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Foreward

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FOREWORD

*Jason Anthony Robison**

“Frank J. Trelease was Western water law for almost his entire career. Only the lack of an enforceable doctrine of scholarly appropriation permitted many of us to enter the field with any confidence.”¹ That’s how this year’s Trelease Speaker, Anthony Dan Tarlock, describes the legacy of a professor who devoted thirty-three years to the University of Wyoming College of Law, including twelve years as its Dean.² And Professor Tarlock assuredly is not alone in his assessment: “our foremost scholar in Western water law,”³ “the undisputed dean of water law professors,”⁴ “the acknowledged master of water law for several decades,”⁵ “the nation’s leading water law scholar.”⁶ These voices are in harmony—both with respect to the appraisals themselves and the soil out of which they grow. For, as further described by Professor Tarlock, Frank Trelease’s diverse contributions to natural resources law—water law and more broadly—rested on a plain foundation. They were “firmly rooted in the life of the arid West.”⁷

* Professor, University of Wyoming College of Law. S.J.D., Harvard Law School (2013); LL.M., Harvard Law School (2009); J.D., University of Oregon School of Law (2006); B.S., Environmental Studies, University of Utah (2003). I wish to thank *Wyoming Law Review* Editor-in-Chief Jason Mitchell and Managing Editor Meridith Heneage for their work on this foreword and Professor Tarlock’s remarks. All errors and omissions are my own.

¹ A. Dan Tarlock, *Tribute*, 22 LAND & WATER L. REV. 299, 299 (1987).

² *Id.* For a bibliography of Trelease’s scholarship, see *The Writings of Frank J. Trelease*, 22 LAND & WATER L. REV. 305 (1987). Upon his death in 1987, the *Land & Water Law Review* dedicated an issue of the journal (Vol. XXII, No. 2) to Trelease. The bibliography and tributes cited here appear within that issue.

³ Charles F. Wilkinson, *Tribute*, 22 LAND & WATER L. REV. 303, 303 (1987).

⁴ Joseph L. Sax, *Tribute*, 22 LAND & WATER L. REV. 295, 295 (1987).

⁵ George A. Gould, *Tribute*, 22 LAND & WATER L. REV. 287, 287 (1987).

⁶ Charles J. Meyers, *Tribute*, 22 LAND & WATER L. REV. 291, 293 (1987).

⁷ Tarlock, *supra* note 1, at 299. Charles Wilkinson echoes this sentiment: “His conception of water law was very broad: Frank correctly perceived water and water law as a cornerstone of society in the American West. As a result, Frank’s life work touched on a great many aspects of natural resources law and policy in the region.” Wilkinson, *supra* note 3, at 303.

Professor Tarlock fits a similar bill roughly a generation later. Dan, too, is from and of the American West,⁸ and, like Frank Trelease, has shaped the field of water law for over a half century, among other contributions.

“In many ways, my career has been like a raft trip down the Grand Canyon,” describes Professor Tarlock.⁹ It’s an apt metaphor of serendipity. And the proverbial river put-in makes sense of the whole journey. Dan’s lineage resembles Bernard DeVoto’s.¹⁰ With family in Arizona and Utah on his mother’s side, Dan spent summers visiting relatives in the “Arid Region,” as John Wesley Powell called it.¹¹ What were those ditches with water running through them in Provo? “Irrigation”? Fascination ensued.¹² A healthy dose of books on Western history from his mother—a subject which engrossed him while apart from the West at Cornell—and the foundation was set.¹³

I suppose it didn’t hurt that Wallace Stegner was at Stanford when Professor Tarlock returned to California to complete his undergraduate work. And even more influential was Stanford Law School’s recruitment of Charles Meyers during that successive chapter in Dan’s life. All told, Palo Alto proved formative. It was where Dan published his first piece on Western water law, a Note entitled *Colorado Encourages Rapid Depletion of Its Ground-Water Resources*,¹⁴ challenging the Colorado Supreme Court’s race-to-the-bottom decision in *Whitten v. Coit*.¹⁵ It was also where Dan read Wallace Stegner’s famous book on John Wesley Powell, *Beyond the Hundredth Meridian*,¹⁶ flipping the pages while hospitalized as a third-year law student.¹⁷ Stegner later sponsored Dan’s Sierra Club

⁸ Dan grew up in the San Francisco Bay Area. A. Dan Tarlock, *Western Water Law and the Challenge of Climate Disruption*, 48 ENVTL. L. 1, 2 (2019).

