water in order to bottle and ship it elsewhere, manage and sell it for profit locally, or build infrastructure to move it via massive long-distance pipelines. There are those who argue that without the existence of private ownership rights in what was once almost universally a public resource the scarce resources will become even more scarce due to lack of sufficient price structure incentives that will limit wasteful use.

Critics of privatization and the global prospecting it has spawned argue that profit-seeking ventures are not the best steward of the resources and not likely to meet the needs of the world's neediest, poorest people. A short 2010 Newsweek story, "The New Oil: The Race to Buy up the World's Water" offers a basic primer for those with no prior familiarity with the issue. It covers both issues within the US and globally.

Privatization, Commodification, and Sovereign Control



Sierra Club image

Quite often, critics of water resource management and ownership schemes pushed both domestically in the developed world and promoted globally in developing nations object to a variety of closely related ideas endorsed by those who favor markets over government involvement in every aspect of water resource policy. For example, the Sierra Club's Corporate Accountability Committee argues for the need for communities to mobilize "to prevent corporate privatization of their water services and resources" and as part of their educational mission, it seeks to provide "a broad overview of the corporate-driven trend toward the privatization and commodification of water."

It is quite natural that critics would address privatization, commodification and local or domestic control issues as integral parts of a single public policy agenda. For in fact, proponents of privatization of all sorts of government activities do tend to see the issues as bound up together. Nonetheless, it is important to understand the extent to which the debate about privatization is really about three separate but overlapping concerns. The following definitions of the first two are taken from the Executive Summary of the Pacific Institute report, "The New Economy of Water."

"Privatization in the water sector involves transferring some or all of the assets or operations of public water systems into private hands. There are numerous ways to privatize water, such as the transfer of

the responsibility to operate a water delivery or treatment system, a more complete transfer of system ownership and operation responsibilities, or even the sale of publicly owned water rights to private companies. Alternatively, various combinations are possible."

"Commodification is the process of converting a good or service formerly subject to many non-market social rules into one that is primarily subject to market rules."

Water Sovereignty is a third issue, and the core of the worry revolves around the potential for various forms of ownership and sale arrangements to undermine the sovereignty of local communities or nation-states exercised over scarce and vital natural resources for the sake of the common good.

Privatization of water managements systems is a major global trend, long encouraged by various international development agencies such as the IMF and World Bank, on the theory that systems of public control of scarce resources are likely to be far less efficient than privately run entities, and that in addition, public utilities tend either to make water available for free or at below market cost and therefore fail to provide adequate economic disincentives against overconsumption and virtually guarantees long-term depletion of resources.

Water sector privatization **need not involve transfer of ownership rights** to a private entity, but such transfer is a common practice, and the confusion over terminology is itself a familiar topic around the world. Private ownership of the water itself makes long-term investment decisions more secure and it makes it easier for private managers to insulate themselves from competition by others. Private ownership is a further worry that many critics of private management schemes undertaken in the developing world find especially objectionable.

But ownership of water can in principle remain in the hands of local communities or in the hands of those persons and entities that had legal rights to access to sources of water under the laws of a country prior to privatization of public systems of treatment and distribution. For example, a private entity can be given a contract to manage local water purification and distribution systems, and they may achieve that end simply by drawing a portion of the water available from lakes, rivers, or groundwater sources such as deep wells, just as publicly owned utilities had done previously.

Among the worries about privatization under "non-ownership" management contracts are the usual doubts that some have about the inherent conflicts between private profit motives and the pursuit of the public good. The thought, in many cases it seems, is that water is too important to entrust to private entities that are difficult to hold accountable through regulatory mechanisms and democratic processes. Even if water rights are not surrendered to exclusive private ownership, the objection is to the abdication of responsibility for which government entities are the most appropriate stewards. Compare the debate over water privatization to that regarding privatization of prisons or policing. The worry in the case of prisons and policing is that private actors are doing work that is inherently a state's fiduciary responsibility and that outsourcing to private entities substitutes profit maximization aims for what should be the responsibility of the state to carry out first and foremost for the sake of the common good, and no other purpose.

Objections to commodification, on the other hand, often are more fundamental. If commodification in itself is the locus of moral objection, then one should object to any mechanism for the sale of water as a commodity, whether the sellers are private companies or government entities. Those who oppose commodification, say, on the grounds that water should be treated as a human right, have a complaint against public utilities, private management contractors, and even private citizens who opt to sell some of their own water in the marketplace. Literally construed, if one objects to water as a commodity, then one should object to its being a market good in the same way some might object in principle, for example, to the sale of human organs or sexual services. Is commodification, as some anti-commodification rhetoric suggests, inherently wrong?

