

# William & Mary Law Review

---

Volume 14 (1972-1973)  
Issue 1

Article 10

---

October 1972

## Book Review of Waters and Water Rights

Timothy J. Sullivan  
*William & Mary Law School*

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Water Law Commons](#)

---

### Repository Citation

Timothy J. Sullivan, *Book Review of Waters and Water Rights*, 14 Wm. & Mary L. Rev. 239 (1972),  
<https://scholarship.law.wm.edu/wmlr/vol14/iss1/10>

Copyright c 1972 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

## BOOK REVIEW

WATERS AND WATER RIGHTS. EDITED BY ROBERT EMMET CLARK. INDIANAPOLIS: THE ALLAN SMITH COMPANY, 1967-72. Six volumes, pp. 3,457. \$28.50 per volume.

\*TIMOTHY J. SULLIVAN

So great has been the technological thrust of our science and energy, so rapacious our consumption of non-renewable resources, so rapid our growth in numbers, so heavy the load we place on our life supporting systems that we begin to perceive the finite qualities of the biosphere of soil, air and water. . . . This is a revolution in thought fully comparable to the Copernican revolution.

Dr. Margaret Mead, speaking at the United Nations Conference on the Human Environment, Stockholm, Sweden, June 15, 1972.<sup>1</sup>

No scholar who aspires to write seriously about natural resources law can ignore the intimate links between his subject and a myriad of other disciplines whose learning is indispensable in understanding the legal and other, broader implications of the ecological crisis. This crisis, in turn, is a critical factor in the reconfiguration of water law that is now underway in many jurisdictions. Law, in this as in other fields, neither develops in a vacuum nor springs spontaneously from the minds of judges and legislators. Judges may write with analytical rigor, and legislators may frame laws which speak in sovereign imperatives, but the official certitude of courts and legislatures masks much uncertainty and many doubtful judgments. A modern work comprehending natural resources law must be especially careful to incorporate the contributions of economists and scientific conservationists. It is reflective of the breadth of scholarship manifest in *Waters and Water Rights* that the seminal observations of the cultural anthropologist Margaret Mead come to mind even upon a preliminary examination of the treatise.

*Waters and Water Rights* is a work of genuine excellence. Professor

---

\*A.B., The College of William and Mary; J.D., Harvard University. Assistant Professor of Law, The College of William and Mary.

1. N. Y. Times, June 19, 1972, at 33, col. 2.

Robert E. Clark and his co-authors, almost all of whom are leading scholars in the fields of environmental law and science, have produced a comprehensive study of water law in all its aspects. The authors clearly perceive that their subject demands more than the mastery and recapitulation of a body of technical rules. With Justice Holmes, they understand that the character of law is often shaped by forces far more fundamental than the brittle logic of judicial opinions.<sup>2</sup> Accordingly, substantial portions of the work are devoted to the economics of water use and the technical character of water pollution. One may question the judgment of individual authors in particular instances (Professor Ciriacy-Wantrup's analysis of the role of external costs in the economics of water pollution is especially troubling), but the spirit of relentless scholarship which infuses the work as a whole is more than adequate compensation for an infrequent failing in judgment.

The treatise is divided into seven volumes, six of which have been published. The six volumes cover topics as diverse as the historical development of water law, the growth of state and federal regulation of water resources, the international law of water rights, and the legal-economic dilemma posed by the need to allocate increasingly scarce water resources among competing demands. There are separate volumes treating the water law of western and eastern states. Perhaps the most unusual feature of the work is the inclusion of one volume devoted to the problems of water law practice. Of course, form books and practice manuals are useful works, but they all too often lack the imagination and intellectual rigor of more scholarly endeavors. Thus the editor's judgment in appending what is, in effect, a practice manual to a work chiefly scholarly in character may be questioned by many

---

2. O. HOLMES, JR., *THE COMMON LAW* 5 (M. Howe ed. 1963). In perhaps the most quoted paragraph of this classic work, Holmes wrote:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed. The law cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

The idea that law springs from sources more varied and complex than judicial opinion may seem a tiresome truism. The difficulty is that much of the best legal historical scholarship available has concentrated almost exclusively on judge-made law. Holmes, it seems, is more cited than heeded. See generally Hurst, *Legal Elements in United States History*, 5 *PERSPECTIVES IN AMERICAN HISTORY* 7 (1971).

readers. Yet, water law is a field in which the application of general principles to particular cases is especially taxing. Moreover, natural resources law generally is in flux, reflecting the growing concern and debate throughout society about the problem of environmental degradation. This debate and the resulting protean state of water law make the demands of practice unusually severe. In this context, attention to the practical aspects of litigation and the integration of the practical with the theoretical is commendable.

