

GOING WITH THE FLOW: A WATER LAW JOURNEY

BY

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During all the years I taught water law, I always began the first class with a quick story about how I came to be teaching water law, and I'm going to tell that story again now. I apologize for repeating myself to the many former students in the room, but I feel like it's where I need to start.

I spent most of my childhood in Minnesota—the land of 10,000 lakes, as it says on the license plates. Actually, there are thousands more than that, but the slogan just refers to the bigger ones. I swam in them, caught fish in them, rowed boats across them, got leeches and mosquito bites around them, and ice-skated on them in the winter time. There were rivers, too, most particularly the mighty Mississippi. All Minnesota kids know the chant: “*M-i-ss-I-ss-I-pp-I*.” From way back, I remember being amazed at how the Mississippi started so small in Itasca State Park in northern Minnesota, and then became a huge river by the time it reached New Orleans.¹ The river was already plenty big by the time it flowed between the Twin Cities of Minneapolis and St. Paul, where I grew up.² It seemed like magic that it

* Thank you all for being here. Thank you to Mike Blumm and Katie Walter and the rest of the *Environmental Law* staff and the law school staff for organizing this symposium. Thank you to Dean Klonoff for the wonderful introduction, and to Mike for the comprehensive festschrift comments. And thank you to Jim—whose body of scholarship puts mine to shame—for sharing the limelight with me. I must confess that I'm very uncomfortable with this whole notion of being “honored.” It totally goes against the grain of my Midwestern Scandinavian upbringing.

¹ At its source, the flow is about six cubic feet per second (cfs); in New Orleans, the flow is about 600,000 cfs. Nat'l Park Serv., U.S. Dep't of the Interior, *Mississippi River Facts*, <http://www.nps.gov/miss/riverfacts.htm> (last visited Feb. 6, 2012).

² At this point, the river contains about 12,000 cfs. *See id.* The Twin Cities are not directly across from each other, but several miles apart, with St. Paul growing on the east bank and Minneapolis developing on the west. St. Paul began as one of the Midwest's original “river towns,” located at what was then the head of navigation on the Mississippi River. An early name for the settlement was reportedly Pig's Eye, after Pierre “Pig's Eye” Parrant, a local whiskey seller. JOHN O. ANFINSON, NAT'L PARK SERV., RIVER OF HISTORY: A HISTORIC RESOURCES STUDY OF THE MISSISSIPPI NATIONAL RIVER AND RECREATION AREA 69, 166 (2003), *available at* <http://www.nps.gov/miss/historyculture/upload/HRS-full-comp.pdf>. The more welcoming name of St. Paul was bestowed by a Catholic priest who came to render services to the area's fur traders. *Id.* at 166. Minneapolis began some distance upstream near St. Anthony Falls, which powered lumber and flour mills. Its name means “Water City”—combining the Dakota Indian word “minne” with the Greek word “polis.” *Id.* at 167–68. The name of the river itself comes from the Ojibwe language—a combination of “Messippi” meaning Big River and “Mee-zee-see-bee” for Father of Waters. Twin Cities Tours, *The Land of Sky Blue Waters: The Mississippi River*, http://www.twincitiestours.com/info_mississippi_river.html (last visited Feb. 6, 2012).

could flow all the time, year round, day and night. In fact, that's still magical to me. When it rained, my friends and I made little boats to sail down the roiling gutters along the streets, pretending that the boats would go all the way to the river and eventually the ocean, like the little canoe in the children's book *Paddle-to-the-Sea*.³

I also spent a few of my growing-up years in South Dakota, where I swam and water-skied with friends in the Missouri, a tributary of the Mississippi. The Missouri was muddy and slow, but as adolescents we didn't think about why that was. We weren't focused on the dams and reservoirs at that age—we just knew that the big old ugly carp that lurked in the murk might nibble our legs if we stood in one place too long, because they could find us even if we couldn't see them. In high school, my family went back to Minnesota—St. Cloud this time. The Mississippi was only a couple of blocks from our house, and that's where I went to walk off the angst and worries of my teenage years. After poking along the banks—smelling the leaf mulch and maybe startling a turtle into the smooth water—I always felt better.

The point is that water played a big part in my formative years. Even my favorite books and movies had water and rivers in them: *Life on the Mississippi*,⁴ *Sometimes a Great Notion*,⁵ *Angle of Repose*,⁶ and *Chinatown*.⁷ In college in Iowa, I was fascinated by an urban history class that explored the differences between the development and character of river towns and railroad towns—and I always felt partial to the river towns, with their more organic history and rough and tumble reputations.⁸ In geology field study classes, we started close to campus with the glacial features of Iowa, but then ventured much further west. Rafting the San Juan River in Utah, hiking into the Grand Canyon, camping in the Big Horns near the hot springs of Thermopolis, Wyoming, I got to know and love many other rivers, big and small. I'll never forget standing above the Goosenecks of the San Juan, contemplating the geological forces that created the oddity of a meandering stream incised into bedrock. As I drifted along my own meandering course of life, rivers and lakes were always there.