What are the implications of supposing that water is a human right? Compare what you might think if you similarly hold that health care is a human right. Do you have sufficient reason to oppose a system of private health care delivery alongside some system of public guarantee? For the sake of argument, suppose that the public system is very good and very comprehensive. Do you have in-principle

objections to the commodification of health care when whatever requirements of human rights are fully satisfied?

What about the proponents of market commodification? Do they have reasons to object to a combination of private and public delivery of water? As it turns out, they do have a problem with such a scheme, and it is rooted in the intellectual basis of increased commodification of water, as exemplified in the economic slogan "full-cost recovery." The idea is that unless water is largely - perhaps if not exclusively — treated as a market commodity, with market-based pricing that captures the full cost of extraction, treatment, and delivery, then water will be wasted.

The market argument might seem harsh, but quite often it is made in the following way. The claim is that the very persons hurt most in the long run from a failure to price a vital commodity adequately are those least economically able to secure water for themselves inasmuch as the larger, improvident users will not have incentive to restrain present consumption. In effect, the market argument pits the presumed interests of the more vulnerable future poor against the narrowly self-interests of the currently affluent.

Critics of large scale efforts to transform water systems in developing nations press worries against familiar water resource regimes that combine privatization and commodification in a particular way. The perceived ills of privatization that are associated with loss of democratic accountability in the delivery of a public good are coupled with worries that full-cost recovery pricing mechanisms will harm those who are currently poor. The worry is that water prices will rise (and often have risen) well beyond what the poor can pay once state subsidization of water is removed and purely market prices are left to determine access. This is a worry of special significance given the fact that investment in water systems infrastructure is often expensive, and in order to recapture the full cost of the investment the price has to go up considerably, and no political remedy would be available.

Consider again the argument for full-cost recovery. On reflection, do we really need to make sure that private households pay the full freight? Or do we need only make sure that the large users, such as agriculture and water-intensive industries pay the full cost? It depends on the primary sources of water use and the mechanisms available for monitoring. See the water scarcity page for some clues as to what the major consumers of water are around the world

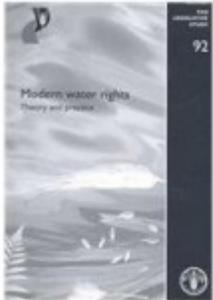
Privatization of management — and often of resource ownership — then goes hand in hand with a form of commodification that is not necessarily objected to because it is something that in principle should not be for sale, but for the more focal reason that water access ought not be subject exclusively to market norms. Thus, while the rhetoric of some critics suggests that they really do **object in principle to commodification — i.e., the very idea of treating water as a market good** — others object to treating water as no different from any other commodity. They **reject the idea that market forces alone should determine pricing.**

Issues of ownership and the locus of sovereign control over vital resources such as water dovetail with the debates over privatization and commodification. Some argue for strictly communal ownership such that no one, not even those who own land contiguous to bodies of surface water, ought to have private rights that give them powers of unlimited, exclusive use and sale of water. Others who raise concerns about **sovereign control** are mainly focused on the threats posed by private owners — especially foreign owners - who might extract water and treat it as a commodity within international commerce. The claim is that nation-states or the people directly perhaps should exercise sovereign control over the permissible uses of water resources and the preservation of the reserves of water that lie within a nation or community.

The sovereign control objection is in one sense, against a form of commodification, but unlike the other two objections the animating concern is loss of local or domestic control over an asset that (foreign) owners have no incentive to reserve to meet current or long-term needs of local communities. This **third objection then is against treating water as a global commodity** that can be extracted, removed from the country, and traded in international markets. Global trade in water can take a number of forms. Water can literally be loaded on tankers and shipped away, or it can be lost from a community through its use in high water-content agricultural and food products such as vegetables, fruits, juices, or sodas

that are shipped overseas. This becomes a problem under conditions in which depletion of accessible water reserves exceeds rates of replenishment.

Water Rights: A Comparative Legal Perspective



If privatization of management of water systems is distinct from the more fundamental notion of "privatization" by which we mean the transfer of state owned resources in water to private owners, then we need to know more about the sort of water ownership and use rights regimes that are in place before, and very often, after the privatization of public water utilities.

Who owns the surface water in lakes, rivers and streams, or the ground water deep below the surface and recoverable with deep wells? What uses are permitted or prohibited legally? As one might guess, the answers to these questions vary among legal jurisdictions around the world and within federal systems such as the US.

