

2020

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Recommended Citation

Tarlock, Anthony Dan (2020) "Transboundary Waters: Won't You Be My Neighbor?," *Wyoming Law Review*. Vol. 20 : No. 2 , Article 1.

Available at: <https://scholarship.law.uwyo.edu/wlr/vol20/iss2/1>

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EDITED TRANSCRIPT

TRANSBOUNDARY WATERS: WON'T YOU BE MY NEIGHBOR?

*Anthony Dan Tarlock***

I'm really delighted to be back in Laramie and very honored to deliver the Trelease lecture. I want to say I'm very happy to see that Frank's legacy is so alive and well.

To the students and faculty, the hospitality here has been sensational.

I was privileged to deliver the first Trelease lecture back in 1983. At that time, the Supreme Court had just held that water was an article of interstate commerce in the *Sporhase* decision.²⁹ So, I gave a lecture trying to explore, in light of that decision, how much water the states could still hold onto and not share with other states. Frank liked that a lot.

Tonight, I want to look at water sharing from another angle—and that's the capacity of the institutions that we have that allocate and manage interstate rivers and how they are faring in the face of challenges that were really unanticipated when these institutions were put in place: climate change, the increasing demand for aquatic ecosystem conservation, and the continued urbanization of the West.³⁰

As you know, Wyoming is a headwaters state. It's the headwaters of the West's three major rivers—the Colorado of course, the Green, even the Columbia with a little bit of the Snake up by Jackson, and then both the direct tributary to the Missouri and then to the Platte River System. All the Western rivers are facing these three challenges that really weren't anticipated in the twentieth century. And they've got another problem. Really starting in the 1980s, the federal government basically exited from water policy and planning.³¹ They're not building much, and the idea of river basin planning and management doesn't have any traction, certainly in Washington. There's no effective federal leadership, and this is a

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²⁹ *Sporhase v. Nebraska ex rel. Douglas*, 485 U.S. 941 (1982). For a more detailed discussion of the *Sporhase* decision, see A. Dan Tarlock, *So It's Not "Our Water," Why Can't We Still Keep It? A First Look at Sporhase v. Nebraska*, 18 LAND & WATER L. REV. 137 (1983).

³⁰ For an exploration of these challenges in the context of their impacts on Western water law, see A. Dan Tarlock, *Western Water Law and the Challenge of Climate Disruption*, 48 ENVTL. L. J. 1 (2018).

³¹ See, e.g., A. Dan Tarlock, *A First Look at a Modern Legal Regime for a "Post-Modern" United States Corps of Engineers*, 52 U. OF KANSAS L. REV. 1285 (2004).

trend that began in the eighties and has continued through both Republican and Democratic administrations.

Tonight, what I want to do is explore why it is hard for Western states to respond to these challenges, and I want to argue that they really need more long-term cooperation, more flexibility, more adaptive management, and even entitlement adjustment. There's not enough water to go around, so we have to decide who gets it and who must be compensated. I'll go into this in great detail, but I want to offer the heretical suggestion that there are some principles of the body of law—international water law—that might be useful for the Western states. Not as rules to follow, but as a different approach to cooperative management of shared rivers. I'm not sure Frank would like that because he was a key supporter of states' rights, but, among his vast accomplishments in water, he was a keen student of interstate water management. For example, in 1953 he wrote a long article in the *Wyoming Law Journal* on the Missouri River and said there seems to be general agreement today that something should be done about the hodgepodge of federal bureaucracy presently engaged in the development of the Missouri River Valley.³² I don't know if he would like what I'm going to say, but Frank was pretty tolerant of heretics, a very generous and open-minded person, and it was a privilege to know him in 1966 when he actually tried to lure me to Laramie. He didn't have permanent funding for a tenure-track job, and I'm pretty risk averse, so I had to turn him down. But he was a dear friend and colleague from then on until his death in 1986.

So, let me talk a little bit more about the stresses on the Western rivers. We'll start with the Colorado River. The Colorado River is clearly the most stressed by climate change and growing urbanization, both in the Upper and Lower basins. People are talking, and this may be a bit too hysterical, but about the permanent drying up of the West due to climate change and driven desertification.³³ But the consensus seems pretty clear that there is going to be less water than in the past. In the future, water needs to be shared differently than it is now. It is not a good time for the Platte and the Wind Rivers. Their temperatures, and the temperatures on the Upper Snake, are expected to go up maybe 6.5 to 8.5 degrees Fahrenheit or even higher in the summer in about thirty years.³⁴ We will also have lower snowpack. Not good for fish. Not good for water supply.