And then came law school, like a big boulder in the middle of the stream, throwing me temporarily off course. It was different than anything I'd experienced, in more ways than one. First of all, it was California. I started law school at Stanford during one of California's many cyclical droughts—the first time I had really experienced aridity. The dry brown hills, the endless sunny days, and the water use restrictions were new and strange to me, but law school was even stranger. I was not one of those who took to law school like a fish to water—I spent several months wondering

³ HOLLING CLANCY HOLLING, *PADDLE-TO-THE-SEA* (1980).

⁴ *LIFE ON THE MISSISSIPPI* (Great Amwell Co. 1980).

⁵ *SOMETIMES A GREAT NOTION* (Universal Pictures 1970).

⁶ WALLACE STEGNER, *ANGLE OF REPOSE* (1992).

⁷ *CHINATOWN* (Paramount Pictures 1974).

⁸ See generally ANFINSON, *supra* note 2 (describing the colorful history of development along the Mississippi River).

what planet I had landed on and thinking that law school might have been a big mistake. But then—I remember the precise moment—during the spring of my first year, in property class, Professor Bob Ellickson drew a map on the board. I sat up and took notice—I’ve always been a map geek. Better yet, it was a map of the Colorado River and Professor Ellickson was talking about Arizona and California’s fight over water. A light bulb went on. “Wow! There’s law about this stuff? About water? Not pollution, but water itself?” It really was an epiphany, and I fell for water law, right then and there. And to some extent, the rest is history, even though the path from there to here was definitely meandering rather than straight.

Why do I love water law? Because it’s about people and geography and history—and all the interrelationships among them. It’s a microcosm of natural resources law generally, with all of its complexities. It’s about people’s relationship to one of the most important substances on earth. Most of all, water law is just a great story, full of life and death and passion and epic disputes.

Becoming a law professor was the furthest thing from my mind when I was a law student, and I’m sure none of my classmates or professors would have predicted that future. I began my legal career in litigation, but even there, a river ran through it. In my first job in a Minneapolis firm, I worked on a case involving a Mississippi River barge company whose barges got stuck up river near St. Paul when the river froze earlier than expected, stranding tons of valuable cargo for the whole winter. After moving to Oregon, I did some research on the navigability of the Deschutes River and what that might mean to the jurisdiction and authority of the Confederated Tribes of the Warm Springs Reservation over Portland General Electric’s hydroelectric facilities on the river. After a few years of private practice, I rounded another bend and landed a job in natural resources management at the Oregon Department of State Lands, which manages state-owned waterways and other lands and resources for the benefit of the Common School Fund. Although public hearings on state waterway ownership produced some of the most difficult and vitriolic professional experiences I’ve ever had, I still loved the job, and it took me to rivers all over the state.

But I always knew I wanted to teach and to write, and after several years of private practice and government work, I was ready to explore that tributary. I always assumed I’d teach at the college level, but at that point I had to face the fact that I had forgone graduate school for law school, giving me a J.D. instead of a Ph.D., so the only place I was qualified to teach was at a law school. Here was Lewis and Clark practically in my backyard and fortuitously, I discovered that Anne Squier—whom I had known for some time—was leaving the law school, and she taught water law along with other classes that were of interest to me. Now, most of what I knew about the law school at that time came from only two sources: NEDC’s⁹ sometimes irate

⁹ The Northwest Environmental Defense Center is a non-profit organization “established by a group of professors, law students and attorney alumni at Lewis and Clark Law School in 1969.”

comments on my agency's wetlands permits and Mike Blumm's anadromous fish law newsletter,¹⁰ which came to me at the Department of State Lands. Both of those were very intriguing, but they didn't necessarily give me a full picture. Ultimately it was a few hours of conversation with Anne that really convinced me to pursue her position. I realized that Lewis and Clark was—and is—very different from my own law school experience. This place is an incredible community of faculty, staff, students, and alumni, and it's about as warm and nurturing as a law school could be. I could indeed see myself teaching here, and, apparently, enough of the faculty could imagine it, too, so I got an offer.

