

TRIBUTE

THE WATER LAW SCHOLARSHIP OF JIM HUFFMAN AND JANET NEUMAN: PROLOGUE TO THE FESTSCHRIFT

BY
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Jim Huffman and Janet Neuman have both been prolific water law scholars for many years. Jim began his water law writings in the 1970s and has assured us that he will not cease in his retirement from teaching. Janet began her scholarship in the 1990s and actually was accelerating her scholarship at the time of her retirement. Like Jim, she insists that she will remain a prominent figure in the water law journal literature. And her magnum opus, her treatise on Oregon water law, has just been published.¹

I cannot in this space be as comprehensive as Jan's treatise, although appended to these remarks are lists of each of their water writings.² Here, I survey selected articles to supply a flavor of the themes that animated their work over the years.

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¹ JANET C. NEUMAN, OREGON WATER LAW: A COMPREHENSIVE TREATISE ON THE LAW OF WATER AND WATER RIGHTS IN OREGON (2011).

² Jan's scholarship centered on water law, but Jim's was more broad-ranging, including matters of constitutional law, see, e.g., James Huffman, *The Commerce Clause and State-Owned Resources*: South-Central Timber v. LeResche, W. NAT. RESOURCE LITIG. DIGEST, Winter 1984, at 36; environmental law, see, e.g., James L. Huffman, *The Past and Future of Environmental Law*, 30 ENVTL. L. 23 (2000); and even natural disaster law, see, e.g., JAMES HUFFMAN, GOVERNMENT LIABILITY AND DISASTER MITIGATION: A COMPARATIVE STUDY (1985). Moreover, Jim is the foremost scholar of the often-overlooked subject of chicken law. See James L. Huffman, *Chicken Law in an Eggshell: Part III—A Dissenting Note*, 16 ENVTL. L. 761 (1986).

I. JIM HUFFMAN'S WATER LAW SCHOLARSHIP

Jim Huffman has long been an iconoclastic advocate for private property rights, including water rights. He remains deeply skeptical of government regulation of private rights, and he claims that public rights do not—or should not—exist. For Jim, the quintessential normative scholar, the invisible hand of the private market is omnipresent and benign. Government interference with the workings of markets, in Jim's view, almost always leads to perverse results or unintended consequences. He has always been willing to challenge those who would defend government intervention or regulation.³

Jim has been less interested in explaining what the law is than in criticizing existing doctrine and arguing for reform. His project is to change the law, change the underlying philosophy, and change the country! Jim is in short a revolutionary scholar.

So, I suppose it was no surprise that Jim would seek to enact his vision of the good by running for political office. Maybe the surprise was he won the Republican nomination for the United States Senate in 2010 so easily,⁴ and he then proceeded to collect nearly forty percent of the vote in the general election against an entrenched incumbent.⁵

Even those who did not share Jim's vision had to admire his courage in leaving the academic world for the political. But actually, Jim's career has always been trailblazing. His deanship—the longest in the modern history of Lewis and Clark Law School—was characterized by innovation: he was always encouraging the faculty to try new things, to arrange conferences or visits, to found law reviews, and to establish moot court competitions. As dean, Jim was a facilitator, an activist, in the best sense that term.⁶ And Dean Huffman was non-ideological in that role.

But a sampling of Jim's water law scholarship shows that Jim's non-ideological approach to his deanship did not characterize his scholarship. The vast majority of his writings contain a distinct point of view: he

³ See, e.g., James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y FORUM 1 (2007) [hereinafter Huffman, *Speaking of Inconvenient Truths*].

⁴ Jim, for example, made no secret of the fact that he was pro-choice on abortion rights, unusual for a successful Republican nominee in the 21st century. See Jim Geraghty, *Because This Man Can Get Oregon's Economy on the Rebound*, NAT'L REV. ONLINE, May 17, 2010, <http://www.nationalreview.com/campaign-spot/55671/because-man-can-get-oregons-economy-rebound> (last visited Feb. 18, 2012).

⁵ *Oregon Election Results 2010*, N.Y. TIMES, <http://elections.nytimes.com/2010/results/oregon> (last visited Feb. 18, 2012).