³² Frank J. Trelease, *A Federal-State Compact for Missouri Basin Development*, 7 WYO. L. J. 61, 161 (1953).

³³ Jim Robbins, *The West's Great River Hits Its Limits: Will the Colorado Run Dry?*, YALE ENVIRONMENT 360 (Jan. 14, 2019), <https://e360.yale.edu/features/the-west-s-great-river-hits-its-limits-will-the-colorado-run-dry> [<https://perma.cc/N4SM-EF3B>].

³⁴ UPPER SNAKE RIVER TRIBES FOUNDATION, CLIMATE CHANGE VULNERABILITY ASSESSMENT IN THE UPPER SNAKE RIVER WATERSHED: CHINOOK SALMON (2017), <https://static1.squarespace.com/static/50c23e29e4b0958e038d6bd6/t/59108701d1758e85c59c9614/1494255363873/USRT+Chinook+Salmone+Sho-Pai+Climate+Summary+Sheet+Final.pdf> [<https://perma.cc/DSZ8-VTPW>].

You have these challenges, and as I'll demonstrate, they're going to force the Western states in grappling with issues that were never part of the water dialogue. These [issues] get into diet, fashion, green infrastructure, change in hydrographs—nothing is as certain as it was in the past. So, let me give a few more concrete examples. The West is the most urbanized section in the country, despite the cowboy myth. I assume most of you are from cities of some size, as that's where most of us are living. There are some real questions about sustainability. Phoenix usually tops the list of unsustainable U.S. cities because of increasing heat and continued urbanization. I just read an article from the *New York Times* that Phoenix is adjusting in a way that nobody anticipated. Now they're developing a night life scene that would be very familiar in Brazil—something that doesn't start until midnight when it starts to cool down a little bit. Due to climate change and urbanization, I think there's going to be a decline of irrigated agriculture in the West. Nebraska will be ok, but I've already insulted Nebraskans here yesterday, and Nebraska is not part of the West, so don't worry about that! There are a lot of statistics, but states like Texas, Colorado, Oregon, New Mexico, and Oklahoma show declines in yearly acreage of [water], having gone over ten percent in the last few years.³⁵ In Wyoming, between 2016 and 2018, there was a voluntary program to retire acreage for cash payments. I think you're going to see more of that, and that's a good model of managing transition fairly.

Then there are a couple issues that were never part of the water dialogue for almost my entire career in water—a little over fifty years. The two things that have just caught my attention recently are diet³⁶ and fashion.³⁷ Beef is coming under moral attack and Burger King is now selling a plant-based burger. It's a growing movement and it's a tough question. The United States is still the biggest consumer of beef, but it's decreased since the seventies. It seems to be leveling off at that decrease, but the plant-based substitutes are growing. They are attracting capital. It's kind of an interesting trade-off. From what I've read, it's actually better to have a real hamburger than a plant-based burger in terms of fat and other things, but from a climate change perspective the plant-based burger wins. And then for the same reason, everybody's wearing cotton tonight. The trouble with the growing worldwide look at fashion is there are two things catching people's

³⁵ *Irrigation & Water Use*, U.S. DEPARTMENT OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, www.ers.usda.gov/topics/farm-practices-management/irrigation-water-use/ (last updated Sept. 23, 2019) [<https://perma.cc/VT4Q-5C48>].

³⁶ The impact of beef production on greenhouse gas emissions is clear. Whether diets will change is unclear. See Gidon Eshel et al., *Land, Irrigation Water, Greenhouse Gas, and Reactive Nitrogen Burdens of Meat, Eggs, and Dairy Production in the United States*, 111 PNAS 11996 (2014); JONATHAN SAFRAN FOER, *WE ARE WEATHER: SAVING THE PLANET BEGINS AT BREAKFAST* (2019).

