Land & Water Law Review

Volume 22
Issue 2 *Symposium: Western Water Rights*

Article 4

1987

# Tribute to Frank J. Trelease

Joseph L. Sax

# Tribute

*Joseph L. Sax**

When I began teaching in 1962, Frank Trelease was already the undisputed dean of water law professors. Most of what I learned then—and I had to learn quickly, for water law was a subject I had never studied and about which I knew virtually nothing—I drew from Frank's already extensive and wide-ranging articles. I never had occasion to ask how one of those articles, which had served me so well when I knew so little, would stand up to two decades of change. The sad occasion of a memorial offers the opportunity to assess the lasting value of Frank Trelease's work.

As a means to that end, I went back to a Trelease article that had been very useful to me when it was first published in 1965, though its details had faded from my memory.[1] On re-reading it, I was struck to discover how much the central themes of the article are those around which I build the teaching of my water law course: Why treat the law of water (which is a form of property) differently from the way we treat bread, land or potatoes; and how do we decide when to let the use of water be guided by ordinary market transactions, and when to seek public intervention. Frank unerringly captured in that article the salient features of a water law system, and he there pioneered in drawing upon the insights of economists to the analysis of legal problems. Twenty-two years later, I can think of no other single article that I would as promptly recommend to a student for its succinct analysis of the fundamental issues in water law. That is high praise (the more so since the same issue of the law review contains an article of my own that has attained well-earned oblivion).

There is another element in the Trelease article that singles it out for praise and as a model for law professors. Frank was not only a scholar, but an active participant in the formulation of water policy. He talked to legislators and water users—bridging what for many academics is an impassible chasm between theory and practice—and those influential people of the practical world listened to him. Surely one important reason was that he was not the captive of any ideology, a point that is powerfully demonstrated by the "Policies . . ." article. Personally attracted to market solutions, Trelease in that article carefully lays out the reasons why the market can solve only some, but by no means all, problems of water policy. He explains clearly, and in terms any irrigator can understand, the externality, public good and joint use issues that make water problems special and often especially complicated. Who else could credibly have made the point to Western ranchers—and in the words he used—that sometimes "central public planning and public control,"[2] is important. At the same time he had an important message for those who claim



* Professor of Law, Berkeley School of Law, Berkeley, California.

1. Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 NAT. RESOURCES J. 1 (1965).

2. *Id.* at 17.

to speak for the public interest, and who sometimes see private users as their implacable adversaries: "[P]olarity of thinking should be avoided when speaking of the regulation of private rights in order to protect the public interest. The private water user is not always arrayed against the public .... A private purpose may also be a public purpose .... Impoundments of water may make better wildlife habitat ...."[3]

Just as he brought the insights of economics to legislators, he brought the common sense of practical legislation and administration to the sometimes too-precious observations of ivory-tower economists. It had been pointed out by an economist, he noted, that the law's definition of a transferable water right was imperfect, and the writer offered a definition that was theoretically correct, but unworkably complex. Avoiding the temptation to scoff, Trelease wryly observes that "such a definition would be difficult to translate into action terms relating to just what the water right holder might do in the exercise of his right and what others must forebear to do ...."[4] This is Frank Trelease at his best, modestly but unmistakably explaining that the law is a working system that practical people have to live with and understand.

At the same time he translates big concepts—like the claimed entitlement of future generations—into terms that the rancher can understand, explaining to practical but self-interested people why they cannot demand "that every possible immediate benefit should be wrung from a water resource."[5]

He also knows how to deflate those proud peacocks who think they have at last brought the light of benefit/cost analysis to the benighted drones of the law. Again, Frank uses his laconic prose style to point out that:

> The benefit-cost technique should not be thought of as providing a new approach to water law .... Judges and water officials of the territory of New Mexico probably had never heard the phrase in 1910, but they intuitively reached for it and described it ... in choosing which of two applications for inconsistent projects should be granted a permit ... on the statutory grounds that the project was "contrary to the public interests."[6]

Are there major contemporary issues that he failed to foresee? Not really. Newspapers in the late 1980's are discovering, as if for the first time, the miraculous possibilities of a private market in water. Encouraging transfers to higher-valued uses through market mechanisms is one of the devices that the "Policies ..." article most assiduously emphasizes. There is nothing to add to his observation that

> the water right must be mobile. There should be no artificial restrictions on who is eligible to purchase the water right or where

3. *Id.* at 37-38 (footnotes omitted).
4. *Id.* at 33.
5. *Id.* at 3.
6. *Id.* at 17.

> the new use is to be made . . . . Rigid appurtenancy of the right to specific land is undesirable . . . [and likewise] to restrict the right to the purpose for which it was originally used or acquired.[7]

Are instream appropriations for ecosystem protection and public recreation the latest thing in Western water law doctrinal development? Trelease discusses instream uses at length. This article may be the first important discussion of the interaction between environmental and traditional uses of water. In fact, I believe it was Dean Trelease in this article who first called my attention to the public trust issue as a constraint on traditional appropriative uses,[8] and it was this article which cited and discussed the unjustly forgotten pioneering environmental litigation in *Namekagon Hydro Co.*,[9] a decision that foreshadowed the far more well-known *Scenic Hudson* case,[10] decided by the U.S. Court of Appeals in the same year that Trelease wrote his article.

Frank Trelease began his article with what he called a water law professor's credo. It is not exactly my credo, but I venture to say it is about as close to mainstream enlightened thinking today as any such statement one could find in a 1965 publication. Here it is:

> Water law should provide for maximum benefits from the use of the resource, and this end should be reached by means of granting private property rights in water, secure enough to encourage development and flexible enough for economic forces to change them to better uses, and subject to public regulation only when private economic action does not protect the public interests.[11]

There are only a very few people in any field of whom it can be said—as it can unqualifiedly be said of Frank Trelease—that he shaped the field with his thinking and writing, that he greatly influenced the practical course of development in the courts and the legislatures, and that every person who works in the field is one of his students, and deeply in his debt.

---

7. *Id.* at 33.

8. *Id.* at 17 n.54. Perhaps Trelease was put on to some of the forward-looking developments in Wisconsin by Jake Beuscher, with whom he worked (see prefatory note to the "Policies..." article), and who was in effect Frank's counterpart for water law in the East.

9. Namekagon Hydro Co. v. Federal Power Comm'n, 216 F.2d 509 (7th Cir. 1954).

10. Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

11. *Supra* note 1, at 2.