⁶ See Ronald B. Lansing, *The Crowning of Hearts: A Tribute to Dean Huffman*, 37 ENVTL. L. i (2007); Michael C. Blumm, *The Bow-Tie Era of Lewis and Clark Law School: Dean Jim Huffman, 1993–2006*, 37 ENVTL. L. v (2007); William Funk, *A Tribute to Dean James Huffman*, 37 ENVTL. L. ix (2007); Susan F. Mandiberg, *Jim Huffman: Free Market and Laissez Faire in the Dean's Office, 1993–2006*, 37 ENVTL. L. xiii (2007); Brian A. Blum, *Jim Huffman: A Scholar Exceeding Wise, Fair-Spoken, and Persuading*, 10 LEWIS & CLARK L. REV. 727 (2006); Edward Brunet, *A Tribute to Jim Huffman, Teacher*, 10 LEWIS & CLARK L. REV. 729 (2006); John R. Kroger, *Tribute to Jim Huffman*, 10 LEWIS & CLARK L. REV. 731 (2006).

persistently argues for the primacy of private rights. Jim may in fact be the principal advocate in the legal academy of “free market environmentalism.”⁷

Turning to his water law writing, Jim’s first substantial contribution was a multivolume analysis of instream flows in the Pacific Northwest,⁸ a comparative analysis that still provides useful information thirty years later. A few years later, Jim levied his first sustained criticism of the public trust doctrine in an article that critiqued the writing of four prominent water law scholars: Professors Joseph Sax, Charles Wilkinson, Hap Dunning, and Ralph Johnson, all of whom he named in the title to the article.⁹ Adopting a “Langdellian methodology”—by which he meant looking closely at the case law to determine what the law is—he accused all four scholars of not taking a hard look at the public trust doctrine case law and instead invoking their own personal preferences about the trust doctrine.¹⁰ Jim, who is quite skeptical of both public rights and judicial lawmaking, claimed that the public trust doctrine is a poor remedy for the failure of public allocation of natural resources; instead, he argued that improvements should come through using the private rights system of allocation.¹¹ Thus began a long strand of Jim’s scholarship critical of the public trust doctrine.

In a 1987 article, Jim added the reserved rights doctrine to his criticism of the public trust doctrine, referring to both as myths.¹² He claimed that both circumvented the Constitution’s Takings Clause by trumping private rights with prior public rights.¹³ The effect, he maintained, was to allow judges to unconstitutionally reallocate property rights.¹⁴

A couple of years later, Jim claimed that the public trust doctrine was “a fish out of water” and began to question the historical legitimacy of the doctrine.¹⁵ He also claimed that the doctrine conflicted with the principles of constitutional democracy.¹⁶ Like the formalists of the nineteenth century, Jim attempted to fit the public trust doctrine into a category; in this case, as

⁷ See, e.g., James L. Huffman, *Protecting the Environment from Orthodox Environmentalism*, 15 HARV. J.L. & PUB. POL’Y 349, 349, 353–54 (1992).

⁸ 1 JAMES L. HUFFMAN ET AL., *THE ALLOCATION OF WATER TO INSTREAM FLOWS: A COMPARATIVE STUDY OF POLICY MAKING AND TECHNICAL INFORMATION IN THE STATES OF COLORADO, IDAHO, MONTANA AND WASHINGTON* (1980); 2 JAMES L. HUFFMAN ET AL., *THE ALLOCATION OF WATER TO INSTREAM FLOWS: COLORADO WATER RESOURCES MANAGEMENT* (1980); 3 JAMES L. HUFFMAN ET AL., *THE ALLOCATION OF WATER TO INSTREAM FLOWS: IDAHO WATER RESOURCES MANAGEMENT* (1980); 4 JAMES L. HUFFMAN ET AL., *THE ALLOCATION OF WATER TO INSTREAM FLOWS: MONTANA WATER RESOURCES MANAGEMENT* (1980); 5 JAMES L. HUFFMAN ET AL., *THE ALLOCATION OF WATER TO INSTREAM FLOWS: WASHINGTON WATER RESOURCES MANAGEMENT* (1980).

⁹ James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565 (1986).

¹⁰ *Id.* at 568–69.

¹¹ *Id.* at 582–83.

¹² James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVT. L. 171 (1987).

¹³ *Id.* at 174.

¹⁴ *Id.* at 209.

¹⁵ James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVT. L. 527 (1989).

