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Changing Currents: Perspectives on the State of Water Law and Policy in the 21st Century

Introduction

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Water, like religion and ideology, has the power to move millions of people.
—Mikhail Gorbachev¹

Water is one of the fundamental forces of nature that has shaped human development. Beyond its purely physical character, it has been central to how people have tried to order their lives relative to nature and one another. Water was elemental to the philosophies of Plato and Aristotle (along with wind, fire, and earth). It is one of the five great elements of Hinduism. For Christians, water can be a medium of spiritual cleansing, while for Mark Twain it is reputed to have been something to fight over (as opposed to whiskey, which is for drinking).

Plainly, water matters to people, and things that matter a lot tend to tempt efforts to explain and control them through laws, a tendency that has only grown as human society has become more complex and trade and property development have grown in importance. Water law in America has changed as the nation has changed. In the early nineteenth century, water law was largely composed of a relative handful of common law doctrines, a few civil code articles that shaped rights in Louisiana and titles originating under French or Spanish law, and the

* © 2010 Mark Davis. Senior Research Fellow and Director, Tulane Institute on Water Resources Law and Policy

1. *Quoted in* PETER SWANSON, WATER: THE DROP OF LIFE 7 (2001).

still-evolving jurisdiction of the federal government's power over admiralty and interstate commerce. Groundwater was so poorly understood that it was pretty much there for the taking.

In the past century and a half we have seen those traditional legal regimes yield to (or be supplemented by) regulatory regimes, systems of prioritized property rights, a broadening role for the federal government, and a more expansive view of water's ecologic role. Those changes have come in fits and starts, for different reasons and often on a state-by-state basis. As a result, America was transformed culturally, economically, and environmentally in ways that are still playing out. But that was just a beginning. Increasingly, the demands for—and on—fresh water supplies portend a coming revolution in how and where water is used and managed. The success or failure of that revolution to meet our needs as a society, and as stewards of our environment, will ultimately be as much a matter of law as it is a matter of science, engineering, and social ethics—indeed perhaps more so. As with any revolution, there will be winners and losers, and the degree to which the ensuing changes fit within our social fabric will in large measure depend on having laws that are forward-looking and tempered by notions of social justice. Those are not necessarily the laws we have today.

This special issue of the *Tulane Environmental Law Journal* offers a glimpse of where we stand today in the area of water law and of where we might be headed, both in the United States and internationally. There is no roadmap for the journey ahead, but the articles in this issue offer some fascinating insights and possibly even some signposts. It is a journey worth planning for; after all, it is one we will share with millions of others.