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Colorado Supreme Court

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DAN TARLOCK, FAITHFUL WAY-FINDER

JUSTICE GREGORY J. HOBBS, JR.*

*I gazing at the boundaries of granite and spray,
the established sea-marks, felt behind me
Mountain and plain, the immense breadth of the continent,
before me the mass and doubled stretch of water.*

Continent's End, Robinson Jeffers
Selected Poems (Vintage Books 1963)

Prodigiously prolific, Dan Tarlock's been a reliable scholar and interpreter of western water law's sea changes since the 1960s. Born in Oakland in 1940, he crossed the Bay for a Stanford law degree in 1965; then taught at UCLA, Kentucky, Penn, and Indiana.

His long tenure at Chicago-Kent College of Law beginning in the early 1980s has magnified his way-finding perspective. As the Jeffers poem suggests, he has the plains, the mountains, and the vast interior west to the Pacific Coast clearly in focus as he teaches, writes, and moves amongst us. For him, "There are no bars across the way. There is no end to the plan and the clue, the hunt and the thirst."¹

His Stars

Dan's tribute to his mentors, Frank Trelease and Charlie Meyers, resonates as we turn in our own careers to unlocking key insights into the public's water resource and its usufruct:

Like Frank, [Charlie] advocated a presumption of state rather than federal allocation primacy, and he was an even more forceful advocate of the position that the principal function of the law should be to define exclusive property rights in natural resources so the operation of a market could be triggered.²

* Colorado Supreme Court Justice (Ret.).

1. CARL SANDBURG, *Leather Leggings*, in THE COMPLETE POEMS OF CARL SANDBURG 108, 109 (rev. & expanded ed. 1970).

2. A. Dan Tarlock, Tribute to Frank J. Trelease and Charles J. Meyers, 29 Nat. Resources J. 327, 329 (1989).

Writing in 1989 for the *University of Colorado Law Review*, Bennett Raley and I cited Trelease for the proposition that certainty and flexibility are hallmarks of prior appropriation water law:

[T]he requirement of certainty is satisfied by the decision to use one system for allocating the exclusive right to use a quantity of stream water in priority for beneficial uses. Flexibility exists because the water right can be changed to alternate uses, subject only to the prohibition against injury to other appropriative rights.³

In the same article, we questioned Tarlock's suggestion that federal statutory law might create something akin to a police power water right.⁴

Dan, it seems, delights in shadow boxing with prior appropriation for a purpose. What's right, what's wrong, what needs fixing, what's well enough? Is it rule, principle, or rhetoric? He invokes a Colorado decision characterizing the modern purpose of its beneficial use requirement as the advancement of "the fundamental principles of Colorado and western water law that favor optimum use, efficient water management, and priority administration, and disfavor speculation and waste."⁵ As he pulls the curtain open on the doctrine's actual application, he's both critic and seer. "Like all drastic rules, the rule's importance lies more in the threat of its application rather than the application."⁶ Much of western water infrastructure and law, he observes, is devoted to buffering the effects of calls for priority enforcement.

The net result of the large and small reservoirs and distribution systems that vein the West is that the risks of variable stream flows and *the actual enforcement* of priorities have been masked by this infrastructure and the importance of priority diminished. Carry-over storage reduced, rather than eliminated, the inherent risks and therefore, created the conditions for the expectation of a dependable supply to become the real rule of water allocation. Water rights are more accurately characterized as a risk allocation regime among a wide range of claimants.⁷

Dock of the Bay

Born in 1944, a 1971 graduate of Berkeley Law, I've been learning from Tarlock my entire career as lawyer, judge, and now Co-Director of

3. Gregory J. Hobbs, Jr. & Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. COLO. L. REV. 841, 874 & nn.182-83 (1989).

4. *Id.* at 867 n.144.

5. Santa Fe Trails Ranches Prop. Ass'n v. Simpson, 990 P.2d 46, 54 (Colo. 1999) (footnote omitted).

6. A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881, 883 (2000).

7. *Id.* at 907.

the University of Denver Sturm College of Law Environmental and Natural Resources Law Program. In the D.U. Water Law Review's inaugural 1997 issue, I invoked his water resources treatise for the proposition that riparian water law is not well suited to a system of transferable water rights. In contrast, prior appropriation water law provides more exclusive property rights, enabling new and changed uses to occur via water markets that are subject to administrative and judicial oversight, protecting against injury to other water rights.⁸

Over the ensuing two decades, Colorado water courts and its supreme court have issued many decisions defining engineering and legal factors that apply to applications for conditional and absolute surface rights, exchanges, changes of water rights, tributary groundwater extractions, and replacement water supply plans to prevent injury to other water rights while allowing out-of-priority water uses to occur.⁹ The water resource management casebook Dan co-authors with other distinguished water law professors contains illustrative decisions and statutes from many jurisdictions—state, federal and international—dealing with appropriative rights, riparian rights, tribal water rights, other federal reserved water rights, the public trust, and environmental laws.