¹⁶ *Id.* at 533, 565–68.

a traditional private trust.¹⁷ He claimed that it did not fit that category because if the public were the equivalent of the settlor—the founder of the trust—they are also its beneficiaries, and in trust law the settlor and the beneficiaries must be separate entities.¹⁸ Thus, according to Jim, the public trust is no trust at all.¹⁹

Jim also challenged the public trust doctrine by claiming that there exist no individual or public rights in the environment.²⁰ He did acknowledge that the trust doctrine could be embedded in state constitutions,²¹ but claimed that it could not disturb vested property rights—as he alleged the Montana public trust doctrine had done,²² a particular source of irritation to this native Montanan.

In 1991, in response to Charles Wilkinson's apocryphal entombment of the prior appropriation doctrine,²³ Jim wrote an amusing reply.²⁴ Writing as the personification of Mr. Prior Appropriation from Twodot, Montana, Jim claimed that the doctrine of prior appropriation was just "a simple, but damn good, idea" for allocating scarce water resources in the West.²⁵ Jim accused the "gov'ment" and "fuzzy headed bureaucrats and politicians" of abusing the doctrine and attempting to use notions of the public interest to get allocations of water without compensating prior users.²⁶

Jim proceeded to celebrate Federal Circuit Judge Jay Plager's takings opinions in two cases from Florida in 1994, referring to them as ushering in a "sea change" in takings jurisprudence.²⁷ Plager found takings in both cases largely by rejecting the balancing called for by the Supreme Court's decision in *Penn Central Transportation Co. v. New York City*²⁸ in favor of extending the application of the Court's decision in *Lucas v. South Carolina Coastal Council*,²⁹ which created a new, categorical, per se type of unconstitutional takings. However, that extension was later apparently rejected by the Court in the *Lake Tahoe* case.³⁰

¹⁷ *Id.* at 532–33.

¹⁸ *Id.* at 534–45.

¹⁹ *Id.* at 544.

²⁰ *Id.* at 545 ("The federal constitution says nothing of individual or public rights in the environment or in the use of particular resources . . .").

²¹ *Id.* at 547.

²² *Id.* at 548 (referring to *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984); and *Mont. Coal. for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088 (Mont. 1984)).

²³ Charles F. Wilkinson, *In Memoriam: Prior Appropriation 1848–1991*, 21 ENVTL. L. v (1991).

²⁴ James L. Huffman, *Clear The Air*, 21 ENVTL. L. 2253 (1991).

²⁵ *Id.* at 2255.

²⁶ *Id.* at 2256.

²⁷ James L. Huffman, *Judge Plager's "Sea Change" in Regulatory Takings Law*, 6 FORDHAM ENVTL. L.J. 597, 599, 617 (1995) [hereinafter Huffman, *Sea Change*] (citing *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), and *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994)).

²⁸ 438 U.S. 104 (1978); Huffman, *Sea Change*, *supra* note 27, at 602, 612.

²⁹ 505 U.S. 1003 (1992); Huffman, *Sea Change*, *supra* note 27, at 602, 612.

³⁰ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002).

Applauding Plager's "no balancing" approach, Jim nonetheless criticized the Judge's assumption that some economic losses are not takings.³¹ He claimed that an invigorated takings clause would not mean less environmental regulation, merely providing just compensation to landowners.³² This assertion is apparently undercut by the results of Oregon's statutory compensation scheme for landowners, which in practice has proved to be a large-scale deregulatory scheme.³³

Jim's next foray into water law jurisprudence was a full-scale assault on the historical legitimacy of the public trust doctrine. He contended that "an inconvenient truth" was that neither Roman nor English law recognized the doctrine as an antiprivatization mechanism.³⁴ He proceeded to cite examples of privatization of submerged lands in both Rome and England.³⁵ Interestingly, Jim agreed with the nineteenth century expansion of the public trust doctrine from tidal to navigable-in-fact waters,³⁶ but he vehemently opposed the twentieth century evolution of the doctrine to include recreational waters and environmental protection.³⁷

In other articles published between 2004 and 2009, Jim persistently opposed federal control of waters and promoted water transfers and water marketing, while also criticizing central planning like river basin governance and dismissing public ownership of water.³⁸ He was also skeptical of "stakeholder" rights because they might give equal status to those who do not possess property rights in water, which he thought could produce stalemates and vetoes.³⁹ Interestingly enough, although opposed to most

³¹ Huffman, *Sea Change*, *supra* note 27, at 602–03.

³² *Id.* at 616.

