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COMMENTARIES

AN OKLAHOMA SLANT TO ENVIRONMENTAL PROTECTION AND THE POLITICS OF PROPERTY RIGHTS

DREW L. KERSHEN*

Messrs. Sawyer, Huffman, and Echeverria have presented thoughtful, provocative articles for this symposium on Environmental Protection and the Politics of Property Rights.[1] Their ideas are well-presented and timely. Tensions between environmental protection and property rights have fostered a national debate with significant implications for the American body politic. This debate needs and deserves the thoughtfulness and clear articulation that their articles present. Oklahoma too has an intense, on-going debate about environmental protection and property rights.

In this commentary, I do not intend to reargue the positions that Messrs. Sawyer, Huffman, and Echeverria have so ably presented in their articles. This commentary takes a major point from each of the three lead articles and provides an Oklahoma example illustrating that major point. This commentary attempts to make the ideas of the lead authors concrete and real for Oklahoma readers by giving an Oklahoma slant to their articles.

I. Andrew Sawyer on the Public Trust

Mr. Sawyer ends his article with speculation about the application of the public trust to land. However, he concentrates his attention upon water and the dispute about water rights arising from Mono Lake.[2] As I read Mr. Sawyer's argument, he posits that water is different from land to a significant degree principally because water is a necessity of life and a shared resource. As a necessity of life, the State of California has demanded that water be used beneficially, efficiently, and non-wastefully to serve the greatest possible set of interests for the people, animals, forests, and streams of California. As a shared resource, people think of property rights in water as a right of use that must be exercised reasonably, without harm, and with respect for the right of other users, including the fish and other aquatic life

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1. The symposium took place April 26, 1997, in Norman, Oklahoma. The Interdisciplinary Program on the Environment of the University of Oklahoma funded and sponsored the symposium. Zev Trachtenberg, Associate Professor of Philosophy, University of Oklahoma carried the primary burdens of organizing this excellent symposium.

The symposium also served as the first collaborative effort between the Oklahoma Bar Association Real Estate Section and the Oklahoma Law Review. The OBA Section and the Law Review obtained certification of this symposium as Continuing Legal Education through the University of Oklahoma.

2. National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983).

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in the water. For these two reasons, the public trust doctrine is a principle of stewardship that serves as a background principle of property law against which all Californians' claims to property rights in water must be understood and evaluated.

As a consequence of the public trust serving as a background principle of property rights in water, Mr. Sawyer argues powerfully that Los Angeles had a difficult (if not impossible) task in establishing a Fifth Amendment taking of its water claims to the Mono Lake. As Mr. Sawyer analyzes the *Mono Lake* dispute, the judicial and administrative reconsideration of Los Angeles' claim to Mono Lake water simply reasserted and reemphasized the background principle of property law — the public trust — that Los Angeles was trying to ignore.

Unlike California, Oklahoma does not have any judicial, legislative, or administrative recognition of the public trust doctrine. However, Oklahoma does have a water law case that on its facts and in its opinion has undertones that are similar to the *Mono Lake* case. The Oklahoma case is *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board.*[3]

In *Franco*, the City of Ada obtained a prior appropriation water right in Byrd's Mill Spring on Mill Creek as a municipal water supply from the Oklahoma Water Resources Board (OWRB). Downstream riparian landowners challenged the water right because, if Ada exercised the water right, Ada, in many years, would dry up Mill Creek, thus depriving the riparian land owners of water flowing past their lands. The OWRB acted pursuant to a 1963 Oklahoma statute through which the Oklahoma legislature moved Oklahoma from a mixed system of water rights (riparian and prior appropriation) to a pure prior appropriation system.[4] In *Franco*, the downstream riparians sought a Supreme Court ruling that the 1963 statute unconstitutionally took their riparian rights to water and, therefore, should be declared void.[5]

The Oklahoma Supreme Court agreed with the downstream riparians. In the 1990 *Franco* decision, the Court ruled that the 1963 statute was unconstitutional and void.[6] As a consequence of these holdings, the Supreme Court ruled that Ada's prior appropriation to Byrd's Mill Spring could not trump the downstream riparians' claims to riparian water rights.[7]