³⁷ Clothing production consumes about 2% of the world's freshwater resources annually. *Sustainability Issues: Water*, COMMON OBJECTIVE, (Feb. 1, 2018) www.commonobjective.co/article/the-issues-water [<https://perma.cc/QZ3E-P9KE>]. For a broad overview of the environmental and social impacts of clothing production, see DANA THOMAS, *FASHIONOPOLIS: THE PRICE OF FAST FASHION AND THE FUTURE OF CLOTHES* (2019).

attention. One is that fashion changes too quickly, so you have to keep growing fiber to keep up with the fashion and, second, we are growing too much cotton which uses a lot of water. Those are a couple issues and certainly the beef plays into the Western dialogue as well as cotton to some extent. But nobody thought of those until very recently. I should have worn bamboo clothing, and I guess walked from Chicago to be here.

Let me now turn to four methods used in the U.S. to allocate the interstate rivers and talk a little bit about what I see as their drawbacks. We'll start with the Supreme Court doctrine of equitable apportionment. There is an irony to equitable apportionment. In international water law, people always point to United States Supreme Court law as the foundation of international water law. But in the foundational litigation between Kansas and Colorado at the turn of the twentieth century, the Supreme Court thought they were applying international law—equality between the states—to develop this law, but the laws got a big boost when Wyoming was able to successfully prevent Colorado from diverting water from the South Platte and transporting it to the Fort Collins area, because the Supreme Court in *Wyoming v. Colorado* basically said the equitable portion was just prior appropriation writ large.³⁸ There's been a little tinkering with the interests, but when push comes to shove, you add up the priorities and the person with the most priorities wins. And so, Wyoming has more priorities. This summer when I drove through the center of Wyoming, I did go to the Platte County Courthouse in Wheatland, Wyoming, and I saw the statute of the irrigator, a testimony to Wyoming's victory.

What I'm going to go through are the four methods. The oldest is equitable apportionment. Now *Wyoming v. Colorado* was great for Wyoming, but it caused a great panic in Colorado and Utah and to some extent in Wyoming because California was sucking up the Colorado River for the Imperial Irrigation District, which had recently renamed itself from something like Hell's Kitchen or something, which is the original name for that area. A Colorado lawyer named Ward Bannister came up with the idea of an interstate compact. Actually, Frank joined the Bannister firm immediately after his graduation from the University of Colorado School of Law. And so, almost immediately after *Wyoming v. Colorado*, the seven Colorado Basin states signed the Colorado River Compact and basically divided, incorrectly as it turns out, the flow of the river equally between the Upper and Lower basins.³⁹ They each got 7.5 million-acre feet, although the Lower Basin got a priority above—the Upper Basin has to deliver 75 million-acre feet over a ten-year average. The Compact gave the Upper Basin some breathing space because they had an allocation that could not be lost by Lower Basin development.

³⁸ *Wyoming v. Colorado*, 259 U.S. 419 (1922).

³⁹ Colorado River Compact, 45 Stat. 1057 (Dec. 21, 1928).

I want to add that once, a very high-ranking Bureau of Reclamation official who used to work out on the Colorado River told me with a straight face, “Yeah, we can deliver 75 million-acre feet in one year.” I said, “Really?”

Now, starting in the thirties during the New Deal, continuing well into the sixties, the expert opinion of water people was that the interstate compact was the way to go. You can do things other than just add up priority, but for the most part I think the era of compacts has come to a close. Now what we are doing is litigating endlessly. Wyoming litigated over the Yellowstone. Texas is suing New Mexico. The suit over the use of the river system in the states of Georgia, Alabama, and Florida is still on-going, but basically the head of the river system is in Atlanta, a growing city. In between are peanut farmers in Georgia and at the bottom is an oyster area—Apalachicola. And Florida basically claims that Atlanta and the peanut growers are wiping out the oysters. States failed to negotiate a compact. They couldn’t and, so far, Florida has obtained no relief from the years of Supreme Court litigation.

Now, the third method was invented by the Supreme Court out of the whole cloth. Frank, of course, wrote one of the two leading articles parsing the decision.⁴⁰ After the Colorado River Compact, the federal government tried to force Arizona, California, and Nevada to allocate the Lower Basin. The Upper Basin states did their allocation in 1948 with relative ease, but Arizona held out. But, the Lower Basin states needed a dam to hold back water for their 7.5 million-acre feet entitlement. In 1928, the federal government authorized the Hoover Dam and dived the water among Arizona, California and Nevada. Finally, after many lawsuits, the Supreme Court came down with a decision in 1963. The historical evidence is pretty clear that they were quite prepared to apply prior appropriation, which meant that Phoenix would not be one of the most sustainable cities because they would not get water from the Colorado River. If you apply priorities, Arizona didn’t fare well. But the Supreme Court out of whole cloth created this doctrine of congressional apportionment, and they gave Arizona 2.5 million-acre feet, out of which came the Central Arizona Project to bailout communities in Tucson and a few cotton farmers along the way. The Supreme Court has never really applied that [doctrine]. Well, they have only applied it once since *Arizona v. California*,⁴¹ so I think it is highly unlikely that the Supreme Court would apply it again. People have tried to get the Supreme Court to say that the Missouri had been apportioned by the Pick-Sloan Act, but the Court wouldn’t bite.

