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Fred Cheever - Western Problem Solver

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FRED CHEEVER—WESTERN PROBLEM SOLVER

GREGORY J. HOBBS, JR.[†]

SIMPLE TALK

> Spilling themselves in the sun bluebirds
> wing-mention their names all day. If everything
> told is so clear a life, maybe the sky would
> come, maybe heaven; maybe appearance and
> truth would be the same. Maybe whatever seems
> to be so, we should speak so from our souls,
> never afraid, "Light" when it comes,
> "Dark" when it goes away.
>
> William Stafford, western poet[1]

Simply speaking, Fred Cheever devoted his most observant work to the creatures, peoples, and landscapes of the West. A problem solver, he was never afraid to lead from his soul and his intellect in law practice, teaching, writing, and in helping students navigate into the profession and the communities they would serve.

It's tragic but fitting he passed before us in the late spring of the year 2017 on the Green River inside Dinosaur National Monument. Earlier in the year, he'd traveled to Patagonia with his beloved wife, Mary, celebrating in the hemisphere of the Southern Cross his Sixtieth birth year. With their daughters, Elizabeth and Laurel, in early June they launched into the Gates of Lodore running the traces of John Wesley Powell. They were heading downriver for Echo Park where the Green and Yampa Rivers join within Dinosaur.

THE CREATURES

As a lawyer with the Sierra Club Legal Defense Fund, Fred helped with a lawsuit leading to the 1994 critical habitat designation for conser-

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† Gregory J. Hobbs, Jr., a Justice of the Colorado Supreme Court from May 1, 1996, to August 31, 2015, served with Professor Cheever as Co-Director of the Environment and Natural Resources Program at University of Denver Sturm College of Law beginning in September of 2015.

1. William Stafford, *Simple Talk*, *in* OREGON MESSAGE (1987).

vation of the endangered Colorado River fishes—the endangered razorback sucker, pikeminnow, humpback chub and bonytail chub.[2] The Green and Yampa Rivers are essential components of the fishes' habitat. Two years later as a University of Denver law professor in a 1996 law review article centering on its recovery provisions, Fred re-characterized the Endangered Species Act as a "problem-solving" statute, instead of the project-stopper others criticized the Act for being:

> [A] new emphasis on the concept of recovery can help us reconceive the act in a way that better addresses the dynamics of extinction and reestablishes its role as a problem-solving law . . . . The concept of recovery has provided the courts with an interpretive key, linking the terms of the Act with its purpose: the conservation of species and the ecosystems on which they depend.[3]

His 1996 law review analysis tapped familiarity with the upper Colorado River endangered fishes recovery planning process. [4] Commenced in the mid-1980s, this partnership brought the states of Colorado, New Mexico, Utah, and Wyoming together with federal agencies and water and environmental interest groups. Unprecedented in its big river system reach, this novel alliance focused on means to conserve and recover the fishes without presuming to rearrange the water allocations preserved to the states under the 1922 Colorado River Compact and 1948 Upper Basin Compact. The recovery-plan umbrella covered all existing depletions to river water plus an increment of additional depletions, subject to an annual finding of sufficient progress.

Primary measures evolved to include habitat restoration, operation of reservoirs for instream flows as well as their other uses, control of nonnative fish that prey on the endangered fish, design of water diversion devices for fish passage, and, when indicated, introduction of hatchery-bred natives to encourage sustainable populations in the wild. Adjustments to the program continued to occur through monitoring and responsive actions in consultation with the many interested participants.[5]

In a 2016 statement reflective of Fred's view of the Endangered Species Act, the U.S. Fish and Wildlife Service "remains convinced that the best chance for success, i.e., recovery, results with this collaborative Recovery Program."[6]

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2. Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Colorado River Endangered Fishes: Razorback Sucker, Colorado Squawfish, Humpback Chub, and Bonytail Chub, 59 Fed. Reg. 13,374 (Mar. 21, 1994) (codified at 50 C.F.R. pt. 17).

3. Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1, 10, 48 (1996).

4. *Id.* at 70–71.

5. *See* Noreen E. Walsh, FISH & WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR, FINAL 2015—2016 ASSESSMENT OF SUFFICIENT PROGRESS UNDER THE UPPER COLORADO RIVER ENDANGERED FISH RECOVERY PROGRAM IN THE UPPER COLORADO RIVER BASIN 41–45 (2016).

6. *Id.* at 44–45.