Justice Marian Opala wrote the majority opinion for the Oklahoma Supreme Court in *Franco*. Nowhere in his opinion did Justice Opala use or even mention the public trust doctrine to support his reasoning. Yet a careful reading of the opinion leaves the impression that the public trust was floating unseen beneath the majority

3. 855 P.2d 568 (Okla. 1990). The *Franco* case has a long history dating back to 1980 and is an active case as of April 1997. The history of the *Franco* case and essays about its implications for Oklahoma water law are set forth fully in *The Impact of* Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board, ENVTL. INST. PROJECT REP. (Drew L. Kershen ed., Oklahoma State Univ., Stillwater, Okla., Oct. 1995).

4. *See* 82 OKLA. STAT. §§ 105.1-105.32 (1991 & Supp. 1996). The statute at 82 OKLA. STAT. § 105.2(D) (1991) is particularly applicable.

5. *See Franco*, 855 P.2d at 570.

6. *See id.* at 571.

7. *See id.* at 580.

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opinion's surface. Justice Opala referred favorably several times to California doctrines and cases as precedent for the prevailing law in Oklahoma.[8] Justice Opala emphasized that water rights are use rights that must be exercised reasonably to protect the interests of others, including potential aesthetic and recreational claims to water in streams.[9] Justice Opala opined for the majority that the OWRB must maintain a minimum flow in streams for riparian reasonable use that may include use of the stream for the preservation and support of wildlife.[10] Justice Opala stated that in some instances that minimum flow required to meet reasonable riparian needs may well equal the natural flow of the stream.[11]

While the public trust doctrine was an undercurrent in Justice Opala's majority opinion, Justice Lavender in his concurring and dissenting opinion explicitly discussed it.[12] Justice Lavender wrote that the majority had confused public rights (the public trust) in water with private property rights claimed by riparians.[13] Justice Lavender particularly took issue with riparians being allowed to assert riparian claims for uncaptured wildlife because uncaptured wildlife are indisputably public property.[14] In the genteel way that Supreme Court justices write opinions disagreeing with their colleagues, Justice Lavender seemed to be saying to the majority that they could not protect the public trust doctrine by reinvigorating the private property rights regime of riparian water law. Justice Lavender seemed to challenge the majority to state explicitly and clearly whether the majority recognized the public trust doctrine as a viable, controlling doctrine for Oklahoma water law.

Justice Opala's majority opinion and Justice Lavender's concurring/dissenting opinion obviously do not resolve the status of the public trust doctrine in Oklahoma water law. However, discerning readers of the *Franco* opinion cannot help but feel that one day, probably soon, the Supreme Court of Oklahoma will decide a case like the *Mono Lake* case. When this occurs, Mr. Sawyer's perceptive discussion of *Mono Lake* in this symposium will be relied upon by opposing counsel to shape their arguments and by the Supreme Court in drafting its opinion. Mr. Sawyer's article thus is a possible vision of Oklahoma's future.

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8. *See id.* at 571.

9. *See id.* at 576. In the brief filed on behalf of Franco-American Charolaise, Mr. George Braly waxes poetic in making claims for riparian uses of water. He argues that riparians have a riparian claim to cooling water in the stream for the bellies of cattle on hot days and to rippling water in the stream for dangling toes while boys and girls steal a kiss behind a cottonwood tree. Answer Brief of the Riparian Landowners/Appellees at 106 n.63, Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568 (Okla. 1990) (No. 59-310). Justice Opala's opinion impliedly makes the OWRB decide whether "belly cooling" and "dangling toes" claims are reasonable riparian claims to water.

10. *See Franco*, 855 P.2d at 577.

11. *See id.* at 578 n.56.

12. *See id.* at 583. (Lavender, J., concurring in part and dissenting in part). Although his opinion is a concurrence and a dissent, Justice Lavender expressed dissenting views to the majority opinion in all but the last paragraph of his opinion. Justice Lavender discussed the public trust doctrine in the text accompanying his footnotes 62-64 immediately preceding his last paragraph. *See id.* at 595. Chief Justice Hargrave and Special Justice Reif joined Justice Lavender's opinion. *See id.* at 596.

