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## Introduction: Symposium 2000: Water Rights and Watershed Management: Planning for the Future

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## *Introduction*

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### SYMPOSIUM 2000

## WATER RIGHTS AND WATERSHED MANAGEMENT: PLANNING FOR THE FUTURE

*Eventually, all things merge into one, and a river runs through it. The river was cut by the world's great flood and runs over rocks from the basement of time. On some of the rocks are timeless raindrops. Under the rocks are the words and some of the words are theirs.*

*I am haunted by waters.<sup>1</sup>*

The term watershed management seems to be self-explanatory in its very wording: the managing of watersheds. Truly defining watershed management as practiced today, however, is not an easy task. Watershed management covers a vast array of disciplines, including social, cultural, economic, and legal affairs as well as natural resource and environmental issues. Furthermore, even if a definition can be established, those who support the use of a watershed management approach often disagree on its application, as watersheds often cross political boundaries and are impacted by inconsistent local land use controls.

Natural resource managers have long been familiar with watershed management, but the idea's exposure to the general populace is a rather new development.<sup>2</sup> Fifteen years ago, calls for watershed management were made only at the "grass-roots" level.<sup>3</sup> Today, however, watershed management has taken a prominent position in the future of the nation's water quality, evidenced by President Clinton's Clean Water Initiative,<sup>4</sup> which relies heavily on watershed management ideals to achieve the Clean

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<sup>1</sup> Norman Maclean, *A River Runs Through It*, in *A RIVER RUNS THROUGH IT AND OTHER STORIES* 104 (1976).

<sup>2</sup> Joe Gelt, *Managing Watersheds to Improve Land and Water*, 10 *ARROYO* No. 3 (1998), at <http://ag.arizona.edu/AZWATER/arroyo/103.html>.

<sup>3</sup> See Planning and Conservation League, *The Benefits of Watershed Management: Water Quality and Supply*, at <http://www.pcl.org/Land%20Use/section2.html>.

<sup>4</sup> See William J. Clinton, Address before a joint session of the Congress on the state of the Union Address (Jan. 27, 1998) in weekly compilation of Presidential Documents; see also <http://www.cleanwater.gov>.

Water Act's original goal of "fishable and swimmable" waters.<sup>5</sup> What explains the watershed management approach's meteoric rise to the forefront of our national water policy? Is it the hope that the nation's waters will someday actually meet the lofty goals of being "fishable and swimmable"? Perhaps the explanation is found not in the hope of realizing substantive water quality and quantity goals, but rather in the voluntary, collaborative processes and consensus-based solutions that stakeholders find most intriguing about watershed management.<sup>6</sup>

Observing the growing importance placed on watershed management approaches to resolving legal and policy questions concerning water quality and water rights allocation, the WILLIAM AND MARY ENVIRONMENTAL LAW AND POLICY REVIEW sought out leading figures in water law and watershed management, and hosted a symposium that took place on March 31 and April 1, 2000. *Water Rights and Watershed Management: Planning for the Future* brought together water-law attorneys, academicians, students, and policymakers to focus on issues that intertwine law and the environment, as well as economic, political, scientific, cultural, and ethical concerns.

The first panel, which included Professor John Echeverria of Georgetown University Law Center, Assistant Professor Kurt Stephenson of Virginia Polytechnic Institute, Professor Judith Royster of University of Tulsa College of Law, and moderator Linda Malone of the College of William & Mary School of Law, explored the political and cultural issues of watershed management and water law. The second panel, which featured Professor Robert Beck of Southern Illinois University School of Law, Professor Dan Tarlock of Chicago-Kent College of Law, Professor Jon Cannon of the University of Virginia School of Law, and moderator Lynda Butler of the College of William & Mary School of Law, analyzed the legal and ethical issues of watershed management and water law. Panel three was moderated by Professor Ronald Rosenberg of the College of William & Mary School of Law and featured Professor Barton Thompson, Jr. of Stanford University School of Law, Professor Joseph Dellapenna of Villanova University School of Law, and Professor Wendy Wagner, formerly of Case-Western Reserve School of Law and now professor at the University of Texas School of Law. The speakers focused on economic and scientific issues of watershed management, highlighted by a lively debate over the merits of water markets.