The fourth and last method would be federal river basin management—the great project from Theodore Roosevelt through the New Deal. You had the

⁴⁰ Frank J. Trelease, *Arizona v. California: Allocation of Water Resources to People, State, and Nation*, 1963 Sup. Ct. Rev. 158 (1963).

⁴¹ *Arizona v. California*, 373 U.S. 546 (1963).

Tennessee Valley with the Tennessee Valley Authority, but after that, states really put the kibosh on federal river basin management. Frank, writing in 1953, talked about the hodgepodge of federal bureaucracy engaged in the development of the Missouri River.⁴² On the Missouri you have a federal plan to build dams which didn't get real management and the states and tribes had no voice in that. They have been squabbling for years and haven't been able to come up with a solution. Now you've got endless litigation on Corps of Engineers' decisions regarding endangered species and flooding. I don't mean to suggest that these efforts have not been very beneficial to the West—they certainly have permitted development that characterizes the modern West. But what we are doing now is just tinkering with those institutions. The Colorado River Basin states are endlessly now tinkering with the management of the two big dams like Glen Canyon and Hoover, but they really are not digging deeper. You can ask Jason [Robison] about this. He is an expert on that.

So, let me turn to international law. There *is* something called international water law. In 1997, the United Nations adopted a Convention, which is just a soft word for treaty, but they are the same thing. The treaty actually entered into force in 2014, so the Convention is now law, although it is subordinate to treaty allocations.⁴³ The duty to cooperate starts with Article 8, which is a typical compromise draft, but it does impose a duty of cooperation on riparian states. So, you have a formal duty, which you don't have in all the four methods we have that states just work around. But there are other aspects of international law that push people to cooperation. There are some substantive rules that states have a "reasonable and equitable" share of the river. No one knows what that means.

There are about ten factors that go into it. Priority is in there, but it doesn't play the dominant role that it does in United States law. I think the incoherence may be a benefit because it pushes states to cooperate. In addition, states have a duty not to cause harm. The duty of cooperation to avoid causing harm has actually been endorsed twice by the International Court of Justice (ICJ).

The first case was a dispute between Hungary and the then-nation of Czechoslovakia, but after Slovakia broke off it became Slovakia and Hungary.⁴⁴ During the Soviet era, a big project was proposed where basically you get a whole bunch of locks, dams, and hydro facilities in the Upper Danube of Slovakia, by Bratislava, about sixty miles from Vienna. Hungary became concerned about its impact on the Danube bend, which really is a sacred space in Hungary. They consider that space the heart of the real Hungary. There were concerns about

⁴² See Trelease, *supra* note 32.

⁴³ United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700.

⁴⁴ Gabčíkovo-Nagymaros Project (Hung./Slov.), 1997 I.C.J. 7 (Sept. 25).

wetland deterioration. The big arguments were that Hungary was making it up—how serious it was—but it ultimately went to the ICJ, and the ICJ did not resolve the issue. But among other things, [the ICJ] said Slovakia diverted ninety percent of the flow of the Danube for hydroelectric generation. So, they said whatever “equitable and reasonable” is, [diverting ninety percent] is overreaching. So now you’ve got the principle of customary international law. The court told the nations to work it out, but they still haven’t worked it out. But it is very important. In international law, there are also a bunch of procedural duties besides Article 8. [States] must give prior notice for a project, exchange information, engage in good faith negotiation, and there is probably now a customary duty for an acting state to prepare an environmental impact statement.

