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Introduction: Multijurisdictional Water Resources Regulation

Ray Jay Davis*

I have a sneaking suspicion that few people bother reading introductions to law journal symposium issues—at least I do not. Surely symposium introductions are not exciting enough to place high on anyone’s “must read” list. But it is traditional to launch legal periodical symposia with introductions, and I have agreed to do it for this issue on multijurisdictional water resources regulation. So I will have at it.

If anyone has read this far, the temptation is now probably almost irresistible to ignore the rest of this Introduction and go at once to the articles, or skip this issue of the Journal altogether. It is my job to see to it that you read on, at least a few more lines. Experience has taught me that the best way of getting attention at this point is to use a “grabber,” something so insightful or outrageous that it will generate sufficient interest so as to compel a reader to devote a few more seconds wading through what has been written.

“This book should be burned in the public square!” That is one of the better grabbers I have seen. This first sentence in a book review caused me to read the rest of the review. Of course I did not tackle the book itself; I rarely do. The book was about medieval English property law, a subject with limited application to my anticipated teaching career or, for that matter, much of anything else. But at least it induced me to read the entire rather laudatory review. The author so liked the book he did “almost persuade” me to look at it. He tweaked my interest.¹

“Water law is not a dry subject.” How is that as an attention-getter? Not as graphic as fire, but maybe good enough to stimulate readers to hang in there a bit longer. In fact, water can be downright exciting. Remember the account of Moses parting the Red Sea? Fleeing Israelite civilians, drowning Egyptian charioteers, and Charlton Heston holding aloft his shepherd’s staff. It has been a long time since anyone has had that much control over water. You can find it somewhere in the Good

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¹. You will have to trust me on this because I do not recall the citation to the review, and I am not about to waste time looking for it.
Book, or at your local video store compliments of MGM studios. Water is both scriptural and stimulating.

If you are with me this far, the time has come to announce my intentions for this introduction. It is my job to inform readers what this symposium is about and con them into actually reading it, or at least dipping into it.²

The symposium springs from two facts about water: often there is not enough of it where people want it, and there are overlapping governmental entities—international, national, federal, state, tribal, local—with competing interests establishing legal regulations that control access to it. All of the articles that follow address ways and means of accommodating those multijurisdictional concerns. They examine various combinations of international law, federal law, interstate compacts, and state statutes that attempt to regulate water rights. Boundary waters, water coursing through upstream and downstream jurisdictions, and water occurring in places governed by more than one sovereign power are the subject of the legal rules discussed by the writers of this symposium. They discuss how multijurisdictional regulation has been accomplished in the past and in the present, and how future water sharing might be more effective.

This issue is the place to learn about the “Swamp Thing” or “The Creature from the Federal Lagoon.”³ We visit the Near East where water is more precious than oil. Images of Desert Storm, Atatürk, Abrahan and Saddam Hussein float before us. One piece advises us how Las Vegas—when the Colorado river was divvied up, Nevada crapped out—is belatedly trying to cash in on the water jackpot. We wrestle with the Bear River of Wyoming, Idaho and Utah, and join one author as he waterskis across depleted Bear Lake—not a world-class recreational experience. The mysteries of “practically irrigable acres”—such as how many gallons of water can be balanced on the point of an Indian’s or federal land manager’s shovel—are addressed. And there is a primer on how international legal norms can promote river basin ecosystem integrity in shared waters. Exciting locales. Interesting topics. Everything from Arabian nights to desert sidewinders of the great southwest, from birds to bears,⁴ from war to peace. Take a dip. Immerse yourself. You will like it.

Lest the reader should now believe that this writer does not take water and this symposium seriously, and the authors who produced it

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². There will be buckets of water stuff throughout the piece. Look for words like “spring,” “splash,” “dive,” “dip,” “wade,” “float,” “immerse,” “sprinkle” and “boil.”
³. The author of the wet lands paper resisted using those terms in his title, but I cannot.
⁴. Sorry, no bees.
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become outraged over being made light of, it is time to disclose that I regard water with utmost seriousness. Over a century ago my great-grandfather fled drought-stricken Utah to dry southern Arizona because he lost a water rights dispute. In my youth, the difference between a profit and a loss from the family truck farm depended upon whether we got the cheap canal water to which we were entitled or had to use available but expensive metered city culinary water to irrigate. We were at the end of the ditch and learned that there can be a difference between a water right and the wet stuff itself. Water law is serious business, so without further ado I will recount some of the specifics of the articles in this symposium issue.