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<sup>5</sup> See 33 U.S.C. § 1313(c)(2)(A).

<sup>6</sup> See Gelt, *supra* note 2.

Issues 25:1 and 25:2 of the *Review* bring together the insights of eight of our nine speakers, along with an article by Professor Robert Adler of the University of Utah College of Law.<sup>7</sup>

Stephenson explores the changing role of analysis and negotiation in making decisions about the future use of our river systems in hydropower relicensing and makes predictions about how the relicensing decision process will evolve to account for the many environmental and economic consequences of hydropower relicensing.<sup>8</sup> Stephenson identifies two conceptual models of decision-making that could be used to make choices between competing ends and discusses the role of professional analysis and analysts in each conceptual framework;<sup>9</sup> he then goes on to describe the FERC's historical decision-making approach and the analysis it uses to decide the conditions in a relicensing case.<sup>10</sup> Additionally, Stephenson summarizes the new pressures for change and reform of the relicensing process and analyzes how these pressures are changing the FERC decision process.<sup>11</sup> Stephenson concludes that the processes used to decide how to take nature into account in relicensing decisions will continue to change, but that the underlying analysis that supports the decision process will not.<sup>12</sup>

Looking at cultural issues of water law, Professor Judith Royster provides a warning to eastern states that are now beginning to address issues of water shortage. Royster warns that in their attempts to address the issue of riparian water rights in an era of limited water, eastern states have so far ignored one of the most important issues in fashioning an integrated system of water allocation: the rights of the Indian tribes to water as a matter of federal law.<sup>13</sup> Consequently, points out Royster, tribes and states in the eastern United States are in danger of repeating one of the major mistakes made in the West, where states allocated water to non-Indians despite contrary to Supreme Court precedent, only to have Tribes assert and win rights to considerable quantities of water with very

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<sup>7</sup> Professor Adler was unable to attend the symposium, but his paper was presented as a part of the second panel.

<sup>8</sup> Kurt Stephenson, *Taking Nature into Account: Observations about the Changing Role of Analysis and Negotiation in Hydropower Relicensing*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 473 (2000).

<sup>9</sup> *See id.* at 478.

<sup>10</sup> *See id.* at 484.

<sup>11</sup> *See id.* at 487.

<sup>12</sup> *See id.* at 491.

<sup>13</sup> Judith Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 169 (2000).

early priority dates, and curtail many of those state allocations of water.<sup>14</sup> Royster suggests that if tribes and states can start to address the issue now, perhaps much of the litigation and acrimony that have plagued Indian water rights in the West can be avoided.<sup>15</sup> Unlike other scholars who have written on this issue, Royster not only looks at how the fundamental principles of Indian reserved water rights have been put into practice in prior appropriation states,<sup>16</sup> but also analyzes the question of tribal reserved rights to water in riparian jurisdictions.<sup>17</sup> The article concludes that tribal reserved rights to water are as viable in the eastern United States as in the West, but that implementing those rights in the context of riparianism may involve some distinctions in the specific rules that govern the reserved rights doctrine in the West.<sup>18</sup>

Robert W. Adler and Michele Straube identify several great divides in the legal and policy regime used to govern water resources in the United States.<sup>19</sup> They first observe that state law of water rights and allocation operates apart from the basic structure of federal water pollution law.<sup>20</sup> Secondly, they note that decisions about water resources are divorced from closely related land use policies.<sup>21</sup> Third, they examine the riparian rights doctrine of water law prevalent in the East that stands in contrast to the prior appropriation doctrine of western water law.<sup>22</sup> Fourth, they observe that water issues often are addressed independent of broader questions of ecosystem health.<sup>23</sup> Finally, they discuss the fundamental divide of federalism that spans across all of the great divides.<sup>24</sup> Adler and Straube explain why the divides present obstacles to more rational and effective water resource management and protection, and then describe four large watershed programs to illustrate the development of a more integrated approach.<sup>25</sup> Finally, the authors evaluate the significance of the

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<sup>14</sup> *See id.* at 173.