And now I come to the heart of the matter. My nearly twenty years on the faculty here were an incredible privilege. I confess that the entire time, I felt a little bit like Cinderella at the ball, since—as I said—I was a very unlikely person to become a law professor. Soon after I started, my colleague Craig Johnston said to me, “Isn't this the greatest job? We get paid to learn!” And he was absolutely right. It's an amazing profession where you get paid to learn—and then (the harder part) to try to convey that learning to students—many of whom may also be wondering what planet they've landed on, just like I did thirty years ago. Teaching is kind of like parenthood—it's one of the hardest jobs in the world, but on the good days, it's also one of the most rewarding. Watching a couple decades of students develop from deer-in-the-headlights on the first day of class, to world-class lawyers, judges, and professors—what an honor. Being part of this place, especially, where students, faculty, and staff are such a community, has been an incredible privilege and a tremendous honor.

Just considering who's here participating in this symposium today—three are former students: Robin Craig,¹¹ Keith Hirokawa,¹² and Barb Cosens,¹³ all of whom are wonderful colleagues and friends. Granted, none of them were deer in the headlights. They were instead “wind-em-up and let-em-go” students. I used to see Robin in my peripheral vision in both Water Law and Administrative Law and think “she gets it before I even say anything. I hope she's not bored.” Lo and behold, not too many years later, Robin has a stellar academic career far surpassing my own.

I hired Keith as a research assistant before I even met him, to work for me during the summer before he started the LL.M. program. He arrived in my office wearing board shorts and a backwards baseball cap, armed with a

Lewis & Clark Law Sch., *Northwest Environmental Defense Center*, http://law.lclark.edu/centers/northwest_environmental_defense_center/ (last visited Feb. 6, 2012).

¹⁰ StreamNet Library, *Anadromous Fish Law Memo*, <http://www.fishlib.org/library/Bibliographies/AFLM.html> (last visited Feb. 6, 2012) (providing electronic access to all archived issues).

¹¹ Robin Kundis Craig, *Defining Riparian Rights as “Property” Through Takings Litigation: Is There a Property Right to Environmental Quality?*, 42 ENVTL. L. 115 (2012).

¹² Keith H. Hirokawa, *Driving Local Governments to Watershed Governance*, 42 ENVTL. L. 157 (2012).

¹³ Barbara Cosens, *Resilience and Law as a Theoretical Backdrop for Natural Resource Management: Flood Management in the Columbia River Basin*, 41 ENVTL. L. 241 (2012).

J.D., a degree in philosophy, overflowing smarts and good cheer, and the energy of the energizer bunny. I gave Keith a box of papers and an outline of an article I'd been trying to get finished, and told him to take it and run with it as a co-author. He took my simple little concept and turned it into a critical legal studies examination of the nature of property. I confess I took most of the critical stuff out of the article and told him to use it in his own writing, which he did: he wrote a deep, philosophical thesis and hasn't stopped writing since. He's still the energizer bunny, bubbling over in frequent phone calls with ideas for writing projects and innovative teaching methods. I knew I was in for it when he told me he'd put me on his speed dial, but even when I'm not as quick on the return call, his messages always make me smile.

And Barb—I was so excited when she came to do her LL.M. because she was the first LL.M. student during my time here to write her thesis in the water law area. I thoroughly enjoyed working with her on that project, and better yet, she saved me from reading yet another thesis about CERCLA¹⁴ or RCRA.¹⁵ Barb arrived pretty much fully formed. She'd been doing water law in Montana for ten years and she had a clear vision of what she wanted to do in our program. I felt like we were colleagues from the beginning. All I had to do was keep nodding my head and encouraging her along the way.

Not to be patronizing, but I just want to say how proud I am of all three of you, and how honored I am to have you here today. You are all way better at this gig than I could ever be, and you represent the tip of the iceberg of all the amazing and wonderful students I've had the privilege of dealing with for the past two decades.

Now I want to broaden my comments to include the rest of the speakers in this symposium. Buzz¹⁶ and Jonathan,¹⁷ I know you more through your writing than personally, but I hugely respect and enjoy your scholarship. You have contributed so much to the important ongoing water law debates. The rest of you I know pretty well. Bo¹⁸—even though he may not realize it—was one of the first people many years ago who made me feel totally welcome in the fraternity of the Natural Resources Law Teachers Institute gatherings. I appreciated that collegial warmth immensely in my early days with that group. Dan¹⁹ and I had the privilege of working together on the Western Water Policy Review Advisory Commission, and we shared

¹⁴ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006).

¹⁵ Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2006) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).

¹⁶ Barton H. Thompson, Jr., *A Federal Act to Promote Integrated Water Management: Is the CMZA a Useful Model?*, 42 ENVTL. L. 201 (2012).