13. *See id.* at 583 (Lavender, J., concurring in part and dissenting in part).

14. *See id.* at 595 (Lavender, J., concurring in part and dissenting in part).

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II. James Huffman on Cost Internalization and Wealth Redistribution

Professor Huffman argues that private property is an inevitable and unavoidable fact about the allocation of scarce resources. Starting from this fact, he further contends that private property should not be viewed as antagonistic to environmental health. Just the opposite, Professor Huffman reasons clearly and forcefully that a well-defined private property rights regime actually enhances environmental protection by providing proper incentives to individual behavior and by promoting the efficient use of resources. Professor Huffman queries rhetorically, does not American society prefer incentives and efficient resource allocation to forced obedience and inefficient resource allocations?

Yet despite his rhetorical queries, Professor Huffman shows that in fact private property rights are often on the defensive, including on the defensive in the debate between the environmental claims for public rights and property claims for private rights. He argues that private property rights are forced into this defensive posture because environmental regulations and claims are as often about wealth distribution to favored groups as these regulations and claims are about cost internalization to protect the environment. Put simply and bluntly, Professor Huffman contends that environmental regulations and claims as often redistribute private wealth to special interests (majoritarian or not) as they benefit the environment. To protect against this wealth reallocation, Professor Huffman urges a reinvigorated private property regime and a Fifth Amendment takings jurisprudence to redress what should be seen as legal system failures, not private property-market failures.

Oklahoma echoes of Professor Huffman's insights resonate strongly in the on-going debate about the proper public policy for Oklahoma's laws and regulations governing concentrated animal feeding operations (CAFOs). Oklahoma has a substantial animal feeding industry — catfish farms, cattle feedlots, dairies, poultry barns, ratite pens, and swine operations. Each of these industries create manures, dead animals, liquid and solid wastes, and odors that can pollute the water, the air, and the land of Oklahoma. Each of these industries needs to internalize the cost of these potential pollutants to protect Oklahoma's environment and to free neighbors from cost burdens arising from pollution. Protecting the environment and freeing neighbors from cost burdens seem to be easily identified public policy goals even if the means to achieve those goals become hotly contested in the public debate.

While the Oklahoma debate about CAFOs has generally kept its focus on the goals of environmental protection and reasonable land use, wealth redistribution (i.e. economic advantage and economic protectionism) through environmental regulation of CAFOs has also been a persistent theme in the public debate. Several examples exist of wealth redistribution arguments occurring in the Oklahoma debate about the animal feeding industries.

• Many proponents of stricter environmental laws and regulations for CAFOS are most bothered by the concentration occurring in the feeding industries. They argue that CAFOs provide evidence of the corporate takeover of agriculture and of the industrialization of agriculture. These persons concerned with concentration are most passionate about the structural issues of agriculture. They want to preserve

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family farms and small-scale animal feeding operations. They want farming and ranching to be family lifestyles rather than commercial businesses. For those concerned about the structural issues of agriculture, increased environmental regulations happily create additional economic entry barriers into animal feeding by competitors of the preferred structures of family farms and small-scale operations.

• During the debate of spring 1997 about a new Oklahoma law for CAFO permits, many directed the attention of legislators first and foremost to protecting particular sectors of the animal feeding industry from the new law. For some making these arguments that exempt their sector from the new law it would coincidentally have the beneficial impact of burdening a competing meat. As a consequence, the new Oklahoma Concentrated Animal Feeding Operations Act[15] focuses its attention on the swine industry. Most other animal feeding industries escaped significant additional environmental controls. While the swine industry and its possible pollution is getting the greatest public attention in Oklahoma, by failing to keep the debate focused on environmental goals as opposed to wealth distribution concerns, the new law left unaddressed environmental issues that arise from the other animal feeding industries. The City of Tulsa is now worried about perceived threats to its municipal water supply from the poultry industry and demanding that the law be amended to address the possible pollution arising from poultry barns.[16]

Structural issues in agriculture and potential pollution from the swine industry are, of course, important, complicated public policy issues. But Professor Huffman's article properly admonishes us that these structural or sector issues should not be confused with environmental issues. Confusing the issues may do what Professor Huffman warns against — to use environmental regulations to redistribute wealth between competitors without necessarily or efficiently protecting the environment.