*Waters and Water Rights* is the first comprehensive treatise on water law since Kinney's *Irrigation and Water Rights* (1912), Wiel's *Water Rights in the Western States* (1911), and Farnham's *The Law of Water and Water Rights* (1904). These earlier works, which were published shortly after the closing of the western frontier, reflect a view of water law appropriate to an era in which the cardinal presumption was the abundance of natural resources. American law, indeed American society, was profoundly influenced by the physical fact of the seemingly endless frontier.<sup>3</sup> Legal scholars of the late nineteenth and early twentieth centuries believed that natural resources were almost inexhaustible, and the law was shaped according to that vision. The earlier works on water law were also devoid of any genuine understanding of the then nascent conservation movement, and largely were unsympathetic to the first experiments in government by independent administrative agency—a regulatory mode that has since become pervasive. It is precisely because the early treatises on natural resources law embodied a legal schema wedded to the twin ideals of inexhaustible plenty and laissez-faire, that a new work has been needed for so long—a treatise that would record most of the great changes in water law since 1900 and which would also reflect a sense of the still greater intellectual transformation that Dr. Mead's new Copernican revolution portends.

*Waters and Water Rights* must be considered the modern, definitive treatise on water law, not merely because it is the only recent comprehensive treatment of the subject, but also because its authors have not been content simply to codify a complete but sterile body of technical

---

3. Many American historians and economists have analyzed the influence of the frontier and the impact of the concept of infinite plenitude upon the development of the American psyche. Frederick Jackson Turner was the first to articulate a theory of the frontier as a factor in the development of a national personality. See F. TURNER, *THE FRONTIER IN AMERICAN HISTORY*, (1920). There have been more recent works elaborating upon Turner's thesis. See D. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 221-74 (1965); D. POTTER, *PEOPLE OF PLENTY: ECONOMIC ABUNDANCE AND THE AMERICAN CHARACTER* (1954).

doctrine. The effort throughout has been to analyze the reasons for a rule, to root out the economic or social forces which produced it, and to project its development well into the future. The authors clearly perceive that the causes as well as the contours of a legal principle are important, and that a creative, useful, and enduring scholarship must consist of more than the mere passive cataloguing of doctrinal orthodoxy.

A number of the work's features are especially worthy of comment. The analysis of the prior appropriation theory of the western states is of particular importance. This is so because the reality upon which the water law of the West is based inevitably will have increasing applicability for all sections of the country in the years to come. The doctrine of prior appropriation is grounded upon the persistent scarcity of water in the West. The East, on the other hand, traditionally has been confronted with legal problems incident to an abundance of water and the accompanying navigational problems. If the demand for water resources continues to increase and the ravages of pollution grow more widespread, it is likely that the legal assumptions which underlie eastern water law will encounter increasingly critical examination. This is not to say that eastern courts will discard in a single decision the entire body of riparian doctrine and its considerable accretions. A more likely eventuality is that judges will modify the substance of riparian doctrine by discreetly adopting and engrafting appropriate principles.

Of course, it is not precisely proper to refer to "western water law" as if there existed some unified, universal body of principles which governed in all the semi-arid jurisdictions of the nation. There is much substantive diversity in the laws of those states which nominally adhere to the common law doctrine of prior appropriation. Professor Clark, in one of the most lucid sections of the treatise, demonstrates that the genesis of the appropriative schema can be traced to a conceptual separation of water rights from the ownership of adjoining land. This was the universal starting point, but in many western states different doctrines have evolved to meet the needs of their particular circumstances. Some jurisdictions continue to consider riparian ownership and water rights wholly severable (the so-called "Colorado doctrine") while other states have adopted a hybrid system owing something both to the riparian and appropriative views (denominated the "California doctrine") The point is that whatever the variations in the water law of individual western states, each has had, perforce, to respond to the reality

of scarcity. It seems inevitable that the eastern region of the country—increasingly confronted by the growing danger of an inadequate supply of clean water—will soon find much that is instructive in the experience of the West.

The authors of *Waters and Water Rights* also treat extensively and intelligently the growth in importance of administrative regulation in the area of natural resources law. Earlier works on water law, written at a time when administrative agencies were an insignificant part of the state and federal governmental structure, were quickly rendered obsolete by the growing power of the independent regulatory agencies. The authors here have devoted the better part of two volumes to delineating the character of the regulatory role in water resource law. Substantial attention is devoted to the Army Corps of Engineers, the Federal Power Commission, and other agencies of the national government concerned with water resource use and pollution control. Wisely, however, the treatise does not focus exclusively on regulatory activity at the federal level. Extensive consideration is also given to the pioneering role that state regulatory agencies have performed in the management of water resources. Sensitivity to the development of state regulatory schemes is of especial importance in the field of water law. It was at the state level that the first efforts, however ineffective, were made to structure agencies capable of contending with the problems of water pollution and use.<sup>4</sup> The development of federal regulatory agencies can be understood fully only if viewed as a reaction to state efforts and state inadequacies in meeting the often intractable problems of water resource use.