³³ See JOHN D. ECHEVERRIA, GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE, PROPERTY VALUES AND OREGON MEASURE 37: EXPOSING THE FALSE PREMISE OF REGULATION'S HARM TO LANDOWNERS 2–3 (2007), available at <http://www.law.georgetown.edu/gelpi/GELPI Measure37Report.pdf>. Passed in 2004, Oregon Measure 37 requires the government to compensate landowners for any adverse effects of regulations or waive enforcement of the regulation. *Id.* at 4.

³⁴ Huffman, *Speaking of Inconvenient Truths*, *supra* note 3, at 18, 22–23.

³⁵ *Id.* at 18–19, 25–29. But of course the public trust doctrine has never forbidden all privatizations, as is evident from the Supreme Court's *Illinois Central Railroad Co. v. Illinois* decision, 146 U.S. 387 (1892), which Jim acknowledged in this article. *Id.* at 50. Nor did Professor Sax's famous article on the public trust doctrine. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

³⁶ Huffman, *Speaking of Inconvenient Truths*, *supra* note 3, at 95–97.

³⁷ *Id.* at 96, 101.

³⁸ James L. Huffman, *Comprehensive River Basin Management: The Limits of Collaborative, Stakeholder-Based Water Governance*, 49 NAT. RESOURCES J. 117, 148–49 (2009) [hereinafter Huffman, *Comprehensive River Basin Management*] ("Comprehensive river basin management is not the solution to water allocation and distribution in the United States . . . Rights-based institutions . . . are far more likely to succeed."); James L. Huffman, *The Federal Role in Water Resource Management*, 17 N.Y.U. ENVTL. L.J. 669, 700 (2008) [hereinafter Huffman, *Federal Role*] ("Congress should enact legislation declaring its intention that there be a national market in water . . ."); James L. Huffman, *Water Marketing in Western Prior Appropriation States: A Model for the East*, 21 GA. ST. U. L. REV. 429, 429 (2004) ("[T]he future will lead to more water marketing and, as a result, to better use and protection of scarce water resources.").

³⁹ Huffman, *Comprehensive River Basin Management*, *supra* note 38, at 146.

federal initiatives, Jim supported federal legislation that would preempt state laws imposing barriers to water marketing.⁴⁰ Moreover, his opposition to all federal subsidies contained an exception for municipal water supplies in low-income areas, and he also endorsed federal efforts to clarify the scope of Indian reserved rights as well as federal research into water conservation measures.⁴¹

Overall, Jim has certainly earned his reputation as the Darth Vader of the public trust doctrine,⁴² which he sees as an unlawful interjection of public control of water resources better left to the private market. His support for water markets through private transfers extends so far as to support federal preemption of state laws.⁴³ And of course his principal academic interest—expanding compensation duties of government to private property holders, including water rights owners⁴⁴—has spilled over beyond the academic world, as he successfully defended the constitutionality of Measure 37, Oregon’s statutory compensation scheme for certain landowners,⁴⁵ before the Oregon Supreme Court.⁴⁶

II. JANET NEUMAN’S WATER LAW SCHOLARSHIP

In contrast to the iconoclastic private rights advocacy of Jim Huffman’s scholarship, Janet Neuman’s writings are more measured, textured, and more moderate in tone. She writes frequently about collaboration, consensus, and conciliation. In short, hers is a kinder, gentler scholarship.

A good example of Jan’s scholarship is her 1996 article on the Umatilla Tribe’s efforts to negotiate an agreement to reallocate water from the Columbia River to the Umatilla Basin for groundwater recharge benefiting both irrigators and salmon runs.⁴⁷ Explaining the mediation process that

⁴⁰ Huffman, *Federal Role*, *supra* note 38, at 700 (“State property rights laws have provided a critical part of the infrastructure necessary to American commerce They can do the same for water markets, but only if the federal government prevents states from creating and maintaining barriers to interstate commerce in water.”).

⁴¹ *Id.* at 698–99, 701–02.

⁴² See Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 597 n.108 (1989) (“Professor Huffman’s frequent criticisms of the public trust . . . have earned him the reputation of being the Darth Vader of the public trust.”).

⁴³ See Huffman, *Federal Role*, *supra* note 38, at 700.

