

Conservation Easements in Arizona, Water and Private Property (17 April 2023)

Although the 1980 Groundwater Management Act specifically in effect codifies the law of the commons or public trust doctrine in regard to water, establishing in statute that waters of the state belong to the people and are held on trust by the state government, their use to be regulated by the state for the general good of the people (or, as the AMA section of the law says, "to support the general economy and welfare").

Unfortunately, the lands which those waters run through and underlie are not governed by a public trust doctrine, but by a private property ideology that regards the land and its products not as part of a commonwealth or ecological community but as commodities to be bought and sold at the will of the owner.

There is nothing like the widespread indigenous land ethic which says "We do not own the land, but borrow it from our children." There is no legal sense of the land and its non-human inhabitants as a trans-generational democratic community of which we are not masters (or landlords) but a contributing and benefiting member.

Sad to say, this view of the land and its products as commodities also poisons our waters, insofar as in the process of regulation and distribution those public trust terms "general economy and welfare" typically are warped so that instead of supporting the ecological base upon which the commons and commonwealth depend, waters are normally allocated for legally-defined "beneficial use" based on the same property rights commodification ideology that governs our lands.

Although there has been some shift toward rectification of this profit-motive bias in recent years and a shift toward protecting public interest in non-market social and ecological values [see, e.g., Helen Ingram & Cy R. Oggins, *The Public Trust Doctrine and Community Values in Water*, 32 *Nat. Resources J.* 515 (1992), available at: <https://digitalrepository.unm.edu/nrj/vol32/iss3/5>], "supporting the general economy and welfare" is still usually interpreted to mean promoting private profit and maximum production in a framework of endless growth economics, despite these being more or less obviously insane goals in a time of extended drought and climate collapse. Steady state economics, multi-generational community sustainability, protection and preservation of the land not for market use but in and for itself are not part of the normal criteria for allocation of water.

While we work toward somehow getting commonwealth-not-commodity values into the plan for the new Douglas Basin AMA, we might also want to look into means for taking land out of the commodities market. One way of doing that, of course, is to donate land to public agencies with stipulations that it be used for purposes of wildlife or ecosystem preservation or restoration. However, unless the target agency is a park or similarly dedicated to longterm preservation, there are some loopholes in that option, since most public land agencies, even when they are nominally designated as preserves or special conservation areas (as we've learned to our sorrow with the San Pedro National Conservation Area) are managed in terms of the same commodity production ideology as our private lands.

Another option, especially for individuals with large tracts of land, or for communities of like-minded people with contiguous properties, may be conservation easements. Here are some websites with introductory information about conservation easements.

<https://lawofarizona.com/conservation-easements/>

<https://www.alwt.org/for-landowners/>

<https://sonoranjv.org/az-land-water-trust/>

<https://codes.findlaw.com/az/title-33-property/az-rev-st-sect-33-272.html>