⁹ Email from Dan Tarlock, University Distinguished Professor Emeritus, Chicago-Kent College of Law to Jason Robison, Professor, University of Wyoming College of Law (Apr. 4, 2020) [hereinafter Tarlock Email] (on file with author).

¹⁰ DeVoto’s life and work are chronicled by one who knew him best in WALLACE STEGNER, *THE UNEASY CHAIR: A BIOGRAPHY OF BERNARD DEVOTO* (1988).

¹¹ JOHN WESLEY POWELL, *REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES* (1878).

¹² Telephone Interview with Anthony Dan Tarlock, University Distinguished Professor Emeritus, Chicago-Kent College of Law (Apr. 3, 2020) [hereinafter Tarlock Interview]; see also Tarlock, *supra* note 8, at 2.

¹³ Tarlock Interview, *supra* note 12.

¹⁴ A. Dan Tarlock, *Colorado Encourages Rapid Depletion of Its Ground-Water Resources*, 16 STAN. L. REV. 721 (1964).

¹⁵ *Whitten v. Coit*, 385 P.2d 131 (Colo. 1963).

¹⁶ WALLACE STEGNER, *BEYOND THE HUNDRETH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* (1954).

¹⁷ Tarlock Interview, *supra* note 12.

membership.¹⁸ Last but certainly not least, Palo Alto is where Dan's lifelong friendship with Charles Meyers began. Meyers served as Dan's advisor for the Note on Colorado groundwater law and also hired him as a research assistant. The project? Meyers' seminal article *The Colorado River*,¹⁹ for which Dan helped write the content on the Upper Colorado River Basin.²⁰ That, of course, includes the Upper Green.

Thus, "a fifty-year-plus fascination with water law was launched" at Stanford.²¹ Put differently, a fifty-year-plus Grand Canyon float trip launched there. One segment of the journey would focus on the flows in the Provo irrigation ditch mentioned above—surface water whose allocation is governed by the legal doctrine of prior appropriation in the West. How might prior appropriation evolve to enable some of those flows to remain instream? Part of Dan's float trip has entailed thinking through that paradigm-shifting question.²² Another segment would revolve around the Water Science and Technology Board of the National Research Council—an organization within the National Academy of Sciences—and touch on two topics that remain in vogue: (1) Western water marketing and (2) Glen Canyon Dam's operation just upstream of Grand Canyon National Park.²³ Efforts in both areas require reconciling diverse values and stakeholders, and all of us are beneficiaries of Dan's attempts at these reconciliations. Finally, international water law would mark the last segment of Dan's float trip. Among other projects, he advised the Global Water Partnership on cooperative management of transboundary rivers and aquifers.²⁴ This topic is taken up further below. But suffice it to say that in an era of anthropogenic climate change, it is difficult to overstate the importance of these relations.

¹⁸ Tarlock, *supra* note 8, at 3.

¹⁹ Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1 (1966).

²⁰ Tarlock Interview, *supra* note 12.

²¹ Tarlock, *supra* note 8, at 3.

²² Tarlock Interview, *supra* note 12; *see also* Tarlock, *supra* note 8, at 3. A nice duo exemplifying Dan's work on instream flows under prior appropriation is A. Dan Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 UTAH L. REV. 211 (1978), and A. Dan Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law*, 1975 UTAH L. REV. 871 (1975).