⁴⁴ See, e.g., James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After Lucas*, 35 ECOLOGY L.Q. 1 (2008); James L. Huffman, *Dolan v. City of Tigard: Another Step in the Right Direction*, 25 ENVTL. L. 143 (1995); James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171 (1987).

⁴⁵ OR. REV. STAT. § 195.305 (2011).

⁴⁶ *MacPherson v. Dep’t of Admin. Servs.*, 130 P.3d 308, 322 (Or. 2006) (en banc). For a critical review of Measure 37 and the initiative, Measure 49, which restricted its scope, see Michael C. Blumm & Erik Grafe, *Enacting Libertarian Property: Oregon’s Measure 37 and Its Implications*, 85 DENV. U. L. REV. 279 (2007).

⁴⁷ Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy—For a Time*, 67 U. COLO. L. REV. 259, 271–72 (1996).

produced the agreement in detail, she concluded that mediation was a viable alternative to litigation, and especially good at establishing working arrangements that are necessary to implement complex outcomes over time.⁴⁸ She did express concerns that such mediated settlements lacked a definition of the “public interest” and could not fairly represent nonparties to the mediation.⁴⁹

A couple of years later, in a major contribution to water law scholarship, Jan thoroughly investigated the history and contemporary significance of the beneficial use requirement in western water law and the related doctrines of waste and forfeiture.⁵⁰ She explained that the beneficial use doctrine was originally aimed at preventing speculation and asserted that the requirement to continually demonstrate beneficial use by water rights holders had largely achieved this goal.⁵¹ But because the West of the twenty-first century faces many challenges in terms of transfers of water to possessors of concentrated wealth, she defended restrictions on water transfers.⁵² She explained that water is in fact different from other commodities, due to its scarcity, its importance to communities, and the dangers of accumulated power.⁵³ Maintaining that the existence of the beneficial use requirement in all jurisdictions reflected the public ownership of water,⁵⁴ Jan argued that the interpretation of beneficial use and waste must evolve in the twenty-first century to ensure efficient use by rights holders of scarce water supplies.⁵⁵

In a 1999 article, Jan explained the history, development, and challenges of the Oregon Water Trust,⁵⁶ something which she knew firsthand as president of the nonprofit, which seeks to improve instream flows in the state through market transactions.⁵⁷ She described the economic and scientific challenges of putting more water in the state’s streams, including the need to develop in-house scientific expertise to quantify the benefits of

⁴⁸ *Id.* at 333–34.

⁴⁹ *Id.* at 333.

⁵⁰ Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919 (1998).

⁵¹ *Id.* at 963–64, 968.

⁵² *See id.* at 971–72.

⁵³ *Id.* at 973–74.

⁵⁴ *Id.* at 994.

⁵⁵ *Id.* at 987 (“Significant gains could be made in the efficiency of western water use if the courts began holding water use practices and customs accountable to the reality of water demands in the 1990s and beyond.”).

⁵⁶ Janet C. Neuman & Cheyenne Chapman, *Wading Into the Water Market: The First Five Years of the Oregon Water Trust*, 14 J. ENVTL. L. & LITIG. 135, 136 (1999). Jan later updated the article in Janet C. Neuman, *The Good, the Bad, and the Ugly: The First Ten Years of the Oregon Water Trust*, 83 NEB. L. REV. 432 (2004).

⁵⁷ Freshwater Trust, *Homepage*, <http://www.thefreshwatertrust.org/> (last visited Feb. 18, 2012). The Freshwater Trust was formed in 2009 out of a merger between the Oregon Water Trust and Oregon Trout. Freshwater Trust, *History*, <http://www.thefreshwatertrust.org/about-us/history> (last visited Feb. 18, 2012).

increased flows.⁵⁸ Just as she mentored countless students over the years, she concluded her article with detailed advice to potential water trust start-ups in other states.⁵⁹

In a 2001 article on federal water policy, Jan, who served on the Western Water Policy Review Advisory Commission from 1995 to 1998,⁶⁰ argued that development of a coherent federal water policy was something whose time had finally come.⁶¹ She thought a federal water policy was necessary to 1) avoid inter-jurisdictional problems, 2) respond effectively to water scarcity, and 3) safeguard the historic investment of considerable amounts of federal money in water resources.⁶² She investigated some of the past difficulties of implementing a coherent federal water policy—including some federal–state and interfederal conflicts⁶³—and she posited a new federal policy that would be based on sustainable water use, sensitive to natural watersheds and river basins, premised on the interrelationship between land and water management, and reflective of the “user pays” principle.⁶⁴

