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A. Dan Tarlock

This Article examines an underappreciated 1912 United States Supreme Court decision, *Schodde v. Twin Falls Land and Water Company*, which refused to enforce a prior appropriation right because it would have required dedicating the entire pre-dam current of the Snake River to lift a small amount of water actually devoted to beneficial use. *Schodde* both cleared a major legal barrier to dam construction and gave rise to the reasonable appropriation rule. After a long period of relative neglect, *Schodde* reemerged as an important precedent as courts, legislatures, and administrative agencies began to appreciate the inefficiencies of prior appropriation in an era of increasing scarcity, a problem that has become more pressing as the region confronts the real stresses of climate change. The case is a classic example of the development of a judicially imposed background limitation on a private property title. This tradition is now in doubt as the United States Supreme Court has opened up the prospect of an aggressive judicial takings doctrine. The Article's basic

argument is that the sensitive way in which courts have applied Schodde illustrates that courts can satisfactorily balance the protection of individual expectations about the use of resources of property with changing conceptions about the best use of resources, without the straightjacket of the Fifth Amendment.

Legal Convergence of East and West in Contemporary American Water Law 65
Robert Haskell Abrams

Legal instrumentalism and legal convergence, two legal constructs, describe how American water law has developed over time. A study of early Eastern and Western water law shows that both systems are instrumentalist at their core and evolved to suit pressing developmental needs. Early on in the East, law was created to protect water use for millers, who used mills to generate power. In the West, riparian systems of the East were rejected in favor of a system that met the needs of settlers in more arid environments. Legal convergence is a concept suggesting that law governing various fields converges over time—the legal solution best adapted to solving a problem becomes the dominant approach. Legal convergence, like instrumentalism, supports the notion that in matters of societal importance, such as allocation of water resources, the law will converge around the most effective solutions. This Article explores a number of more contemporary converging, parallel developments in Eastern and Western water law where both regimes have come together despite their fundamental, underlying differences in water rights formulation. These include integration of surface water and groundwater and obtaining full utilization of the resource, elimination of situs of use restrictions, and protection of instream and other communitarian values—each example demonstrates that both regions are adopting similar responses to reach a common goal to utilize water resources to meet as many water needs as possible. This Article predicts that the next major change in Eastern and Western water law will be a convergent approach to water triage during episodes of regional water shortage.

Water Rights, Markets, and Changing Ecological Conditions 93
Jonathan H. Adler

Conventional environmentalist thought is suspicious of private markets and property rights. The prospect of global climate change, and consequent ecological disruptions, has fueled the call for additional limitations on private markets and property rights. This Essay presents an alternative view. Specifically, this Essay briefly explains why environmental problems generally, and the prospect of changing environmental conditions such as those brought about by climate change in particular, do not counsel further restrictions on private property rights and markets. To the contrary, the prospect of significant environmental changes strengthens the case for greater reliance on property rights and market institutions to address environmental problems, such as the management of fresh water resources.

Defining Riparian Rights as "Property" Through Takings Litigation: Is There a Property Right to Environmental Quality? 115
Robin Kundis Craig

One of the problems with water rights is defining their status as property—whether they are or can be property in the first place and, if so, what their elements or aspects actually are. Takings litigation can and has helped to define the status of water rights as property in a variety of situations. This Article focuses on takings litigation over water rights associated with federal grazing licenses and over riparian rights, detailing how takings litigation has helped to define the nature and scope of the property interests in water rights, increasingly with the aid of state courts. It ends by examining the riparian right to water of a certain quality, suggesting that takings litigation can and should recognize this aspect of riparian rights as a property right, simultaneously aligning riparian owners with environmental protections.

Driving Local Governments to Watershed Governance 157
Keith H. Hirokawa

This Article explores the potential benefits of driving local governments to watershed planning and management by linking the insights of ecosystem services to local interests. Local governments are critical to watershed management because land use regulation determines the places where and manner in which watersheds are impacted, because communities understand watershed management in a very local way, and because local regulation is reflective of the ways that communities interact with watersheds. An ecosystem services-based understanding of local attachment to watershed processes illuminates the essential linkages between watershed governance and the importance watershed services.

A Federal Act to Promote Integrated Water Management: Is the CZMA a Useful Model? 201
Barton H. Thompson, Jr.