²³ Tarlock Interview, *supra* note 12. Dan served as Chair of the Water Science and Technology Board's Committee on Western Water Management that prepared NAT'L RESEARCH COUNCIL, *WATER TRANSFERS IN THE WEST: EFFICIENCY, EQUITY, AND THE ENVIRONMENT* (1992). Dan was also a member of the Water Science and Technology Board's Committee to Review the Glen Canyon Environmental Studies and one of the principal authors of NAT'L RESEARCH COUNCIL, *COLORADO RIVER ECOLOGY AND DAM MANAGEMENT: PROCEEDINGS OF A SYMPOSIUM MAY 24–25, 1990 SANTA FE, NEW MEXICO* (1991).

²⁴ Tarlock Interview, *supra* note 12; DAN TARLOCK, GLOBAL WATER PARTNERSHIP TECHNICAL COMMITTEE, *PROMOTING EFFECTIVE WATER MANAGEMENT COOPERATION AMONG RIPARIAN NATIONS*, BACKGROUND PAPER NO. 21 (2015); *see also* A. Dan Tarlock, *Toward a More Robust International Water Law of Cooperation to Address Droughts and Ecosystem Conservation*, 28 GEO. ENVTL. L. REV. 261 (2016).

Professor Tarlock transitioned to emeritus status in fall 2017, and hearing him bring cohesion to the rich, distinct parts of his career harkens back to Frank Trelease. “I once heard Frank attribute his success to ‘serendipity,’” recalled a close colleague, “which he defined as ‘dumb luck.’”²⁵ Framed around the Grand Canyon metaphor, Dan tells a similar tale: “[P]eople kept asking me to do things so, to go back to the Canyon, I just tried to accommodate them[,] which was like riding a rapid, exciting but very ad hoc.”²⁶ Inviting Professor Tarlock to be this year’s Trelease Speaker was thus just one ask in a lengthy trajectory—an ask notably preceded by Dan’s earlier stint as the inaugural Trelease Speaker in 1983. The students, faculty, and staff of the University of Wyoming College of Law are truly grateful to Professor Tarlock for accepting our invitation to pay another visit to the Laramie Plains.

Perhaps the most natural lead-in to Dan’s remarks proper stems from a basic truth: water doesn’t respect political boundaries. All the line drawing in the world won’t turn an international or interstate river from its channel. Speaking from a subterranean angle, the same can be said about transboundary aquifers. What this reality fundamentally means is incongruity—frequent non-alignment between hydrological lines drawn by Mother Nature and those superimposed on landscapes to construct nation-states. Headwaters states like Wyoming are keenly aware of and experienced with this reality. It forces the forging of relationships among neighboring sovereigns and poses challenging questions about what those relationships should look like. Reflected in the domestic legal principle of “equitable apportionment,” as well as the international legal principle of “equitable utilization,” one key consideration is distributional: How should transboundary water be used, consumptively or non-consumptively, and by whom? A counterpart consideration, of course, concerns who should have a seat at the table when such decisions are made and implemented? But lest these considerations involving what might be dubbed “substantive equity” and “procedural equity” be viewed as stationary,²⁷ there’s also the fourth dimension to grapple with. Peoples values about these things change across time. Thus, how should neighboring sovereigns equitably transition from outdated to modernized institutions for realizing legal principles such as equitable apportionment and equitable utilization? The element at stake is essential to life. And in that respect and many others it connects us all. At the end of the day, these twin qualities of essentiality and connectivity propel Professor Tarlock’s message of cooperation. There will need to be more of it, and necessity *is* the mother of invention.²⁸

²⁵ Gould, *supra* note 5, at 290.

²⁶ Tarlock Email, *supra* note 9.

²⁷ Jason A. Robison & Douglas S. Kenney, *Equity and the Colorado River Compact*, 42 ENVTL. L. 1157 (2012).

²⁸ PLATO, THE REPUBLIC 49 (Benjamin Jowett trans., 2015) (“[T]he true creator is necessity, who is the mother of our invention.”).