The sections on administrative agencies in *Waters and Water Rights*, although laudable in most respects, are disappointing in one important particular. Society is in the midst of a notable international campaign against pollution.<sup>5</sup> The outcry against environmental degradation is rapidly growing in strength, although there remain those who, surrounded by the palpable evidence of crisis, profess to see no reason for

---

4. The development of state pollution control programs is recounted ably in Hines, *Nor Any Drop To Drink: Public Regulation of Water Quality* 52 IOWA L. REV. 186, 202 (1966).

5. International concern about pollution culminated in The United Nations Conference on the Human Environment held in Stockholm in June 1972. The Conference proceedings revealed great differences in the perceptions of the participants. Undeveloped nations viewed the problem of pollution as much less urgent than did the representatives of more heavily industrialized countries. Despite these disagreements, the Conference approved a wide ranging "Declaration on the Human Environment" and urged further international collaboration. N. Y. Times, June 17, 1972, at 2, col. 3.

concern about deteriorating air and water.<sup>6</sup> Among legal scholars who are troubled by accelerating environmental decline, a complex and sometimes contentious debate has raged over the question of why law has failed to check pollution effectively and how legal institutions might best be transformed into more effective agents in the task of cleansing the earth's air and water. Varying assessments of the performance of administrative agencies in the environmental context have been the focus of much of this debate.

One group of partisans is led by Professor Joseph Sax (a contributor to *Waters and Water Rights*). The Sax faction charges the agencies—both state and federal—with a gross lack of zeal in performing their regulatory function. Professor Sax believes that the agencies' failure to stop polluters from polluting can be traced to the incestuous relationship that frequently exists between the regulators and the regulated. Sax is also disturbed by the pliability of theoretically independent agencies, as well as the executive department generally, in the face of random and sometimes reckless political pressures applied by legislators responding to the demands of their constituent polluters. The remedy proposed to meet this problem is to expand the jurisdiction, and to increase the substantive powers of courts in dealing with environmental issues. At the same time, the judicial forum is to be made more amenable to citizen suits by a substantial liberalization of the standing rules. Sax believes that such reforms will subject the agencies to a persistent and searching judicial scrutiny resulting, it is hoped, in the more vigorous enforcement of pollution control laws.<sup>7</sup>

There are many who take strong exception to Professor Sax's expressed confidence in the efficacy of an expanded role for the courts. Professor Louis Jaffe, for example, does not deny the failings of the agencies as guardians of the environment, but he believes their derelictions are not so serious as Professor Sax contends. While conceding that symbiotic relationships between the regulator and the regulated are not uncommon, Jaffe questions whether the vesting of greater power in the courts will, by itself, significantly improve the law's utility as a device for

---

6. The persistence of the anti-ecology spirit is epitomized by the comment of an outraged corporate official facing the necessity of installing costly pollution control equipment in one of his factories: "I wonder," he asked, "whether mankind will suffer a whole hell of a lot if the whooping crane doesn't quite make it!" L. JAFFE & L. TRIBE, *ENVIRONMENTAL PROTECTION* 60 (1971).

7. A complete exposition of Professor Sax's theory may be found in J. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971)

environmental enhancement. Professor Jaffe views the problem of building a cleaner environment as one requiring a very particular balance between legal skill and technical expertise. The administrative agencies, he contends, are peculiarly equipped to contribute the necessary combination of technical talent and legal power. Jaffe admits that most administrative agencies are not now structured or staffed to make a maximum contribution to the environmental effort, but he suggests that a serious attempt to so structure them is preferable to a narrow dependence upon judicial omniscience. "Does it make good sense," he asks, "to propagate the thesis that judges alone are fit to govern?"<sup>8</sup>

The sections in *Waters and Water Rights* treating administrative agencies never come to grips with the implications for natural resources law of the debate between Professor Sax and his adversaries. That debate, as we have seen, raises important questions about the character of the institutional arrangements that will best promote a cleaner environment. It is certain that the final apportionment of power between courts and administrative agencies will have a profound effect upon the substantive contours of water law. It is, therefore, all the more puzzling that the authors of *Waters and Water Rights* have not been willing at least to illumine the parameters of the problem. This is not to say that the treatise, as a work, is insensitive to the vital role of the administrative process in the shaping of natural resources law. Its defect lies in a certain tumidity, a reluctance in this instance to push the inquiry beyond traditional academic analysis to the ultimate and determinative issues in regulatory government.

