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**CHARLIE MEYERS**

## CHARLIE MEYERS RE-REMEMBERED

DEDICATION BY A. DAN TARLOCK<sup>1</sup>

It is a pleasure and honor to provide this dedication to the late Charles Jarvis Meyers, who was my teacher, great friend, mentor and casebook collaborator for some 25 years. When Charlie died in 1988, there were several tributes to his long, varied and exceptionally distinguished career,<sup>2</sup> but the *Water Law Review's* decision to honor his memory provides both an occasion to introduce Charlie to a new generation of water lawyers and professionals and to reflect on his intellectual legacy with the benefit of the passage of time. Charlie's scholarship and persona remain a vivid presence to those of us who came of age professionally in the 1960s and 1970s. A picture of him staring straight ahead with his steely, penetrating gaze sits on the bookshelf next to my computer desk and constantly reminds me to rethink and to revise whatever I have just written.

Charlie was the leading water scholar of the generation that followed the late Dean Frank Trelease. His professional career included prestigious academic appointments, extensive public service and private practice. He taught at the universities of Texas, Minnesota and Columbia before coming to Stanford in 1962. He remained on the faculty for twenty years becoming the Charles A. Beardsley Professor of Law and ultimately the Dean and Richard E. Lang Professor. In 1981, after a very successful deanship, he moved to Denver where he practiced natural resources law with Gibson, Dunn and Crutcher until his death. When he died in July of 1988, just short of his sixty-third birthday, he was serving as the Special Master in *Texas v. Mexico* and hard at work on the damages phase of the litigation after the Supreme Court affirmed his finding that New Mexico had breached her compact obligations to Texas.<sup>3</sup>

This skeletal recitation of some of the highlights of his professional life does not do justice to either his formidable intellect or the force of his character. He was a true Texan; he wasn't larger than life itself but an example of life lived to the fullest. He both challenged and charmed almost everyone (except the late and equally formidable New Mexico State Engineer Steve Reynolds) who had the privilege to know and work with him. In Charlie, the Apollonian and Dionysian came

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1. Distinguished Professor of Law, Chicago-Kent College of Law, A.B. 1962, LL.B. 1965, Stanford University.

2. See, e.g., A. Dan Tarlock, *Tribute*, 29 NATURAL RESOURCES J. 328 (1989).

3. This chapter in Charlie's life is beautifully detailed in Chapter 7 of EM HALL, *HIGH AND DRY: THE TEXAS-NEW MEXICO STRUGGLE FOR THE PECOS RIVER* (2002).

together, not in some kind of ideal balance, but in constant release of energy that never ceased to dazzle and awe.<sup>4</sup> One of Charlie's great passions was opera, and he and his wife, Pamela, played a major role in launching Opera Colorado. Mozart was his idol and his prose had a Mozartian sparkle, clarity and depth.<sup>5</sup> But, he could also direct the cold fury of a Verdi baritone to those whose prose, and the ideas behind it, did not measure up to his high standards.

Charlie's enduring contribution to water law is his formulation and promotion of two of the central ideas that continue to inform and influence western water law. On balance, one, state water allocation primary, is somewhat fading in importance while the other, the need to encourage the transferability of water rights, is increasing. His federalism views were formed in the epic *Arizona v. California* litigation. Shortly after moving from the University of Minnesota to Columbia, he became the law clerk to retired federal Judge Simon Rifkind who had just been appointed the Special Master in *Arizona v. California*. The Court agreed with the Master's Report on crucial issues such as the existence of non-Indian federal reserved water rights, the then unprecedented power of Congress to apportion interstate rivers and the use of the practical irrigable acreage standard to measure *Winters* rights.<sup>6</sup> However, in his masterful analysis of the opinion,<sup>7</sup> Charlie was extremely critical of the Court's holding that state law did not control the distribution of Boulder Canyon Project water within state lines, and he remained a strong advocate of the principle that there should be a strong, but not conclusive, presumption of state rather than the reflexive federal water allocation primacy then in vogue with the post-New Deal Supreme Court.

