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## Tribute to Frank J. Trelease

Charles Meyers

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## Tribute

Charles J. Meyers\*

The contributions of Frank J. Trelease to water law—both Eastern and Western—are so voluminous, and his influence so pervasive, that one is staggered by the task of preparing an appraisal. Fortunately, the task is not mine alone: the able water lawyers writing elsewhere in this volume have undertaken much of the work, leaving me to discuss Frank's contribution to the efforts of the National Water Commission. The Commission was established by an Act of Congress in 1968 and its work was well underway by 1970 when I joined its staff. One of my first acts of office was to commission Frank to write the background study of what became Chapters 13 and 14 of the Commission's Final Report. Frank's study produced a monograph with the formal title, *LEGAL STUDY NO. 5, FEDERAL-STATE RELATIONS IN WATER LAW* (1971). Thus began the closest professional relationship I had with Frank, one that involved the strenuous give and take of debate on serious policy questions, set against a background of law and history of which he had complete mastery.

Legal Study No. 5 was but one of numerous background studies prepared for the Commission. Those studies—not just the legal studies but the economic and institutional studies as well—contained some of the most thoughtful work on water policy produced up to that time (1973). Fortunately, the ideas in those studies found their way into the Commission's Final Report, *Water Policies for the Future* (G.P.O. 1973), a book that has influenced water policy at both the federal and state level since publication. No one who thinks seriously about water policy can fail to take account of the Report. As Professor Tarlock has said elsewhere: "The 1973 Commission Report is the most comprehensive, balanced and probing assessment of water policy to date."<sup>1</sup>

Frank Trelease's study of federal-state relations in water made a major contribution to the Report, for he took on a vexing—some say, intractable—subject. Not only did he deal with the navigation servitude and federal reserved water rights, but he also wrote on the indubitably intractable subject of Indian water rights. To these inflammatory topics Frank brought his usual qualities: sound scholarship, good sense and good humor, and a clarity of expression which reflects a clarity of thought. Frank was 58 years old at the time, at the height of his powers, and his qualities were burnished as only happens when precious metals are well worn with age. With age comes experience and with experience not only wisdom but the capacity for accommodation. Frank knew perfectly well what he wanted, but he was wise and experienced enough to take, if he had to, half a loaf.

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1. Tarlock, *The Changing Meaning of Water Conservation in the West*, 66 *N.E.B. L. REV.* 145, 166 (1987).

This is not the place to discuss in detail Frank's several recommendations for solving federal-state conflicts over water, but some of his general propositions ought to be recalled. He saw federal reserved rights for non-Indian uses as a means for the government to escape its ordinary obligation to pay just compensation for taking the property of others. He never doubted that the federal government can get whatever water it wants for any purpose it wants—national parks, wildlife refuges, forests, military bases and anything else. If unappropriated water is available, it should be as free of cost to the government as it is to others. In a better world, he thought the federal government should proceed in an orderly manner to obtain its water rights, using the state mechanism for obtaining, quantifying and recording the right. But the federal government would decide whether the use was worthy, not the state. Frank never forgot the Supremacy Clause. But neither did he forget the Fifth Amendment, and he saw as the only purpose of the reserved rights doctrine a device for the federal government to obtain water previously appropriated by others without paying for it.

How then to deal with Indian water rights? He said:

Whatever Indian rights may be, they are profoundly different from government reserved rights for such uses as forests and military posts. In those instances the government has a choice as to whether it will act as a proprietor or as a sovereign and the latter course is recommended. In the Indian cases the rights are attached to lands held not as a government but as a trustee for the Indians and the proprietary nature of this ownership and trust must be recognized and given effect.<sup>2</sup>

To achieve the certainty needed to induce investment, he would have quantified the water rights on Indian reservations, but he did not balk in his study over the generous measures of those rights as set forth in *Arizona v. California*,<sup>3</sup> namely, "practicably irrigable acreage." He did believe, however, that if prior rights were divested by government construction of an Indian project, the government should pay just compensation.

As Frank's many friends and colleagues in the water community will know, these recommendations as to both Indian and non-Indian federal reserved rights were not enthusiastically received in all quarters. But Frank stuck to his core principles of fairness, made accommodations at the edges and persuaded the Commission to adopt the essence of his recommendations. No one, in my judgment, has come up with anything better.

Frank's contribution to the National Water Commission Report was by no means limited to federal-state relations, as important as that was, and is. The fundamental message of the Commission's Report was that the days of subsidized agricultural water development were over, that existing supplies should be made subject to reallocation and that realloca-

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2. LEGAL STUDY NO. 5, FEDERAL-STATE RELATIONS IN WATER LAW 267 (1971).

3. 373 U.S. 546 (1963).

tion should be effected through the mechanism of market transfers. That Frank J. Trelease—a Westerner, a dean of the University of Wyoming College of Law, and the nation's leading water law scholar—not only supported this message, but placed himself in the forefront of those delivering it, says a lot about the man, his mind, and his character. Much of his constituency rejected the message as antithetical to Western values and Western progress. But Frank had thought the matter through: the old ways could not survive; to prosper, the West had to adapt to a new age. The National Water Commission did not usher in that new age; it had already arrived, and all the Commission did was recognize it. But that is no small accomplishment when comfortable tradition supports continued illusion. Frank Trelease saw things plain and helped others to do the same. For that, the nation—and particularly the West—are in his debt.