It may seem unfair or even perverse to judge the worth of *Waters and Water Rights* only by the adequacy of its treatment of water pollution. Yet it may be recalled that the treatises on water law published at the beginning of this century were rendered obsolete almost immediately, because they had failed to assay adequately the impact of administrative agencies and the conservation movement upon water law. The growing environmental consciousness manifest in almost all segments of society will certainly have an equally powerful effect upon the natural resources law of our own era. It is vitally important that any treatise with serious pretensions to definitive status within the field of water law treat the problem of water pollution with thoroughness and imagination. To do less would quickly and surely vitiate its usefulness to scholars and practitioners alike. Fortunately, *Waters and Water Rights*, both in the vol-

---

8. Jaffe, Book Review, 84 HARV. L. REV. 1562, 1565 (1971).

ume devoted exclusively to water pollution and throughout the work, reflects a measured scholarly comprehension of the immense potential impact of the environmental perspective upon the development of water law.

The volume dealing specifically with problems of pollution and water quality affords a useful overview of the field. It begins by emphasizing the interdependence of legal and scientific skills in effectively meeting the challenge of water pollution. The author, Burton Gindler, then surveys existing state administrative regulatory schemes and devotes some attention to the evolution of state case law. The strongest section of the volume is the author's careful analysis of the conceptually difficult framework within which much pollution litigation, based upon common law causes of action, is conducted. The volume concludes with a lucid distillation of the massive body of federal case law and administrative regulations which concern water use. Especially praiseworthy is the treatment of pertinent portions of the Rivers and Harbors Act of 1899, antique legislation which is of great importance in the contemporary federal attack upon water pollution.<sup>9</sup>

It is regrettable that the volume on water pollution and water quality was among the first segments of the treatise to be issued. Many of the most exciting and important developments in the environmental field have occurred since its publication. As a result, *Waters and Water Rights* includes no coverage of either the National Environmental Policy Act<sup>10</sup> and its progeny, or of the work of the Environmental Protection Agency.<sup>11</sup> The problem of standing in environmental litigation initiated by citizen-conservation groups is likewise dealt with in summary fashion, since most of the major cases have been decided within the last

---

9. A recent District Court decision, *Kaluz v. Resor*, 335 F Supp. 1 (D.D.C. 1971), has temporarily, at least, undermined the effectiveness of the Rivers and Harbors Act of 1899. The court declared that the Army Corps of Engineers has no authority under the Rivers and Harbors Act of 1899 to issue permits for the dumping of refuse into *non-navigable* streams. The decision, while achieving the short-term goal of denying the government the right to countenance the pollution of non-navigable streams, destroys the potential of the permit system as a means of controlling and improving water quality. The government has suspended operation of the entire permit apparatus pending an appeal to the Court of Appeals. Reaction to the district court decision among environmental commentators has been linked directly to the particular commentator's confidence in the Corps of Engineers' capacity to act effectively as an environmental guardian.

10. 42 U.S.C. 4321 (1970).

11. Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (Compilation 1966-70), 3 U.S.C. 609 (1970).

three years—all after publication. The publishers do intend to supplement each volume with pocket parts beginning in early 1973. Pocket parts, however, are a weak substitute for the inclusion of important subjects in the corpus of a work as an integral part of the original elaboration of the author's ideas.

The foregoing criticisms should not be construed as an attempt to retreat from the earlier judgment that *Waters and Water Rights* is an estimable work of serious scholarship that is likely to be considered the definitive treatise on water law for some time to come. What matters, finally, is that the authors brought to their task a breadth of vision and a depth of scholarship that are amply reflected in the quality of the work produced. Conventional principles of natural resources law are everywhere under great stress as courts seek to shape traditional doctrines to meet the unyielding demands of a growing environmental crisis. It has long been the particular boast of Anglo-American lawyers that the common law system's special virtue lies in its capacity for dynamic yet orderly change. The basis of the boast in the field of water law is being tested vigorously almost daily in courts across the nation. Justice Blackmun, dissenting in an important environmental case, eloquently framed the fundamental question that our legal institutions now confront in the field of natural resources when he wrote: "Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?"<sup>12</sup> The authors of *Waters and Water Rights* may take much satisfaction in the knowledge that if their work did not quite create a new jurisprudence of natural resources law, it anticipated the need for one—and so furnishes a firm scholarly foundation upon which others may now begin the work of constructing a fresh body of law that responds both to Justice Blackmun's insistent plea for judicial innovation and to the ineluctable imperatives of Dr. Mead's new Copernican reality.

---

12. *Sierra Club v. Morton*, 92 S. Ct. 1361, 1376 (1972).