Five years later, Jan published a careful review of the State of Oregon’s efforts to protect instream flows.⁶⁵ Historically, these efforts were largely unsuccessful because Oregon limited its authority to protecting waterfalls until 1955, by which time streams in the state were mostly overappropriated.⁶⁶ Even when they were not, instream flow enforcement was nearly nonexistent, as the state did not consider instream flows set administratively to be water rights until after the 1987 Amendments to the Water Code.⁶⁷ But those amendments, by authorizing the establishment of instream water rights that were of the same dignity as diversionary rights,⁶⁸ led to the formation, under Jan’s leadership, of the Oregon Water Trust—now the Freshwater Trust.⁶⁹

The next year, in 2007, Jan published an intriguing article about water conservation techniques in a future predicted to be characterized by water

⁵⁸ Neuman & Chapman, *supra* note 56, at 153–54, 161–63.

⁵⁹ *Id.* at 179.

⁶⁰ The Western Water Policy Review Advisory Commission was formed in order to conduct a comprehensive review of federal involvement in western water issues, including allocation, management, legal matters, and performance of federal agencies. Jan and other members of the Commission were appointed by President Clinton based on their expertise in western water policy. See Denise D. Fort, *The Western Water Policy Review Advisory Commission: Another Look at Western Water*, 37 NAT. RESOURCES J. 909, 909–11 (1997).

⁶¹ Janet C. Neuman, *Federal Water Policy: An Idea Whose Time Will (Finally) Come*, 20 VA. ENVTL. L.J. 107 (2001) [hereinafter Neuman, *Federal Water Policy*].

⁶² *Id.* at 108.

⁶³ *Id.* at 112–16.

⁶⁴ *Id.* at 116.

⁶⁵ Janet C. Neuman, Anne Squier & Gail Achterman, *Sometimes a Great Notion: Oregon’s Instream Flow Experiments*, 36 ENVTL. L. 1125 (2006).

⁶⁶ *Id.* at 1132, 1144.

⁶⁷ *Id.* at 1149–50 (citing the 1987 Amendments to the Water Code, OR. REV. STAT. §§ 537.332–537.360 (2011)).

⁶⁸ OR. REV. STAT. § 537.350 (2011).

⁶⁹ See *supra* note 57.

scarcity.⁷⁰ In this piece, Jan surveyed largely overlooked rainwater collection methods that might be useful in the twenty-first century.⁷¹ She observed that the dam-building era in the West created a myth of water abundance, and that myth led to loss of traditional knowledge about water conservation. Traditional methods include bioswales, rain gardens, and buildings disconnected from stormwater sewers, all of which can be employed to keep stormwater out of rivers.⁷² Jan cited a number of examples of using traditional water conservation knowledge from Texas and New Mexico.⁷³ She recommended increased education concerning traditional methods and government support of rainwater harvesting, and she questioned the wisdom of prohibitions against rainwater harvesting, as exist in Colorado.⁷⁴

In 2008, a paper that Jan delivered, as the distinguished environmental law visitor at Florida State University Law School, reflected on inequities in world water consumption.⁷⁵ Inadequate water supplies, she informed, adversely affect not only environmental quality but also human health and political stability.⁷⁶ Noting the relationship between income inequality and water consumption, she advocated making water availability a priority for foreign aid throughout the world.⁷⁷ She suggested raising funds through a tax on bottled water as well as other fundraising options.⁷⁸

In 2010, Jan reviewed water policy reform efforts as far back as 1808 and their failures, mostly due to opposition to reform by interest groups benefiting from the status quo.⁷⁹ She suggested that contemporary reformers should work on the creation of new stakeholder coalitions that, for example, include environmentalists, fishers, farmers, and tribes, and she argued for

⁷⁰ Troy L. Payne & Janet Neuman, *Remembering Rain*, 37 ENVTL. L. 105 (2007). Also in 2007, Jan published an article proposing an ecological services model for managing the Tillamook State Forest that would involve a “re-forestation” approach to management. Janet Neuman, *Thinking Inside the Box: Looking for Ecosystem Services Within a Forested Watershed*, 22 J. LAND USE & ENVTL. L. 173, 175 (2007) [hereinafter Neuman, *Thinking Inside the Box*]. After discussing the history of the forest, growing out of the forest fires of the 1930s, she described the current multiple management of the forest as “spending down the principal” natural capital of the forest. *Id.* at 185–86. By contrast, the reforms she proposed would require the forest’s natural capital to be preserved, protecting the ecological functions of the forest, including wildlife habitat, recreation, and community water supply. *Id.* at 194–95.

