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## Tribute to Frank J. Trelease

A. Dan Tarlock

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## Tribute

A. Dan Tarlock\*

Frank J. Trelease was Western water law for almost his entire career. Only the lack of an enforceable doctrine of scholarly prior appropriation permitted many of us to enter the field with any confidence. He was often the first to address a major issue and his insight was unfailingly penetrating. Fortunately, his preemptive "calls" were only cautionary to the rest of us. Forced to leave his beloved, adopted Wyoming for health reasons after thirty-three years as professor, and twelve as Dean at the University of Wyoming College of Law, he continued his distinguished career at the McGeorge School of Law of the University of the Pacific in California for ten more years. After his retirement from teaching in 1986, Frank settled permanently in Arizona with no loss of professional vigor, despite his steadily deteriorating health. At the time of his death, he was hard at work on an article, which appears in this issue of the *Land and Water Law Review*, which he founded, on one of the most complex and important problems in Western water law, the relationship between state resource sovereignty and the *Sporhase* decision. In a letter to some of his colleagues shortly before his death, he expressed the desire to complete the article and to "die with my boots on." And so he did.

Although his reputation as a scholar, teacher and expert and his range of natural resources and other scholarly interests were national and international, his life and professional contributions were firmly rooted in the life of the arid West. Frank's career spanned the height of the Reclamation Era that began in the 1890's but came to fruition after World War II to the erosion of the reclamation idea and the beginning of the post-Reclamation era. He died much too soon. He had so much more to say professionally and to give personally, but he leaves behind a personal and scholarly legacy to water law, resources law generally and the West that is both immediate and enduring.

Frank's water law scholarship began by organizing and explicating some fundamental but ill-defined concepts in Western water law, beneficial use, preferences, and mixed riparian-appropriative systems. He moved on to track all the major developments, the increasing federal role in Western water allocation, the recognition of environmental values down to the current enthusiasm to induce the more efficient use of water through the creation of water markets. Unlike many, he had more not less to say as he matured. In 1965 he published the first water law casebook by a national publisher, although he had published an earlier one in 1954 with an academic press in Texas. *Cases and Materials on Water Law*, now Trelease and Gould, is in its fourth edition and is a rich source of doctrine on both major and minor issues. It is more than a collection of cases. It is a standard reference in the field because it is liberally salted with Frank's in-

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sights drawn from practice, consulting and his keen observations of the politics of water. The book has often been cited by the Supreme Court for definitive statements of the law of prior appropriation.<sup>1</sup>

Frank's scholarship reflected the intense interest in water allocation in the West. It combined the best aspects of participation in furthering the interests of this unique region with the requisite scholar's distance from simple arguments of self-interest. He was too smart to be a simple spokesman for the traditional Western attitude that a water right is an exclusively state-created property right only that can only be bumped by a senior call as long as the water is continuously applied to some non-wasteful use period! For example, in perhaps his best piece of scholarship, he punctured the Western states' most cherished myth. *Government Ownership and Trusteeship of Water*<sup>2</sup> is a classic piece of legal scholarship. An abstraction is analyzed, its uncertain pedigree exposed and its underlying assumptions are criticized and reformulated. Western water law now starts from the assumption that state assertions of ownership of waters in trust for the people are merely assertions of state police power and thus state law is subject to federal preemption and, as the Court ultimately held in *Sporhase v. Nebraska*, the Dormant Commerce Clause. Of all his many contributions, this article has had the most influence on the development of water law because it has forced both proponents of exclusive state sovereignty, as well as proponents of the new public trust theory of substantive judicial restraints on water use, to confront the limitations of their arguments.

Frank constantly strove to defend the best not the worst of Western water law. He defended with great vigor, wit and passion the essential element of prior appropriation, security of the water right as a superior allocation method. In a 1970 paper given at the Rocky Mountain Mineral Law Foundation annual meeting, he summarized what Western water law gave right holders. "Each wants a permanent reoccurring supply, good every year, good presumably forever. The law has given them that."<sup>3</sup> When he was a doctoral student at the University of Wisconsin, he convinced the leading student of Eastern water rights, Jacob Beuscher, that most riparian rights cases could best be explained as prior appropriation cases. Frank did not think much of Eastern permit systems, which spring up after those intense but short-term droughts that surprise the humid East, that confer a general public interest discretion to allocate water in times of shortage. *The Model Water Code, the Wise Administrator and Goddam Bureaucrat*<sup>4</sup> is mandatory reading for those who advocate "flexible" allocation systems, not tied to property rights, in the name of fairness and efficiency.

No single tribute to Frank can do justice to his scholarship, his service to the University and the State of Wyoming, let alone try to capture

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1. *E.g.*, *Arizona v. California II*, 460 U.S. 605, 620 n.11 (1983).

2. 45 CALIF. L. REV. 638 (1957).

3. *The Use of Fresh Water for Secondary Recovery of Oil in the Rocky Mountain States*, 16 ROCKY MTN. MIN. L. INST. 601, 628 (1971).

4. 14 NAT. RESOURCES J. 207 (1974).

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his decency, integrity and charm or his dry-fly fishing skills. Suffice it to say, for many years to come those of us who work in water law and related fields will be unable to complete any project without asking, "Now what would Frank have thought about this?"