¹⁷ Jonathan H. Adler, *Water Rights, Markets, and Changing Ecological Conditions*, 42 ENVTL. L. 93 (2012).

¹⁸ Robert Haskell Abrams, *Legal Convergence of East and West in Contemporary American Water Law*, 42 ENVTL. L. 65 (2012).

¹⁹ A. Dan Tarlock, *The Legacy of Schodde v. Twin Falls Land and Water Company: The Evolving Reasonable Appropriation Principle*, 42 ENVTL. L. 37 (2012).

lots of fun and frustration on that project. I also remember emailing him once to say “Darn it! Whenever I get an idea for an article to write, as soon as I do a quick literature search, I find out you’ve already written it!” He responded by saying that he always felt that way about Frank Trelease, but you just had to go ahead and write it your own way. To think that I might join in that lineage even indirectly was pretty heady.

Reed²⁰ was never a student of mine, but I somehow always considered him a mentee of sorts, since I knew him well before his transition into academia and participated a tiny bit in that transition by having him teach Water Law for me when I was on a sabbatical many years ago. Since then, both our friendship and our collegial relationship have just continued to grow. Sandi²¹ and I hit it off immediately when we first met at a Natural Resources Law Teachers Institute meeting in Nevada, and have been close friends since, enjoying visits to each others’ homes, walks on the beach at the San Diego water law conference, and many hours of conversation over coffee and wine. And, of course, Mike²² and Jim,²³ who’ve been colleagues to me all these years. I’ve learned so much from both of them—as you can imagine, each from their own unique perspective.

You are all much more prolific and profound scholars than I could ever be, and I admire you all tremendously. I’ve read many of your works and I’m amazed at your output. You’ve all done a great deal for the field of water law (and in Jim’s case, chicken law²⁴ as well!). Thank you for all of your contributions to the field and especially for coming today. I feel truly honored.

Now, with all due modesty, I want to offer a few thoughts about water and water law in the twenty-first century—the actual focus of this symposium. Let me start with the basics: drinking water. We take for granted in this country the clean and abundant drinking water that comes to us at the turn of a tap. We also take for granted what happens at the other end of the pipe—the best wastewater treatment in the world. Clean water and sanitation are crucial to our public health, our quality of life, and our economic prosperity. But most of the infrastructure that brings us the water and carries away the waste was built many, many decades ago, and is seriously in need of repair and replacement.²⁵ Nationwide, we face

²⁰ Reed D. Benson, *Public Funding Programs for Environmental Water Acquisitions: Origins, Purposes, and Revenue Sources*, 42 ENVTL. L. 265 (2012).

²¹ Sandra Zellmer, *Wilderness, Water, and Climate Change*, 42 ENVTL. L. 313 (2012).

²² Michael C. Blumm & Erika Doot, *Oregon’s Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 ENVTL. L. 375 (2012).

²³ James L. Huffman, *Against the Current: Four Decades in Water Law and Policy*, 42 ENVTL. L. 19 (2012).

²⁴ See James L. Huffman, *Chicken Law in an Eggshell: Part III—A Dissenting Note*, 16 ENVTL. L. 761 (1986).

²⁵ Am. Soc’y of Civil Eng’rs, *Report Card for America’s Infrastructure: Wastewater*, <http://www.infrastructurereportcard.org/fact-sheet/wastewater> (last visited Feb. 6, 2012). Wastewater treatment upgrades are needed not just to treat traditional pollutants, but also to deal with new and emerging pollutants such as caffeine, pharmaceuticals, and hormone disruptors.

infrastructure investment needs of \$255 billion.²⁶ Oregon Congressman Earl Blumenauer introduced legislation in 2009 to address these needs, proposing a tax (yes, he even used that word!) on water-using products to pump up the funds in the Safe Drinking Water Revolving Fund for beginning the needed repairs and replacements.²⁷ As you can imagine, with the competing demands of health care, the deficit, defense spending, and general economic turmoil, the bill has not gained any traction. But the problem isn't going to go away, and we'll need to deal with the aging, leaking infrastructure before sudden failures put communities in crisis mode.

If the government can't or won't fund water infrastructure, water suppliers may yet turn to privatization, though such efforts have been rebuffed in many communities in recent years. Private companies supply other essential materials such as electricity and natural gas without public outcry, but many people still remain adamantly opposed to private water utilities. Citizens will be forced to bite the bullet soon—either choosing to fund repair and replacement or to turn over water and wastewater treatment to the private sector.