<sup>15</sup> *See id.* at 172.

<sup>16</sup> *See id.* at 183.

<sup>17</sup> *See id.* at 191.

<sup>18</sup> *See id.* at 200.

<sup>19</sup> Robert W. Adler & Michele Straube, *Law and Policy: Bridging the Great Divides*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 1 (2000).

<sup>20</sup> *See id.* at 4.

<sup>21</sup> *See id.* at 7.

<sup>22</sup> *See id.* at 9.

<sup>23</sup> *See id.* at 10.

<sup>24</sup> *See id.* at 12.

<sup>25</sup> *See id.* at 13.

new approaches contained in these programs, and explain how they are beginning to bridge the vast divides that have hampered U.S. water law and policy in the past.<sup>26</sup>

A. Dan Tarlock examines the extent to which common law property rights use watershed resources to promote watershed conservation. Tarlock observes that for over two centuries, land and water law has functioned to detach property rights from specific landscapes and, thus, has contributed to landscape degradation.<sup>27</sup> Tarlock calls for a redefinition of both land and water rights to include a landscape conservation component under a property rights rationale.<sup>28</sup> Tarlock looks at current Supreme Court interpretation of the Fifth Amendment and finds greater potential to include a landscape conservation component in traditional property rights the closer the connection land has to water.<sup>29</sup>

Professor Jon Cannon explores the capacity of the new generation of collaborative institutions anticipated by the watershed approach to enhance cooperation among often competing stakeholders and to yield watershed policies that fairly reflect the preferences of the affected community.<sup>30</sup> Through an examination of the Chesapeake Bay Program, Cannon explores definitions of successful collaborative efforts, circumstances where collaboration is likely to be more or less difficult, as well as the role of central government in collaborative institutions.<sup>31</sup> Finally, Cannon looks beyond collaborative watershed institutions as bargaining forums for existing interests to their transformative potential.<sup>32</sup>

Beck focuses on the riparian approaches extant in the thirty-one eastern states of the United States and hypothesizes that The Regulated Riparian Model Water Code offers a model for the 21<sup>st</sup> Century that will allow issues diminishing water supply to be addressed not only by the states that have no pertinent statutes, but also by states with inadequate statutes.<sup>33</sup> Beck seeks to delineate the approach, scope, and elements

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<sup>26</sup> See *id.* at 55.

<sup>27</sup> A. Dan Tarlock, *Reconnecting Property Rights to Watersheds*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 69 (2000).

<sup>28</sup> See *id.* at 90.

<sup>29</sup> See *id.* at 107.

<sup>30</sup> Jon Cannon, *Choices and Institutions in Watershed Management*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 379 (2000).

<sup>31</sup> See *id.* at 391, 394.

<sup>32</sup> See *id.* at 419.

<sup>33</sup> Robert E. Beck, *The Regulated Riparian Model Water Code: Blueprint for Twenty First Century Water Management*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 113 (2000).

covered in the Code and to recognize the criticism leveled at both common law riparian doctrine and existing regulated riparianism statutes and indicate how the Code responds, but doing both from the viewpoint of identifying the potential of the Code for supporting a watershed management approach.<sup>34</sup>