• Family farms and small-scale animal feeding operations face enormous economic pressures to survive. If small farms had to comply with additional environmental legal controls, their operating costs would assuredly rise, which increases their financial distress. Yet to protect small farms from environmental controls because of economic concerns allows small farms to continue to pollute. Moreover, exempting small farms from environmental regulation on the ground that they do not constitute significant pollution sources is to act on an assumption that may often be incorrect.[17]

Professor Huffman's insights apply to small farm pollution. If small farms pollute, environmental regulations that are truly oriented toward the environment

15. 1997 Okla. Sess. Laws. ch. 331, §§ 1-21 (codified at 2 OKLA. STAT. ANN. §§ 9-201 to 9-215 (West Supp. 1997). The Oklahoma House and Oklahoma Senate passed the Act on May 23 and May 27, 1997 respectively. Gov. Frank Keating signed the Act on May 28, 1997. The new law, which became effective September 1, 1997, amends and replaces the Oklahoma Feed Yards Act, 2 OKLA. STAT. §§ 9-201 to 9-215 (1991).

16. *See, e.g.*, Mick Hinton, *Task Force Mulls Messy Problem of Chicken Waste*, DAILY OKLAHOMAN, Aug. 21, 1997, at 1.

17. The Kiplinger Agriculture Letter recently reported that the Environmental Protection Agency is working on an environmental enforcement strategy for some non-CAFO animal feeding operations that would take effect in 1998. *See* KIPLINGER AGRIC. LETTER, Aug. 15, 1997, at 2.

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would make the small farms internalize these costs. If the environmental regulations exempt small farms from internalizing environmental costs, Professor Huffman's article alerts us to the possibility that this environmental regulation may only redistribute wealth (by imposing additional costs on non-exempt farm operations) without achieving significant environmental protection. From Professor Huffman's articulated position, creating environmental costs on certain actors without substantially protecting the environment causes a tragic waste both of economic resources and environmental resources.

III. John Echeverria on the Politics of Property Rights

Mr. Echeverria gives an insightful and thorough history of the property rights movement as a political phenomenon for the past decade in the states, the Supreme Court, the federal executive branch, and the 104th and 105th Congresses. He stresses the significant impact the property rights movement has had recently due to a cohesive, well-financed campaign rooted in libertarian ideology and backed with strategic campaign contributions. He argues that the property rights movement has created a public mythology that portrays environmental laws and regulations as adversely affecting the small landowner — the little guy being pummeled by the anonymous bureaucrat. As a consequence of this public mythology, Mr. Echeverria shows that the property rights movement, while often unable to sustain its own legislative proposals, has effectively stymied the reauthorization of major environmental acts and squelched new environmental initiatives.

From his vantage, Mr. Echeverria sees the public mythology as both the strongest and weakest link in the property rights movement. He responds to the property rights mythology by arguing for a counter-mythology that has three emphases: individual rights to environmental protection by empowering citizens to protect their established property uses either through nuisance suits or participatory regulatory procedures; the historical fact of public ownership of certain natural resources such as the public lands and wildlife; and, the dissemination of factual information about land distribution patterns to educate the public about who benefits and who loses if the property right movement succeeds in its agenda. Mr. Echeverria hopes that these three emphases will lead to a rethinking of private property rights. Mr. Echeverria contends that a rethinking of private property rights would result in a broader, deeper understanding that private property rights are always subject to a very substantial communitarian trusteeship.

Mr. Echeverria's first counter-point to the property rights movement — empowering private citizens to protect established property uses from environmental degradation — has become constitutional law in the state of Oklahoma. Indeed, Oklahoma may be a sterling example for Mr. Echeverria to use to illustrate his first counter-point.