⁷¹ Payne & Neuman, *supra* note 70, at 108.

⁷² *See id.* at 128.

⁷³ *Id.* at 134.

⁷⁴ *Id.* at 134–35.

⁷⁵ Janet Neuman, *Chop Wood, Carry Water: Cutting to the Heart of the World’s Water Woes*, 23 J. LAND USE & ENVTL. L. 203 (2008).

⁷⁶ *Id.* at 206–13.

⁷⁷ *Id.* at 240.

⁷⁸ *Id.* at 237. Jan also suggested alternatives, such as a voluntary contribution on tax returns, congressional appropriation, or a fee on international currency transactions. *Id.* at 237–38.

⁷⁹ Janet Neuman, *Are We There Yet? Weary Travelers on the Long Road to Water Policy Reform*, 50 NAT. RESOURCES J. 139 (2010); *see also* Neuman, *Federal Water Policy*, *supra* note 61.

holistic management reform that would address critical issues such as climate change, economic recession, public health, and homeland security.⁸⁰

In an article published in 2011, Jan revisited the Umatilla Tribes collaborative water use agreement, which she examined earlier in her 1996 article.⁸¹ This time, however, she examined the agreement in the context of the Universal Declaration of Human Rights, which declared that there was an international right to water.⁸² She claimed that the Umatilla agreement represented a successful example of collaboration.⁸³ Jan also explained the success of the agreement as due to 1) its recognition of the sovereign ownership of water, 2) its place-based identity, and 3) local alliances.⁸⁴ More agreements like the Umatilla agreement, she maintained, would keep Indian water disputes out of court.⁸⁵

Over the last dozen years or so, Jan's water law scholarship touched on a rather astonishing array of topics, including adaptive management,⁸⁶ federal bypass flows,⁸⁷ Indian treaty fishing rights and the preclusive effect of Indian Claims Commission decisions,⁸⁸ integrated water and land use planning,⁸⁹ ecosystem services,⁹⁰ water marketing,⁹¹ drought management,⁹²

⁸⁰ Neuman, *Weary Travelers*, *supra* note 79, at 161.

⁸¹ Dena Marshall & Janet Neuman, *Seeking a Shared Understanding of the Human Right to Water: Collaborative Use Agreements in the Umatilla and Walla Walla Basins of the Pacific Northwest*, 47 WILLAMETTE L. REV. 361 (2011). *See supra* notes 47–49 and accompanying text.

⁸² Comm. on Econ., Soc. & Cultural Rights, U.N. Econ. & Soc. Council, Geneva, Switz., Nov. 11–29, 2002, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), *available at* http://www2.ohchr.org/english/issues/water/docs/cescr_gc_15.pdf (explained in Marshall & Neuman, *supra* note 81, at 364–65).

⁸³ Marshall & Neuman, *supra* note 81, at 402.

⁸⁴ *Id.*

⁸⁵ *Id.* at 403.

⁸⁶ Janet C. Neuman, *Adaptive Management: How Water Law Needs to Change*, 31 *Envtl. L. Rep. (Envtl. L. Inst.)* 11,432 (2001).

⁸⁷ Janet C. Neuman & Michael C. Blumm, *Water for National Forests: The Bypass Flow Report and the Great Divide in Western Water Law*, 18 *STAN. ENVTL. L.J.* 3 (1999).

⁸⁸ Janet C. Neuman & Michelle E. Smith, *Keeping Indian Claims Commission Decisions in Their Place: Assessing the Preclusive Effect of ICC Decisions in Litigation Over Off-Reservation Treaty Fishing Rights*, 31 *U. HAW. L. REV.* 475 (2009).

⁸⁹ Janet C. Neuman, *Dusting Off the Blueprint for a Dryland Democracy: Incorporating Watershed Integrity and Water Availability into Land Use Decisions*, 35 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,236 (2005).

⁹⁰ Neuman, *Thinking Inside the Box*, *supra* note 70.