Professor Advisor to Student Editors; Law Review Author

Dan's served as a member of the Water Law Review's Advisory Board since 2000 to date. Student editors over these seventeen years have benefitted greatly from his advice about potential authors and subject matter for articles. Colorado judges and justices, including me, have hired a number of their best law clerks from among these students. In 2000, the Water Law Review published his article, *Safeguarding International River Ecosystems in Times of Scarcity*.¹⁰ Among other international river systems, this article highlights operation of the Glen Canyon Dam on the Colorado River to mitigate adverse impacts to endangered native fishes and

8. See Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV. WATER L. REV. 1, 24 (1997) (citing A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 2:12, at 2-13).

9. A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY (7th ed. 2013). See, e.g., *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139 (Colo. 2001), noted in TARLOCK ET AL., *supra*, at 281; *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307 (Colo. 2007), noted in TARLOCK ET AL., *supra*, at 208-15; *Kobobel v. Dep't of Nat. Res.*, 249 P.3d 1127 (Colo. 2011), noted in TARLOCK ET AL., *supra*, at 492-500; *Simpson*, 990 P.2d 46, noted in A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 246-47 (5th ed. 2002) [hereinafter FIFTH EDITION].

10. A. Dan Tarlock, *Safeguarding International River Ecosystems in Times of Scarcity*, 3 U. DENV. WATER L. REV. 231 (2000).

implement ecosystem protection measures for the Glen Canyon Recreation Area and Grand Canyon National Park.¹¹

A decade later, as the early twenty-first century drought continued to ravage the West, he followed with *How Well Can Water Law Adapt to the Potential Stresses of Global Climate Change?*¹² In connection with this article, his keynote at the Water Law Review's 2010 symposium presented seven options for adapting to a variable climate. Along with transferable water rights, these include emphasizing the beneficial use and anti-speculation aspects of prior appropriation in municipal water supply planning, linking land use and water supply decision-making, employing technology-forcing conservation measures, and capturing runoff water through smaller projects that incorporate aquatic habitat restoration measures.¹³

Articulator of Legislative, Judicial Roles

State-initiated instream flow laws are a statutory innovation Dan celebrates. He carefully explains why this kind of public right is particularly suited to state agency appropriation:

An instream flow appropriation may control the future use of the river to a degree much greater than do the traditional non-consumptive private rights. For this reason, instream appropriations should be the exclusive province of state agencies to increase . . . coordination of instream flow maintenance and other state water use objectives.¹⁴

I've always appreciated Dan's articulation of the role judges play in water decision-making. The fifth edition of his co-authored *Water Resource Management* casebook contains this insight:

The courts have continually ushered changes into prior appropriation law, modifying its characteristic features as necessary to respond to society's evolving demands and values . . . it is important to study how the courts developed the principles of acquisition, enjoyment, transfer, and loss of water rights under the prior appropriation system. The courts typically have identified how to escape inflexibilities in doctrine.¹⁵

11. *Id.* at 266–67.

12. Dan Tarlock, *How Well Can Water Law Adapt to the Potential Stresses of Global Climate Change?*, 14 U. DENV. WATER L. REV. 1 (2010).

13. *Water Law Review 2010 Symposium: Water Law and Climate Change, Planning in an Uncertain Future*, 13 U. DENV. WATER L. REV. 497, 505–07 (2010).

14. TARLOCK, *supra* note 8, § 5:30, at 5-54 to -55. His enthusiasm for fish, wildlife, and recreational water rights bubbles along in this 1978 article: A. Dan Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report On "New" Public Western Water Rights*, 1978 UTAH L. REV. 211.

15. TARLOCK ET AL., FIFTH EDITION, *supra* note 9.

I am particularly fond of my copy of this 2002 edition as it's personally inscribed by the authors relatively early in my service as a member of the court:

"To Justice Greg Hobbs, with gratitude for your contributions to this book as well as for your continuing concern for the development of water law. In collegiality and friendship, David Getches"

"Mr. Justice Hobbs, I hope that we did justice to your outstanding water law jurisprudence. Future editions will do more so. Dan Tarlock"

"To Justice Greg Hobbs—With many thanks for your support and friendship over the years. Jim Corbridge"

No Final Words

When you get to land's end, look to your craft. Words lacking reason, rhythm, and sinew assemble no curvature for floating your boat to carry others along, however sturdy the planks you've stacked one upon the other may look to you. Good scholarship bound up with common sense in the pursuit of further progress, available to decision-makers in community an increment at a time, is the common law of water at work and play. Dan Tarlock's body of admirable worth is part of a durable flotilla worth joining.