Let's begin with the distinction between surface water rights and groundwater rights. A system of surface water rights define the entitlements of various persons to access and use of water in streams, lakes, and rivers, for example. Hence the name, surface water. Below the surface, deep in aquifers, is groundwater. The two systems are related, for example, insofar as lakes and streams feed the aquifers and contamination of groundwater ultimately contaminates various surface water sources when pumped from below and introduced into land-based basins. But the legal regimes covering each are usually quite different.

For most people, perhaps, when legal rights to use water are thought of, surface water rights come first to mind. These rights have traditionally been linked to land ownership rights. Owners of land with direct physical access to a stream, river or other natural water source acquire certain rights, consistent with some scheme of rights for other contiguous land users and downstream users. Not only issues of quantity arise in conflicts, but so too are issues of quality and flow rates. And so diversion, restriction, and disposal of wastes are central aspects of water rights. For much of the world, especially in rural areas, customary or local law remains the only basis for establishing expectations and resolving conflicts. Formal legal regimes are of two dominant types. As the 2006 FAO comparative law survey paper (click image for link to the FAO report) observes:

"The civil law tradition, which sometimes described as the Romano-Germanic family, is found in most European countries (including the former socialist countries of Eastern and Central Europe), nearly all countries in Latin America, large parts of Africa, Indonesia and Japan as well the countries of the Former Soviet Union. The common law tradition emerged from the law of England. Countries in which the common law tradition applies include Australia, Canada, India, New Zealand, Pakistan, Singapore, and the United States, and the remaining African countries that are not in the civil law tradition as well as other Commonwealth countries and a number of countries in the Middle East."

For the most part, both civil law and common law traditions inherited the Roman law doctrine that bodies of water could be used and that the "usufruct" is the name for the right to use the benefit of the resource. Also borrowed from Roman law was the notion of riparian water rights to the "ordinary" use of the water flowing in the watercourse for reasonable purposes such as water for domestic purposes and for the watering of livestock. "Reasonable uses" meant that water could be used without regard to the effect which they might have had on downstream land owners. In addition, a riparian land owner does has some rights that are limited by effects on downstream owners.

In some Western states of the US, for example, traditional riparian rights were modified to grant a right of prior appropriation to whomever used the water first, more or less along the lines of mining claims of those first on the scene, whether or not the claimant has contiguous land ownership rights.

In the civil law tradition, navigable waters belong to the public and require government permit or authorization for use. But private waters, both above and below the surface of lands belong to the landowners and require no permit or permission for use. Obviously, differentiation between public and private waters can pose serious problems, and add to that the fact that most major bodies of freshwater in the world cross national boundaries poses yet further problems — well, just look at a map of the Middle East.

Groundwater in both civil and common law traditions was pretty much in agreement in the basics. Ownership of groundwater resides in the owners of the land. Until the technical capacity to pump from afar was developed, along with the improved understanding of how groundwater availability in one location affects availability in another, groundwater rules did not matter much. That was then, but now that we know how much of the freshwater we have available for human use is in groundwater, the calculus of interest starts to shift.

So where do things stand at the moment? Groundwater in the Western US, for example, where scarcity is better appreciated, is under public ownership, or alternatively, regulated under some complex public-private arrangement in which the state has control over sensitive basins and administers access on the basis of the allocation of permits determined by quantifying what counts as a socially important or "beneficial use" or a use not so great as to exceed a "safe yield."

For the portion of groundwater not under strict state ownership and control, or in states and legal jurisdictions around the world that have not followed the model of the Western States, access to groundwater is still linked to the legal entitlements that private land owners have. For much of the history of the western United States, private groundwater laws of states conformed to the "Rule of Capture," which gives landowners unlimited right to the water under their property. (*Source: Bryner, Gary and Purcell, Elizabeth. "Groundwater Law Sourcebook of the Western United States." Natural Resources Law Center. University of Colorado at Boulder. Sept. 2003*).

The kind of regime embodied in the law of capture — a regime formally recognized in most English speaking countries since the early days of English common law and in civil law countries — is therefore still the law in much of the world or, absent any clear legal rules, unlimited withdrawal is simply what is allowed to occur. Now, the existence of such a groundwater regime, or the lack of any other legal regulation of permissible levels of withdrawal, poses a problem for countries that are water-stressed, and it presents an economic opportunity for multinational corporations that wish to extract as much water for whatever commercial purposes as they can from whatever patches of real estate they are able to acquire. Similarly, there are major opportunities for largely unrestricted use of surface waters under legal rules that still conform largely to civil or common law regulations of bodies of water denominated as "private waters" - think of the water-rich nations of Latin America, for example.

For a comparative law assessment of the history and resource management implications of various regimes of legal rights to water, see the 2006 FAO study, *Modern Water Rights: Theory and Practice*.