THE PEOPLES

Not just once in his lifetime did Fred pull on the oars of history. In the early twenty-first century, he helped San Luis Valley descendants of Mexican land-grant settlers regain their valuable easements rights in a large tract of Sangre de Cristo mountain land Jack Taylor bought in 1960 and closed off to access. The descendants sued for rights of entry their ancestors exercised for over a hundred years. They lost in Colorado district court and the court of appeals.

A good argument before the Colorado Supreme Court must resonate in the facts and law of the case. The court welcomes amicus briefs, especially when they assist with the broader ramifications of the dispute and bring expertise to bear on the issues appealed. By then a nationally-recognized expert in real property law, Fred worked with the Hispanic Bar Association to craft influential amicus briefs in the two *Lobato* decisions the court issued.[7]

In *Lobato I*,[8] the court had before it the meaning of an 1863 document written and recorded by Carlos Beaubien, owner of the grant.[9] It confirmed rights of access to common lands of the Sangre de Cristo Grant to settlers receiving deeds to their farmsteads ("varas") on the grant: "[A]ll the inhabitants will have enjoyment of benefits of pastures, water, firewood and timber, always taking care that one does not injure another."[10]

A year later, Beaubien sold a large portion of the mountain tract to William Gilpin (who had just stepped down as Colorado's first Territorial Governor). The 1864 Beaubien-Gilpin agreement contained a condition confirming that "settlement rights before then conceded . . . to the residents of the settlements . . . shall be confirmed by said William Gilpin as made by him."[11] Finding the 1863 Beaubien document ambiguous about which lands these rights of access applied to, the court construed the Gilpin agreement to include the immense mountain tract he was purchasing.[12]

Chief Justice Mullarkey's opinion singled out the hefty assistance the amicus briefers brought to the court's work:

> It would be the height of arrogance and nothing but a legal fiction for use to claim that we can interpret this document without putting it in its historical context . . . We agree with the amici. From the trial court findings, expert testimony, the documents associated with the grant, and a review of the settlement system under which Beaubien and the settlers were operating, we draw two conclusions. First, we conclude

7. Lobato v. Taylor (*Lobato I*), 71 P.3d 938 (Colo. 2002); Lobato v. Taylor (*Lobato II*), 70 P.3d 1152 (Colo. 2003).
8. 71 P.3d 938.
9. *Id.* at 946–47.
10. *Id.* at 943.
11. *Id.*
12. *Id.* at 947, 949–50.

> that the location for the settlement rights referenced in the Beaubien Document is the mountainous area of the grant on which the Taylor Ranch is located. Second, we conclude that Beaubien meant to grant permanent access rights that run with the land.[13]

The court relied on Colorado state law, not Mexican law, in giving effect to the Beaubien and Gilpin documents, as well as access on the mountain lands exercised by land grant settlers and their descendants for over a hundred years.[14] Although the Mexican Government made the grant to Beaubien's predecessors to attract settlers, they moved into the upper San Luis Valley after the 1848 Treaty of Guadalupe Hidalgo.[15] On April 10, 1852, Hispano settlers on the Sangre de Cristo grant commenced construction of the San Luis People's Ditch, which predates the 1861 creation of Colorado Territory and remains the oldest irrigation water right in Colorado in continuous use.[16] The 1863 Beaubien and 1864 Gilpin documents followed the 1861 creation of Colorado Territory.

The Colorado Supreme Court's decision held in favor of three kinds of implied rights of access across a 77,000 acre stretch of the Taylor Ranch under Colorado law: a prescriptive easement, an easement by estoppel, and an easement from prior use for grazing, firewood, and timber.[17] These are valuable "dominant" rights in subservient lands otherwise held in fee simple ownership. Such rights were absolutely essential to settlement of Colorado and the West. For example, they included irrigation ditch rights-of-way necessary for the diversion and conveyance of water from the streams across intervening public and private lands to its place of use.[18] The San Luis farmers could not graze their animals on irrigated cropland without destroying critical food supplies, nor did the San Luis Valley's high alpine desert environment support forest growth for timber and firewood harvesting. Instead, they depended upon Sangre de Cristo forested mountain lands just as Beaubien and Gilpin knew they had to.[19]

Lobato II[20] ruled that landowners enjoyed these access rights if settlement of their property occurred at least at the time of William Gilpin's