Professor Dan Tarlock, arguably the most prolific of all water and environmental law authors, makes his splash with the symposium lead article. In it he considers the extent to which the draft rules of the International Law Commission of the United Nations would integrate protection of an international river system's ecological integrity with what heretofore has been the dominant purpose of international water law: to promote equitable development of multijurisdictional water resources. He advocates application of ethics as well as science to adapt international law of river management to ecosystem protection. Tarlock concludes with a plea for lawyers to provide international river basin managers with a legal framework for applying technical expertise and ethical perspectives allowing development of management regimes which will both better accommodate historic uses and more effectively protect riverain ecosystems.

Professor Joseph Dellapenna, a leading expert on riparian rights and international water law—especially mid-eastern water law where he has significant experience advising policy makers, dives into a boiling caldron: how to share the Tigris and Euphrates Rivers. Ancient Mesopotamia—the "land between the rivers"—rivals Egypt as the birthplace of hydrology. Some of the earliest extant legal codes deal with allocation and distribution of waters flowing from those rivers. Turkey, Syria and Iraq are the co-riparian states, and Iran has a significant interest in the Shatt al-'Arab delta area, the principal site of the protracted bloody Iranian-Iraqi war. Dellapenna recounts the modern history of Mesopotamian water use and international legal arrangements. Although at present the affected countries have no formal water sharing agreements, informal practices based upon customary international law are operative. Dellapenna advocates establishing a restricted sovereignty approach to

5. Or, shall we say, having water sprinkled over their words.
6. In both states you have to prime yourself to spit.
integrated, basin-wide water resources management, but explains that it would be extraordinarily difficult to initiate the plan given hostilities between and within the riverain nations. He sees some hope for compromise in the shared Islamic legal and cultural tradition of the region which allocates community water among water users and calls upon such users to maintain communal water systems. It will take political imagination and fortitude to bring to pass the Dellapenna proposal. Unfortunately, these qualities are in short supply in the region.

The other four pieces in this symposium were written by legal practitioners and scholars who are past students of mine. Jennele Morris O’Hair’s studies of federal and Indian tribal reserved water rights quantification provide appropriate background for her role as Chairperson-Elect of the court-appointed Gila River General Adjudication Steering Committee. Indian tribal reservations lie in the area of southern Arizona to which my great-grandfather emigrated after his Utah water entitlement was diminished. He and thousands of other water users perfected Gila River water rights thereby laying the background for the current effort in the general water adjudication to quantify everyone’s claims. The article considers the reserved rights doctrine which holds that sufficient water was reserved for tribal use on “practically irrigable acres”—whatever that might mean—in light of the perfected water rights. O’Hair gives nine arguments from the cases supporting her proposition that the amount of tribal water entitlement depends upon Indian claimants proving a “reasonable likelihood” that future irrigation projects actually will be built. Given the decline of the big dam era and the ever tightening federal purse strings, this concept surely is welcome news for people like my great-grandfather. It is not so welcome for the Indians whose ancestors settled along the Gila long before my people arrived.

The final three papers originally were written for the Water Law class I taught during the Fall 1994 semester at Brigham Young University-Provo. The student authors all received “high” grades in the course. I encouraged them to get the papers published, and I urge anyone who has read this far into this introduction to immerse themselves in them.

Hawaii’s net tourist revenue suffers inroads from travel to Las Vegas which is the favorite vacation destination of people here. They enjoy the “action” there. They are likely unaware that Las Vegas is a dry mirage, not a desert oasis. The tourists likely assume that Lake Mead on
the Colorado River not too far away from Las Vegas supplies all the water needed to accommodate its expansive golf links, myriad of swimming pools, extravagant water parks, lush desert lawns, residences and other metropolitan uses. Not so. Under governing interstate allocation rules for the Colorado River, Nevada is allowed only 300,000 acre feet annually. That and meager local sources simply will not be able to quench Las Vegas's thirst for water much longer.\textsuperscript{10}