At the same time, municipalities will need to keep exploring what Peter Gleick of the Pacific Institute calls the “soft path” for water.²⁸ Instead of huge, built infrastructure that supplies drinkable water for every purpose, whether needed or not, and then cleans up the resulting wastewater with expensive technology, communities will need to pursue lower-tech, decentralized, “green” infrastructure—including such simple projects as rainwater harvest, streetside swales, and greywater reuse.²⁹ Communities are already becoming much more cognizant of protecting natural capital and ecosystem services, such as the clean drinking water produced by a healthy, undeveloped watershed, rather than investing in replicating those services through expensive man-made projects.³⁰

While we appropriately fret over our own water problems in the developed world, we would do well in the twenty-first century to worry about the water problems of the developing world as well. Billions of people lack clean drinking water and proper sanitation.³¹ As a result, waterborne

²⁶ *Id.*

²⁷ *H.R. 3202 – The Water Protection and Reinvestment Act*, http://blumenauer.house.gov/index.php?option=com_content&task=view&id=1539&Itemid=167 (last visited Feb. 6, 2012). Congressman Blumenauer graduated from Lewis & Clark Law School in 1976 and received the law school's Distinguished Alumni Award in 2004. Lewis & Clark Coll., *Chronicle: Blumenauer and Kobayashi Honored*, <http://legacy.lclark.edu/dept/chron/lawhonorsw04.html> (last visited Feb. 18, 2012).

²⁸ Peter H. Gleick, *Global Freshwater Resources: Soft-Path Solutions for the 21st Century*, 302 SCIENCE 1524, 1526 (2003), available at http://www.pacinst.org/topics/water_and_sustainability/soft_path/science_112003.pdf.

²⁹ *Id.* at 1526–27.

³⁰ See, e.g., Dave Cosman et al., *How Water Utilities Can Spearhead Natural Capital Accounting*, SOLUTIONS, Jan. 2012, <http://www.thesolutionsjournal.com/node/1018> (last visited Feb. 6, 2012).

³¹ Janet Neuman, *Chop Wood, Carry Water: Cutting to the Heart of the World's Water Woes*, 23 J. LAND USE & ENVT'L L. 203, 206 (2008).

diseases kill millions of people every year, most of them children under five.³² Making water diplomacy a bigger part of our foreign aid programs would deliver humanitarian aid where it's needed the most and where it could be most effective in improving the future for millions of people, earning us friends around the world at a time when we could use some. Water should become an active and central feature of our larger foreign policy.

Is water a commodity that should be treated like any other good, given a price and moved by markets? Or is it "special" somehow, better treated as a public good and regulated accordingly? Yes and yes; water is both an important commodity that would often benefit tremendously from being subjected to market forces *and* a very important common resource that requires management for the common good. One thing that Jim and I completely agree on is that incentives matter tremendously in natural resource policy and management and that putting a price on water would very quickly stop wasteful uses of it (such as flood irrigation of low-value crops in very arid areas). But water must also be recognized and protected for its tangible and intangible values *in situ* as well as for critical consumptive needs that are well suited to being part of a marketplace.

In the beginning of the twenty-first century, we're struggling with the difficult process of deciding what uses of water we can no longer afford to subsidize and incentivize, and what new uses we may want to encourage instead. The transition will continue to be bumpy, with arguments about where the proper boundary is between the publicly owned common resource and the usufructuary rights that have been granted to private parties, between the in-place values of water and the consumptive values, and between present uses and future uses. Wherever the line is drawn, it must be drawn somewhere, since the water resource is finite, and it's a matter of division rather than multiplication.

As Jim's poem says, "our choices are few . . . we can move to the water, or bring it to us, or conserve in what we do."³³ I think the next few decades will bring more of the first and the third option, and less of the second. We absolutely must work on conservation, particularly in the agricultural sector, because that's where the water is. I believe we also need to craft water policy to recognize natural limits and carrying capacity, instead of assuming that we can continue to encourage unlimited urban development and irrigation in the driest places on earth. In past centuries, our water policies incentivized those practices; in this century, we need different incentives and different practices.

Another thing we need in twenty-first century water law is leadership. We need a Steve Jobs of water policy—someone creative and innovative, who can think way outside the box about ways to modernize water management. We need to use "hardware," such as science, economics, and technology—both high and low. But we also need to use "software" like

³² *Id.* at 206–07.

³³ Huffman, *supra* note 23, at 26.

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collaboration, communication, respect, and compassion. All of these are critical to designing effective water law and policy for the next hundred years. I wouldn't be a bit surprised to see some of my former students emerge as the water leaders we need. I'll be watching for them, and I'll be bursting with pride, just as I have been every day for the last two decades. Thank you all for joining me on this journey.