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13. *Id.* at 947–48.
14. *See id.* at 946.
15. *See id.* at 946 n.4, 955.
16. *See id.* at 952 n.9.
17. *See id.* at 946.
18. *Lobato I* cites the court's irrigation ditch right-of-way servitude case *Yunker v. Nichols* for the proposition that "water rights are necessary for enjoying land." *Id.* at 953 (citing Yunker v. Nichols, 1 Colo. 551, 554 (1872)). *Lobato I* goes on to explain that the law will imply grant of an easement for ditch construction, maintenance and use arising out of "pre-existing and higher authority of laws of nature, of nations, or of the community to which the parties belong." *Id.* (quoting *Yunker*, 1 Colo. at 554).
19. For an excellent in-depth analysis of a San Luis Valley Hispano settlement centered upon its acequia culture, see Gregory A. Hicks & Devon G. Peña, *Community Acequias in Colorado's Rio Culebra Watershed: A Customary Commons in the Domain of Prior Appropriation*, 74 U. COLO. L. REV. 387 (2003).
20. 70 P.3d 1152 (Colo. 2003).

ownership.[21] Fred was an expert in real property servitudes and easements. His heart must have flown like a bluebird when he read these two supreme court decisions, for he could see therein the handiwork of generations so clearly told, upheld.

THE LAND

Fred was an ardent student of the West's public lands—in particular the 14 million acres of national forest lands existing within the state of Colorado. His article about the 2002 Hayman wildfire southwest of the Denver metropolitan area, the worst in Colorado's history, explores its multiple causations: (1) Terry Barton's liability in starting it, (2) a long tradition of Forest Service fire-suppression policy, (3) climate change impacts, and (4) local land-use decisions allowing residential construction within the forest interface.[22] This fire took a month to suppress, burned nearly 138,000 acres, destroying 133 homes, a commercial building, and 466 other structures; it was fortunate that no one died because of it.[23] This article is remarkable in both its content and tone, thoughtful without hurling invective at individuals and governments

At the outset, Fred gives credit to the expertise of Dr. Stephen Pyne, "[O]ur greatest chronicler of the historical and social aspects of wildfire."[24] "Fire," Fred says, "is one of the consistent forces shaping life on this planet. It is ubiquitous, powerful, frequent, and inevitable . . . many policy makers still desperately want fire to be unforeseeable."[25]

A Forest Service employee, Barton set fire to a letter from her estranged husband, left the scene of the fire ring she had used thinking the letter was no longer burning, and soon turned back only to find the forest uncontrollably burning. She reported the fire, made up a story about discovering it, then recanted and admitted her role in igniting it. Convicted in state and federal court, she incurred six years in federal prison and a $14 million restitution order for re-vegetation of the forest.

Fred questions why Barton stands alone as a foreseeable cause of the Hayman Fire: "Terry Barton's act was a catalyst that transformed reality, a summoning of forces. Her burnt letter was a necessary but certainly not a sufficient condition for what followed."[26] He points to other significant causal chains: "Climate change increased the probability of ignition outside the fire ring and the rapid spread of the fire. Forest Service fire suppression policy increased the fuel available to feed the fire. . . . Residential development in the wildland urban interface dramatically increased the

21. *Id.* at 1156.
22. Federico Cheever, *The Phantom Menace and the Real Cause: Lessons from Colorado's Hayman Fire 2002*, 18 PENN. ST. ENVTL. L. REV. 185, 188, 191, 193–94 (2010).
23. *Id.* at 185–86.
24. *Id.* at 186.
25. *Id.*
26. *Id.* at 196.

damage the fire could cause."[27] He calls for balance in our perspective and actions. Forests must play a significant role in capturing carbon and wildfire is a natural part of the life cycle of forests. While the U.S. Forest Service "has generally gotten the rap as the great hoarder of forest fire fuels[,]" the transformation of private land from farms and pastures to wooded subdivisions has added to the fuel load.[28]

He urges us to rethink "[t]wo uniquely American conditions [that] distort our view."[29] The federal government is responsible for the forest and private land-use regulation is a matter of purely local concern.[30] Instead of invoking jurisdictional boundaries, we should act and work with each other as part of the same community. We have a responsibility "to modify human behavior in ways that will create a substantial likelihood of improving human welfare" and we have to stop "thinking about fire as the unforeseeable calamity or the curable disease rather than part of the fabric of life itself."[31]

We should look to our forested watersheds and interact with federal, state, and local authorities to cultivate remedial relationships implementing effective measures, instead of depending upon lawsuits for sorting out issues of damages or invoking sovereign immunity as a shield against their imposition.

CONCLUSION

This is vintage Fred Cheever, writing—teaching and out in this great land among us. He's about recovering our ability to problem-solve. We will miss him greatly, of course we will. But, his compassionate resolute way of doing his part and urging us on to ours shines in the light.

27. *Id.* at 201.
28. *Id.* at 204.
29. *Id.* at 207.
30. *Id.*
31. *Id.* at 210.