Comparing markets *for* nature in which market participants are seeking to restore or preserve nature and “regulatory markets” that enable regulated entities like factories or developers to trade entitlements to consume the environment, Professor Barton Thompson, Jr. poses the question whether there is a more robust and direct role for markets in preserving the environment.<sup>35</sup> Accordingly, Thompson surveys three other potential types of market approaches and illustrates how they might be used to preserve and restore watersheds.<sup>36</sup> The author then examines the weaknesses of “public goods market” acquisitions such as purchases or leases of water rights by governmental agencies or nonprofit organizations for instream flows needed by fish and wildlife.<sup>37</sup> Thompson then considers the degree to which the economic benefits of watershed protection, in the form of higher water quality or reduced flood threats, might encourage water suppliers, flood control districts, or others to invest in the acquisition and preservation of critical watershed land.<sup>38</sup> Finally, Thompson examines the more radical concept of integrating market concepts into the regulatory process itself by creating what might be called an “environmental broker,” and argues that such an approach offers the potential for more rapid and disciplined regulation, acknowledging, however, that it may require greater scientific expertise and institutional flexibility than currently exists.<sup>39</sup>

In response to Thompson, Professor Joseph Dellapenna questions why markets are so seldom found in fact as a water management tool, and argues that true markets for water have been rare because they will not work.<sup>40</sup> Dellapenna then considers how certain administrative regimes that have been misdescribed as “markets” have functioned—principally

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<sup>34</sup> See *id.* at 118, 125, 144, 159.

<sup>35</sup> Barton Thompson, Jr., *Markets for Nature*, 25 WM. & MARY ENVTL. L. & POL’Y REV. 261 (2000).

<sup>36</sup> See *id.*

<sup>37</sup> See *id.* at 267.

<sup>38</sup> See *id.* at 293.

<sup>39</sup> See *id.* at 307.

<sup>40</sup> Joseph W. Dellapenna, *The Importance of Getting Names Right: The Myth of Markets for Water*, 25 WM. & MARY ENVTL. L. & POL’Y REV. 317 (2000).

the California Water Bank.<sup>41</sup> Dellapenna closes by presenting an alternative to a market regime that he argues could better accomplish the goals of those in favor of water markets as water management tools.<sup>42</sup>

Professor Wendy Wagner suggests that despite the continued prominence of watershed management in the laws governing water quality control, there has been little effort by federal or state agencies to actually implement watershed management into their regulatory programs.<sup>43</sup> Wagner endeavors to explain why water quality protection programs have struggled so unsuccessfully to incorporate watershed management into water quality regulation.<sup>44</sup> In contrast to prior analyses, Wagner calls for heightened public discourse, as opposed to further investment in scientific experts or technocratic tools to restore degraded waters.<sup>45</sup> Wagner analyzes the ways in which involvement and support of the public is both critical and largely missing from current efforts to integrate watershed management into water quality control.<sup>46</sup>

Watershed management is the future of our approach to water quality and quantity law and policy, hence the name of the Symposium—*Planning for the Future*. Arriving at a consensus on how to best define this approach, and more importantly, how to implement it, whether on a community or national level, will not be easy. The Symposium and the publication of these articles are intended to serve further notice of the critical issues that must be debated and acted upon in order to ensure that “every child . . . grow[s] up with water that is pure to drink, lakes that are safe for swimming, and rivers that are teeming with fish.”<sup>47</sup> And so, offered here, like Norman Maclean’s timeless raindrops, are words on our water future.

BRIAN PERRON & SARAH RICHARDSON  
2000 SYMPOSIUM EDITORS

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<sup>41</sup> See *id.* at 358.

<sup>42</sup> See *id.* at 365.

<sup>43</sup> Wendy E. Wagner, *Restoring Polluted Waters with Public Values*, 25 WM. & MARY ENVTL. L. & POL’Y REV. 429 (2000).

<sup>44</sup> See *id.* at 433.

<sup>45</sup> See *id.* at 442.

<sup>46</sup> See *id.* at 461.

<sup>47</sup> See President Clinton, Remarks on the Clean Water Action Plan (Feb. 19, 1998), at <http://www.cleanwater.gov/anniv2/>.