In his paper, Ryan Dennett introduces us to some of the desperate Las Vegas water importation proposals. Transporting all unappropriated underground water from the northern and eastern counties of the state is expensive but does not involve interstate issues. Understandably even the mere suggestion of that makes Las Vegas water managers less popular in Elko, Pioche, Ely, and surrounding ranches than desert sidewinders who are considered benign by comparison. A second major proposal, the examination of which is the thrust of Dennett's paper, is to take water from the Virgin River, a Colorado River tributary rising in the mountains of southern Utah and flowing through the Utah-Arizona-Nevada tri-state area before discharging into Lake Mead. The project is complicated by interstate considerations built into the existing "law of the river" and by environmental laws, including protection of the endangered Virgin River Chub, a species for which environmentalists have considerably more enthusiasm than do Las Vegas Valley Water District officials. Dennett explores how the Nevadans may somehow beat both the "law of the river" and the Endangered Species Act. Also involved is the American treaty obligation to Mexico for water deliveries from the Colorado. Even if the states in the Virgin River Basin can agree, the rest of the Colorado River Basin states, environmentalists and the Mexicans may be able to keep Las Vegas from claiming the desert water jackpot.

I promised readers earlier in this introduction they could learn from the symposium about the "Swamp Thing," also known as "The Creature from the Federal Lagoon." I keep promises on which I can easily be checked. Eric Davis\textsuperscript{11} chose neither of those two obvious titles for his paper. He thought that "Interstate Compacts That Are for the Birds: A Proposal for Reconciling Federal Wetlands Protection with State Water Rights Through Federal-Interstate Compacts," longhand for "federal wetlands protection," to state water rights holders "was at least as terrifying as anything that ever appeared in a Hollywood 'B' movie." Areas that were considered in the nineteenth century so worthless as "swamplands" that drainage was legally encouraged, now are regarded

\textsuperscript{10} And we all thought their tastes ran to something rather more intoxicating.

\textsuperscript{11} No relative, although I wish all of my relatives were as bright as he is.
as environmentally critical and protected as “wet lands.” Davis tries to meet water rights holders’ concerns over the impact of wet lands designations upon development with a model state-federal compact, based on the Delaware River Compact. It would create a mechanism for setting a “condemnation” price for wetlands conservation easements in which landowners and water rights holders would be compensated for their economic losses at a rate analogous to the cost of the unimproved land. Through the federal-interstate compact, costs of such wetlands protection could be shared equitably among the interested parties.

I always have encouraged water law students to write papers about something with which they are familiar. The author of the anchor paper is Jeff Boyce, a former mayor of Mt. Sterling, Utah. Mt. Sterling is in the Cache Valley of Utah and Idaho, a significant geographical part of the Bear River basin, the subject of Boyce’s paper. An interesting provision of the original Bear River Compact among Wyoming, Idaho and Utah is that it called for amendments at least every twenty years. The signatory states, with the required congressional approval, amended the compact once. They are now wrestling with the Bear for a third round. Boyce details the different considerations that drove compact negotiations in the first and second rounds and are coming into the equation during round three. He advocates delegation of additional powers to the Bear River Commission so it can enforce the compact provisions and tame potential litigants. Boyce, who was that disappointed water skier on Bear Lake mentioned earlier, concludes by quoting from a recreational user of the stream: “Swift and serene. Placid and polluted. Spectacularly scenic. Visually obnoxious. A river. A ditch. A dumping ground. Quencher of thirsty crops. A corridor for canoes. Utah’s last watering hole.”

Swim heartily through this issue of the Journal, just splash around, or merely take a timid dip. But do not ignore it altogether, for if you do, you will miss having fun in the water. As for me, I have already read it, so I am off to the beach. There is nothing quite so relaxing as a January day at the Oahu seashore, unless of course it is curling up at home in Utah with a copy of this periodical when snowfall has closed the schools.

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12. You may not have heard of that hamlet because it is so small that Jeff’s major accomplishment as mayor was to get the state to erect a single sign on the nearby highway with “Entering Mt. Sterling” on one side and “Leaving Mt. Sterling” on the other side.
13. In wet years, the lake is an important contributor to the flow of the river.
14. Following my stated practice, I am not providing a reference in my manuscript to that quotation.