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Water Law: Resource Use and Environmental Protection, by Frank J. Trelease

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BOOK REVIEW

WATER LAW: RESOURCE USE AND ENVIRONMENTAL PROTECTION, by Frank J. Trelease. Minn: West Publishing Co., 1974. Pp. xxiii, 863.

Professor Frank J. Trelease says in his Preface to *Water Law: Resource Use and Environmental Protection*, Second Edition, 1974, that this is a new book, and much more than a second edition to his more simply titled 1967, *Water Law, Cases and Materials*.

Although longer by five hundred pages, the book manages to retain the elegant economy and sense of purpose of the earlier edition. The faintly superior regionalism of the first edition has been replaced with a book for all regions. Professor Trelease contributed a thoughtful and comprehensive legal study for the National Water Commission on Federal-State Relations in Water Law, and the new volume has the breadth of his study, and of the Commission's Final Report. Extensive excerpts from the latter furnish a kind of alternate framework for his own excellent notes and discussion.

Those familiar with the 1967 edition might worry about the added subtitle, "*Resource Use and Environmental Protection*". The balance between using and saving is a theme of the book, and of the man. Final returns are far from in as to whether policy will favor using or saving as shortages of all sorts become more acute. Whatever the predilection of student or teacher, his education will be served by this volume.

Professor Trelease believes that the discipline of economics is important to achievement of his objective for a course in water law, which is to educate lawyers about how water resources are handled in the modern world, whether for application as advocate or counsel, administrator or policy maker. The National Water Commission received a study from Professors Meyers and Posner on market transfers of water rights, and part of that study is in the included materials. Wisely, I think, Trelease also includes works by econo-

mists as well as his own observations and explanations. The latter reflect a lesser confidence in the market and a better understanding of politics. As Earl Cook, Dean of Geosciences at Texas A & M, observed in connection with energy management, market economists seem to believe that the sum of a vast number of selfish acts will turn out to be a social good.

As noted above, the recommendations of the National Water Commission march through the materials as an alternate structure. There is another contrapuntal enhancement in the way water law is related to other parts of the law school curriculum. The treatment of riparian rights as tort law rather than property law by the American Law Institute was acknowledged but not emphasized in the first edition. The Restatement of Torts, Second, Tentative Draft No. 17, is now the basic organizational skeleton for the treatment of this part of water law.

Teachers of administrative law have to scramble to integrate the judicial developments under the National Environmental Policy Act as substantive accretions to administrative law as they teach it. Such teachers would find Section 2 of Chapter 8, on Environmental Protection, an admirable supplement for this purpose. Those who emphasize administrative law at the state level (may their number increase), would find Trelease's Chapter 5 on Pollution Control equivalently useful.

The pedagogical problems with this new edition of *Water Law* relate to the interweaving of economics, engineering and other parts of the law school curriculum into the casebook. The greatest suffering will be inflicted upon those teachers who, by reason of either personal or institutional conservatism, have as little as three quarter-hours as their allotted time for a "specialized" course like water law. Lesser pain will be felt by those who might argue with the decision to treat prior appropriation in the casebook before riparian rights, a reversal of the order in the earlier edition. It was pedagogically satisfying to suggest that students could articulate the definitions of appropriations law principles in

terms of the older riparian system, but Trelease is surely right in saying that the historical connection was slight.

A workable alternate suggestion for student and teacher is made in Chapter 1, in the cryptic advice, "Think Land!" Prior appropriations doctrines and riparian rights doctrines, far from being measured and defined one against the other, must satisfy the standard of their efficacy and utility in serving the needs of the country within a legal system dedicated to fairness and to stability. In the "land" context, Professor J. Willard Hurst of the University of Wisconsin, has supplied a needed nexus:

Organization implies deciding who may legitimately make decisions to plan and allot the use of resources. Since it is the distinctive function of law to sanction the ultimate distribution of power in a society, the law must be deeply involved in so basic a relation as that of men, land, and organization for the use of land.¹

When the success or failure of the National Water Commission, or the earlier Public Land Law Review Commission, is measured in the perspective of history, attention will have to be given to how the ideas in their reports survive the filtration process of legal education. The reports and underlying studies supply a wealth of material for law school courses in the natural resource areas of emphasis, and in other areas as well. Professor Trelease's study in federal-state relations in water law may get more exposure through his water law casebook, quantitatively and qualitatively, than that achieved by distribution of the reports themselves to the general public. If we look ahead a decade or so, the then-functioning legislators will have formed working ideas about how to revise water laws more through the process of their individual legal education than through direct reference to the legislature's library copies.

In such a context, Trelease's expanded treatment of the subject of groundwater (or ground water) give the work of

1. J. HURST, *LAW AND ECONOMIC GROWTH* 1 (1964).

Professor Charles E. Corker of the University of Washington a boost toward immortality. Corker is the author of Legal Study No. 6, "*Groundwater Law, Management and Administration*", extensively referred to in Chapter 5. The treatment of the subject reinforces Professor Trelease's thesis that the key to the subject is in administration and administrative law. Consciously or unconsciously, legislatures have had to come to rely upon some kind of expert agency, and that agency has had to be vested with a measure of independence including the independence to chart its own way out of the wilderness of precedent based upon relative water abundance.

More than geographic proximity of Wyoming and Colorado accounts for the satisfying currency of the Colorado material in the casebook. It would not be fair to expect every state to be treated so well, but a representative group of states and other jurisdictions which typify particular kinds of water or water-administration problems have been selected for extensive notes.

Professor Trelease may or may not exhibit subconscious distaste by relegating to the end of the book a discussion of the intellectually unsatisfactory state of the law on "Indian and Reserved Rights". He has devised a euphemistic title for the "navigation servitude", and other intractable problems: "Conflicts with Private Rights".

Trelease introduces the subject of water law to his students by quoting from Roscoe Pound:

What we are seeking to do and must do in a civilized society is to adjust relations and order conduct in a world in which the goods of existence, the scope of free activity and the objects on which to exert free activity are limited, and the demands on those goods and those objects are infinite. To order the activities of men in their endeavor to satisfy their demands so as to enable satisfaction of as much of the whole scheme of demands with the least friction and waste has * * * been what law makers and tribunals and jurists have been striving for.²

2. F. TRELEASE, *WATER LAW: RESOURCE USE AND ENVIRONMENTAL PROTECTION* 14 (2d ed. 1974), quoting from R. POUND, *MY PHILOSOPHY OF LAW* (1941).

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To so worthy an objective, he has made a substantive contribution.

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