Chief Justice Rehnquist adopted Charlie's theory view of federalism in 1982<sup>8</sup> in an opinion that reversed several decades of reflexive deference to federal authority. The western states cling to state allocation primacy, but its importance is fading for reasons that Charlie could not fully anticipate. First, the doctrine is not well suited for the implementation of environmental statutes such as the Clean Water Act and the Endangered Species Act put in place in the 1970s. These statutes do not contain explicit statutory deference to state allocation primacy and have been interpreted to preempt state water rights. Second, the reclamation era has ended and the era of reallocation and restoration has

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4. This attempt to capture Charlie's expansive personality is a slight modification of part of the tribute that I was privileged to deliver at a memorial service in the Stanford Memorial Church on September 22, 1988. The partial text appears in *STANFORD LAWYER*, Vol. 23, No. 1, Fall 1988 at 83.

5. I made some headway expanding his horizons to Wagner and late Richard Strauss.

6. *Arizona v. California*, 373 U.S. 546 (1963).

7. Charles J. Meyers, *The Colorado River*, 19 *STAN. L. REV.* 1 (1966).

8. *California v. United States*, 438 U.S. 645 (1978).

begun. As a result, the federal government's role in water allocation, while still powerful in selected instances, is rapidly declining. Government no longer has the fiscal clout and thus power that it once enjoyed, and as water resource project funding has declined over the past thirty years,<sup>9</sup> the resource agencies lack a coherent vision to replace the dream of an irrigated Eden in the West, which drove the Reclamation Era.

Charlie's other major contribution remains vital and relevant to today's water allocation issues. He was a crucial participant in the tectonic shift in western water policy from dam building to markets and fish habitat protection. Until the 1960s, the idea that the federal government should construct large, subsidized regional water projects was taken as a given, despite the grumblings of a few renegade economists that the policy was of dubious efficiency and anti-dam conservationists such as Bernard de Voto and Wallace Stegner. It was also assumed that much of the inner-mountain West would remain a commodity production economy where water would be perpetually used at the place of original application. The rise of the environmental movement and the election of Richard Nixon in 1968 signaled the sunset of the Reclamation Era and the dawn of the era of reallocation and riverine restoration. The exponential population growth of in most of the western states, except the harsh High Plains, has transformed the region into a series of urban archipelagoes. In the process, the old assumption about water development as the driver of regional growth has been shattered and we have begun the era of reallocation and river restoration.

Charlie was an early and committed believer in the analytical power of economics to promote rational water management. He cast his cold, keenly analytical eye on the many inefficiencies in water allocation from subsidized federal water deliveries to the amount of water consumed by low valued crops. He consistently argued that water rights should be made as certain as possible to promote transfers. This faith is the central premise of his most important legacy to water law and resources management, the Final Report of the National Water Commission, which endorsed the greater use of water transfers, increased environmental protection and tighter economic review of new projects.

Congress created the Commission in 1968 in partial response to fears that large transbasin diversions, especially from the Columbia, might be authorized to supply California and the arid southwest. Ade-

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9. See WESTERN WATER POLICY REVIEW ADVISORY COMMISSION, *WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY* 2-33- 2-38 (1998). This report contains the reasons why the presumption of state supremacy no longer reflects reality but omitted the recommendation of many consultants and witnesses that the presumption be abandoned.

quately funded, staffed with the most knowledgeable water professionals and allowed to operate free from political interference, the Commission's comprehensive survey of all aspects of water management, *Water Policies for the Future*, remains the standard against which all future studies must be measured. Unfortunately, the report's message was a casualty of Watergate. Events such as global warming and the ever-shrinking federal government have overtaken many of the Report's specific recommendations, but many remain as relevant as they were in 1973 and no assessment of water policy since that time has been able to.