⁹¹ Janet C. Neuman, *Have We Got a Deal for You: Can the East Borrow from the Western Water Marketing Experience?*, 21 *GA. ST. U. L. REV.* 449 (2004).

⁹² Janet C. Neuman, *Drought Proofing Water Law*, 7 *U. DENV. WATER L. REV.* 92 (2003).

and water rights forfeiture.⁹³ She also managed to find time to review one of Wallace Stegner's books.⁹⁴

Jan's latest piece of scholarship is her most comprehensive, her treatise on Oregon water law.⁹⁵ This is indeed a comprehensive treatise; it includes not only technical details of Oregon water law,⁹⁶ but also discussions of reserved rights, the public trust doctrine, federal and state navigability, beach access, and even the mysterious navigation servitude.⁹⁷ She also examines Oregon water law's interactions with federal environmental laws like the Endangered Species Act.⁹⁸ Interestingly, she includes "conclusions" in her chapters,⁹⁹ a reflection not only of an attempt to make the work accessible to the nontechnical reader, but also an opportunity for mild editorializing. Among the latter is an endorsement of new policies that are "integrated, flexible, progressive, and based on economic common sense."¹⁰⁰ Her view of water is that of a community resource, where the community comprises not only current rights holders, but also present and future generations of humans, wildlife, and the environment as a whole.¹⁰¹

This brief look at Jan's scholarship shows her to be a voice for collaboration, for cooperation, for integration, and for holistic management approaches. Unlike Jim, Jan does not view water as principally a transferable economic commodity. For her, water is part of the ecosystem, a component of the landscape, and has a place-based identity. In contrast to her colleague, she's not a revolutionary; she instead argues for evolutionary change. But she does also seek water law change—and she's been instrumental in using water markets in this state to produce change,¹⁰² something Jim would surely applaud.

⁹³ Janet C. Neuman & Keith Hirokawa, *How Good Is an Old Water Right? The Application of Statutory Forfeiture Provisions to Pre-Code Water Rights*, 4 U. DENV. WATER L. REV. 1 (2000).

⁹⁴ Janet C. Neuman & Pamela G. Wiley, Book Review, *Hope's Native Home: Living and Reading in the West—A Review of Wallace Stegner's Where the Bluebird Sings to the Lemonade Springs: Living and Writing in the West*, 24 ENVTL. L. 293 (1994).

⁹⁵ NEUMAN, *supra* note 1.

⁹⁶ Jan's treatise builds on her long-time authorship of the Oregon chapter in the multivolume water law treatise. See Janet C. Neuman, *Oregon*, in 4 WATERS AND WATER RIGHTS (Robert E. Beck & Amy K. Kelly eds., 3d ed. 2010) (Oregon state survey).

⁹⁷ NEUMAN, *supra* note 1, at 113–27 (reserved rights); *id.* at 224–35 (public trust doctrine); *id.* at 214–17 (federal and state navigability); *id.* at 235–38 (beach access); *id.* at 238–41 (navigation servitude).

⁹⁸ *Id.* at 250 (Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006 & Supp. IV 2010)); see also *id.* at 243 (Clean Water Act, formally the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006)); *id.* at 247 (Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j-26 (2006)).

⁹⁹ See, e.g., *id.* at 30, 56, 111, 127, 158, 175, 211, 241, 261, 270.

¹⁰⁰ *Id.* at 270.

¹⁰¹ *Id.* at 262–70.

¹⁰² See *supra* notes 56–64 and accompanying text.

III. CONCLUSION

For most of the past four decades, Lewis and Clark law students have had the great privilege to be taught water law by either Jim Huffman or Janet Neuman. They have each changed countless student careers. They've also been prominent water law commentators, although they obviously have decidedly different perspectives on water and, indeed, on natural resources law in general. Although they might be polar opposites in philosophy, they were both great teachers and great mentors. They were also great colleagues whose absence will be deeply felt in the halls of our law school. That they were able to co-exist so seamlessly and so collegially for so long speaks volumes about our school.

May both Jim and Jan continue to be productive and provocative scholars during their early and unexpected retirements from full-time teaching. The articles that follow in this symposium issue are a testament to their influence. The contributions include at least three from former students and several others who have taught alongside both of them. The astounding feature is how eager all the participants were to contribute to a festschrift for Jim and Jan. Not one person decided he or she was too busy to participate. That is quite fitting because neither Jim nor Jan was ever too busy to help out a colleague or a student.