When the Oklahoma Department of Health granted a license for a landfill, neighboring property owners sued the Department. They alleged that their due process rights in protecting their property interests would be violated unless the Department took two actions: gave appropriate notice to the neighbors of the pending license application, and granted a "trial-type" hearing for the neighbors to

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contest the license prior to issuing it. In *DuLaney v. Oklahoma State Department of Health*,[18] the Supreme Court of Oklahoma agreed with the neighboring landowners. The Supreme Court ruled that the state would be perilously close to taking private property without due process if the Department granted a license without notice to and a hearing for neighboring property owners.[19] In effect, the Supreme Court of Oklahoma used the due process clause to grant owners of established property uses a constitutionally-based nuisance action[20] that the legislature may not erode through regulatory regimes, such as the one in *DuLaney*, controlling landfill siting.[21]

As Oklahomans have debated the appropriate governmental regulation of concentrated animal feeding operations (CAFOs), the implications of *DuLaney* have become apparent. For years, the Oklahoma State Department of Agriculture (OSDA) granted licenses to CAFOs through a process internal to OSDA — an internal administrative review of the application. As the debate over CAFOs became more heated, landowners neighboring proposed CAFOs petitioned OSDA for the same notice and hearing rights as those granted the neighboring landowners in *DuLaney*.[22] In November 1996, the Attorney General issued an opinion that directed OSDA to provide notice to neighboring landowners on all applications and a "trial-like" administrative hearing when the neighboring landowners can present specific factual allegations that the proposed feedlot may have a "direct, immediate and substantial harm" upon their property.[23] Within a few months of the Attorney General's opinion, OSDA promulgated an administrative rule providing for notice and hearings in CAFO applications.[24] Similarly, the Oklahoma legislature enacted a provision mandating notice and hearings in CAFO applications in the new Concentrated Animal Feeding Operations Act.[25]

For Oklahomans who opposed land uses that they believe will cause environmental degradation, the *DuLaney* case and the OSDA experience with CAFO licenses provide clear victories for their right to have notice of the license application and their right to contest that application through an adversarial administrative hearing. Oklahomans thus have what Mr. Echeverria suggests for adoption at the federal level — individual citizens empowered to protect their established property uses

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18. 868 P.2d 676 (Okla. 1993).

19. *See id.* at 681.

20. *See* Op. Okla. Att'y Gen. No. 97-30 (May 5, 1997) (holding that OKLA. CONST. art. II, § 23 creates an independent cause of action for taking or damaging property).

21. *See DuLaney*, 868 P.2d at 678. *See generally* Brent M. Johnson, Note, *Environmental Law: Are Oklahoma Environmental Permits Valid under the Fourteenth Amendment's Due Process Clause?* DuLaney v. Oklahoma State Dep't of Health, 48 OKLA. L. REV. 651 (1995) (arguing that the *Dulaney* decision has potentially a far-reaching impact to invalidate many license procedures existing within the state government of Oklahoma).

22. Objection to Issuance of License, In Re Application of Top Farm, Inc. (Mar. 25, 1966).

23. Okla. Op. Att'y Gen. No. 96-76, at 16 (Nov. 1, 1996).

24. *See* License Application for New Facilities or Expanding Operations, Okla. Agric. Admin. Rule 35:15-43-6 (June 26, 1997), 14 Okla. Reg. 2450 (1997).

25. *See* Oklahoma Concentrated Animal Feeding Operations Act, 1997 Okla. Sess. Laws ch. 331, § 7 (to be codified at 2 OKLA. STAT. § 9-205.1) (signed by Governor Frank Keating on May, 28, 1997).

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from developments that may cause environmental harms.[26] Oklahomans have individual rights of a constitutional dimension to environmental protection.

Conclusion

This symposium has been graced with three excellent lead articles filled with provocative insights. Readers can learn much from each of these articles. With this commentary, the author hopes that readers also have an appreciation for the fact that the ideas presented in these lead articles have Oklahoma counterparts. The articles of this symposium are thus more than provocative; they are timely and useful to every Oklahoman engaged in the public debate about environmental protection and the politics of property rights.

26. In his article, Mr. Echeverria specifically mentions the Homeowners Empowerment and Protection Act, S. 2070, 104th Cong. (1996), a bill introduced by Senators Wyden and Warner.

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