There is a second very important ICJ case involving Argentina and Uruguay.⁴⁵ The Uruguay River forms the border. Uruguay got a lot of money from Spanish corporations to build a big paper mill on the river, and Argentina said, “oh, you’re polluting the river.” So, it went to the ICJ. At the ICJ, Argentina ultimately lost on the merits. But there were no clean hands, the river was already polluted, and Argentina was doing its share along with Uruguay. But there was a Commission—an agreement between the two states—to cooperate on the management of the river, and Uruguay basically “dissed” it. They didn’t consult with Argentina. There’s a very bitter underlying fight between the two countries. As you know in these disputes, it’s all politics behind the dispute. But the ICJ for the first time said, “Look, why do we have procedural rules? They’re really to advance the substantive goals of any agreement that you’ve got on the river.” So, by linking the substance and procedure, which our NEPA [National Environmental Policy Act] totally separates, the ICJ has gone in the opposite direction, I think is a big shove toward cooperation.

Now, cooperation is getting more traction.⁴⁶ In 2012, there was a big conference—the Environmental World United Nations Conference. They adopted a series of millennium goals. And in 2015, the UN adopted seventeen sustainable development goals, or SDGs.⁴⁷ You don’t hear much about them in the United States, but Goal 6 involves water, and 6.5 requires that by 2030, states must implement integrated water resources management at all levels, including through transboundary cooperation as appropriate. The United Nations now is involved in a monitoring process, and their metrics decide the extent of cooperation. They’re pretty formal. But when this process is done, we’re going to get a clearer look at what nations are doing, and I think that’s another shove to cooperation. There is still a long way to go.

⁴⁵ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14 (Apr. 20).

⁴⁶ For an extended discussion of cooperation in international water law, see PROMOTING EFFECTIVE WATER MANAGEMENT COOPERATION AMONG RIPARIAN NATIONS, *supra* note 24.

⁴⁷ See *Sustainable Development Goals*, UNITED NATIONS, <https://sustainabledevelopment.un.org/?menu=1300> (last visited Apr. 27, 2020) [<https://perma.cc/JQJ4-UVYN>].

But I want to close on a more positive note and give an example of cooperation that I think should be a model. It involves the Colorado [River] between the United States and Mexico.⁴⁸ In the sacred Law of the River, in 1944, during World War II, the United States and Mexico entered into an agreement that gave Mexico 1.5 million acre-feet of the Colorado River. What happened was that during the New Deal, Mexico had appropriated the oil fields of the big companies, Standard Oil, and basically Franklin Delano Roosevelt forced Standard and the other big companies to accept 10 cents on the dollar for their investment in Mexico. And big surprise, Mexico was threatening to sell oil to Nazi Germany, so the United States said we've either got to get them as an allied power or neutral at best. So, they gave Mexico 1.5 million-acre feet.

The United States uses all its allocation before it gets to Mexico. Mexico uses most of it right across the border in Baja California. So, the result was that the delta dried up. Nobody really cared about the delta. Not very many people lived there. It's not like the Okavango Delta in Botswana, which has a huge safari industry.

Anyway, in the 1980s—high water years—water nearly spilled over Glen Canyon Dam. I don't think it spilled over Boulder [Hoover] Dam. But there were floods on the Colorado River, and lo and behold, the delta started to come back to life. This led to an almost two-decade campaign by NGOs to try to restore the delta, and under the Treaty there is a unique amendment process where it doesn't have to go back to the governments of the countries. The executives of the [United States and Mexico] can agree to something called a "Minute," which is an amendment. There have been two minutes—in 2012 and 2017—that were a very interesting compromise. For years, the United States said to Mexico, "You've got 1.5 million-acre feet, and you're getting it whether it's a wet year or a dry year. It's your problem." And Mexico kept saying that they'd like to store it upstream. The United States kept saying no. "No foreign eyes," as one diplomat put it, "on United States dams." But the United States gave in, so Mexico can now store surplus water. In return, there's a tripartite agreement between NGOs, Mexico, and the United States to provide restoration flows—210,000 acre-feet annually—that's going to come from irrigation retirement, basically, around Yuma and more conservation in Mexico.

Now, there's a long way to go. Water is flowing but the Delta needs more. Still, the precedent of it is very important. It does what international law tells countries to do. Cooperate, do a long-term management program, deal with unanticipated conditions—in this case, the aquatic ecosystem restoration.

Thank you very much. It's been a great pleasure.

⁴⁸ See ANTHONY DAN TARLOCK & JASON ANTHONY ROBISON, *LAW OF WATER RIGHTS AND RESOURCES* § 11.15 (2019).