Water management in the United States currently suffers from both substantive fragmentation (with different agencies handling different aspects of water management) and geographic fragmentation (with watersheds and water basins divided among multiple agencies). This Article examines whether the federal Coastal Zone Management Act (CZMA) could provide a model for federal legislation promoting greater integration of water management by the states. The CZMA successfully addressed similar fragmentation plaguing coastal management in the early 1970s by encouraging but not mandating statewide management plans, raising the possibility that a similar approach could help reduce fragmentation in the water field. Just as in the coastal context, the federal government has a significant interest in ensuring effective state water management, but a federal mandate that states adopt a more integrated approach to water management would appear unnecessary, unwise, and politically impossible.

Resilience and Law as a Theoretical Backdrop for Natural Resource Management: Flood Management in the Columbia River Basin 241
Barbara Cosens

The 1964 Columbia River Treaty entered by the United States and Canada for mutual benefits in flood control and hydropower generation is under review in anticipation of expiration of certain of the flood control provisions in 2024. This article asserts that non-structural measures should be the primary focus of new expenditure on flood risk management in the Columbia River basin over the next sixty-year period of treaty implementation to align flood risk management with management for ecosystem resilience. Floodplains provide important ecosystem function not only as natural storage in flood risk management, but to aquatic ecosystem resilience in general and salmonid habitat in particular. From the perspective of the social system, reliance on multiple geographically widespread locations for natural storage reduces the risk of crisis in the face of collapse of a single flood control structure. Phased movement from sole reliance on centralized storage-based flood management by incremental addition of more diffuse non-structural measures will enhance the social-ecological resilience of the Columbia River Basin.

Public Funding Programs for Environmental Water Acquisitions: Origins, Purposes, and Revenue Sources..... 265
Reed D. Benson

This Article reviews public funding programs for environmental water acquisitions, examining why and how government entities have provided money to buy or lease water rights for healthy ecosystems. The Article does not address implementation of these programs, focusing instead on their origins, purposes, legal and institutional structures, and revenue sources. It briefly explains the rationale for both environmental water acquisitions and public funding for them, then states a couple of important caveats about the role of these measures in securing water for the environment. The main body of the Article describes several different public funding programs, focusing primarily on ones that do not rely on annual legislative appropriations to finance acquisitions. The conclusion offers brief analysis and comments regarding the origins, purposes, and revenues of publicly funded environmental water acquisition programs.

Wilderness, Water, and Climate Change 313
Sandra Zellmer

As the nation searches for climate mitigation and adaptation strategies, the pressure to develop water resources within wilderness areas and to exploit the timber, forage, wildlife, fish, and other virtually uptapped components of wilderness will become more acute. This Article makes the case that managers and legislatures should not yield to this pressure and argues that, if anything, the need to preserve untrammeled wilderness characteristics is just as imperative today as it was in 1964 when the Wilderness Act was passed. The Article examines the potency of the Wilderness Act and a trio of federal water

law doctrines—federally reserved water rights, the Wild and Scenic Rivers Act, and the Clean Water Act—and finds that, while no single one of these doctrines can accomplish the task alone, if implemented in a more complementary fashion, together they can be effective in protecting the wild.

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Michael C. Blumm & Erika Doot

Oregon's public trust doctrine has been misunderstood. The doctrine has not been judicially interpreted in over thirty years but was the subject of an Oregon Attorney General's opinion in 2005. That opinion interpreted the scope of the doctrine to be limited to the beds of tidelands and navigable-for-title waters and erected a separate "public use" doctrine protecting public rights in other waters, including recreational waters. However, since Oregon courts have never limited public rights in the state's waters to those with publicly owned bedlands, the opinion should have recognized that the public trust doctrine provides broad public recreational rights in all waters. This Article maintains that Oregon's public trust doctrine is grounded on public ownership of natural resources held in trust by the state in sovereign ownership. The state has always claimed ownership of water and wildlife within the state, so the courts should recognize both as public trust resources. Similarly, use rights in ocean beaches, claimed by the public under the doctrine of custom, are public trust resources, necessary to enable public use of the adjacent publicly owned tidelands. This Article suggests that public ancillary rights exist in other uplands where necessary to provide public access to, or preservation of, public trust water and wildlife resources. Oregon's public trust doctrine is not of mere academic interest. The doctrine imposes duties on the state as sovereign owner of water, wildlife, and ancillary uplands. In an era of widespread skepticism of government management, the venerable public trust doctrine seems an especially appropriate mechanism to give citizens an opportunity to gain review of government action and inaction threatening unsustainable development of natural resources that are central to the state's identity, culture, and economy.