Charlie served as an Assistant Legal Counsel, but his influence runs through the report and it remains essential reading. The chapter on water and the economy gently but firmly rejected the then-prevailing theory that water development was essential to regional growth. Instead, it concluded that "in the future, policies for water development must be increasingly subordinated to other government policies, including land use, energy, environmental protection, and food and fiber production."<sup>10</sup> Charlie made major contributions to Chapter 7 which recommended the use of marginal rather than average cost pricing for municipal supplies and full cost rather than ability to pay pricing for irrigation water.<sup>11</sup> The report had earlier rejected the case for subsidized Bureau of Reclamation deliveries for new projects<sup>12</sup> and recommended greater use of water transfers. A classic Charlie sentence provided a concise rationale for the termination of federal river basin planning programs that occurred in the Reagan Administration: "Water planning sometimes appears to be an end in itself."<sup>13</sup> He was able to apply the need for greater certainty and more transfers when he was appointed the Vice Chair of Governor Jerry Brown's Governor's Commission to Review California Water Rights Law in 1977.<sup>14</sup> The Staff Director, the distinguished California water rights scholar, Harrison Dunning, recently described the Report in a way that shows Charlie's influence. The Commission was assigned six topics, but "[t]he text of that report departed from the six topic format . . . in that the substantive material was organized under the four headings of 'greater certainty,' 'improving efficiency' (which included voluntary transfers), 'protection of instream uses,' and 'effective management of groundwater resources.'"<sup>15</sup>

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10. NATIONAL WATER COMMISSION, *WATER POLICIES FOR THE FUTURE* 39 (1973).

11. *Id.* at 227 - 314.

12. *Id.* at 147.

13. *Id.* at 366.

14. An exhaustive analysis of the Commission's report and its impact on California law can be found in *Symposium on the 25<sup>th</sup> Anniversary of the Report of the Governor's Commission to Review California Water Rights Law*, 36 MCGEORGE L. REV. 1 (2005).

15. Harrison C. Dunning, *The Governor's Commission: Success or Failure?*, 36 MCGEORGE L. REV. 17, 20 (2005).

Charlie is most often associated with the view that economic rationality should control allocation decisions; however, he was keenly aware of the need for environmental protection and need to pay attention to social equity issues that can arise in water use such as Indian water rights.<sup>16</sup> The second half of his career coincided with the rise of the environmental movement, and he recognized that it would be an integral part of modern water administration and management. In 1971, we completed the first edition of *Water Resource Management*. The environmental movement emerged as we were preparing it, and the book contained an extensive discussion of water pollution, the public trust and the first wave of decisions reviewing agency approvals of water resources projects. Charlie suggested that we cannabilize and expand these chapters. The result was the first casebook on environmental law. The title, *Selected Legal and Economic and Aspects of Environmental Protection*, naturally reflected Charlie's view that economics had much to say about the full range of emerging environmental issues.<sup>17</sup> He would be happy that his legacy at Stanford was carried on by his former student, Barton Thompson, who has been a leader in the development of market-based solutions to hard environmental problems.<sup>18</sup>

Some ideas, like modern music, soon become outdated. Others, like the classic music, which he preferred, have an underlying integrity that makes them to relevant even after the social and historical context in which they were developed has changed. Charlie was always a forward thinking person, but the water world in which he formed his ideas has changed radically, especially in the almost two decades since his death. Still, his core ideas, the power of markets to reallocate water to the full range of beneficial uses and the need to promote the efficient use of resources, regardless of the purpose to which are dedicated, remain as relevant today as when he articulated them, especially as the government structures which supported the Reclamation Era crumble with little prospect of replacement except by endless ad hoc "consensus" processes.

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16. Charles J. Meyers, *Federal Groundwater Rights: A Note on Cappaert v. United States*, 13 LAND & WATER L. REV. 377 (1978).

17. For the fullest exposition of his environmental views, see Charles J. Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 IND. L. J. 426 (1975).

18. See, e.g. Barton H. Thompson, Jr., *Uncertainty and Water Markets in Water Resources*, 36 MCGEORGE L. REV. 117 (2005). In my files, I have a draft outline, with Charlie's handwritten annotations, for a planned joint article on the public trust doctrine, which was prepared the year before he died. We had agreed to argue that there was a pressing need to reallocate water for both urban growth and instream flow protection, but that the use of monitored markets was a more effective way than the doctrine announced in the now totemic but extreme case of *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).