



Fall 1970

Water and Water Rights, Vol. 4, edited by Robert Emmett Clark

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Recommended Citation

Raphael J. Moses, *Water and Water Rights, Vol. 4, edited by Robert Emmett Clark*, 10 NAT. RES. J. 892 (1970).

Available at: <https://digitalrepository.unm.edu/nrj/vol10/iss4/14>

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Waters and Water Rights, Vol. 4

Edited By

Robert Emmett Clark

Indianapolis: The Allen Smith Company. 1970

Pp. xiii, 546

Volume 4 is the latest of the series which will be, when completed, the most current and the first exhaustive survey of the law of water and allied problems since Kinney.

This volume contains six topics: Eminent Domain and Water; Federal Flood Control Activities, Watershed Protection; The Federal Power Commission and Water Power Licenses; Water Distribution Agencies, and Weather Modification.

Eminent Domain and Water was prepared by Richard S. Harnsberger, professor of law at the University of Nebraska. It is excellent, and is almost complete enough to serve as an independent guide to the practitioner interested in acquiring a water right by condemnation, or in defending such an action. Certainly, in conjunction with Orgel or some other standard work not primarily concerned with water rights, one has all of the background and all of the case citation needed for most situations.

Condemnation, although generally considered a last resort by a municipality needing water, is a valuable negotiating tool, particularly in view of the favorable income tax treatment accorded a condemnee when property is taken under threat of eminent domain, even though suit is not actually instituted. This is one of the practical advantages of condemnation not mentioned by Harnsberger. Another is the thorny problem of dismissing proceedings in the event of an unfavorable award.

The next two sections, Federal Flood Control Activities and Watershed Protection, are the least exciting chapters in the book. This is perhaps to be anticipated, as neither activity is conducive to litigation. No one sues Santa Claus, and both activities require a resilience on the part of putative beneficiaries of these programs. An applicant must comply with federal statutes and regulations in order to get the benefits. Whether the attorney representing the beneficiary is entirely satisfied with the legal justification for the numerous requirements imposed by the federal representatives becomes academic. "Beggars can't be choosers," and the discretionary powers of the federal representatives frequently place the applicant in a suppliant position. The chapters do contain the legislative history and details of pertinent legislation.

With the burgeoning interest in the environment and the *Scenic Hudson* decision, attention is increasingly focused on the Federal Power Commission as a sounding board for public expression of concern in environmental protection. Another increasing activity of the Commission results from the requirement that licenses for dams on navigable streams be renewed every fifty years. The early licenses are only now expiring, and considerable interest is being evidenced by consumer groups in what was earlier anticipated to be a routine process. These are only two of the reasons why the chapter on the Federal Power Commission and Water Power Licenses is particularly timely. The chapter is written by Professor James N. Castleberry, of the College of Law of St. Mary's University at San Antonio.

The treatment is exhaustive, and the portion of the chapter dealing with procedure is very helpful, and may well become the Stern & Gressman of the Federal Power Commission—a nuts and bolts approach to what otherwise would be a mystic maze to the general practitioner.

Professor Robert W. Swenson, of the University of Utah, has assembled a very valuable compendium on the law of Local and Private Water Distribution Agencies. In an era when quasi-municipal corporations appear to be the only entities being organized to deal with water supply problems, it is helpful to be reminded that, for many years, the practicing lawyer will have to deal with a multitude of differing legal structures designed for the sole purpose of getting water from its source to the consumer who, unless he is a large industrial user, is unable to do so individually.

It is interesting to observe how, as structures for water diversion become more complex, the lawyer seems to be able to match the engineer in complexity. The economies of scale so dear to the engineer have likewise been embraced by the lawyer and the legislator, so that projects beyond the financial reach of the few may be constructed by the many.

This section concludes with a careful analysis of the problem of excess charges by cities to outlying areas, with comments on Professor Sax' paper entitled "Municipal Water Supply for Non-Residents." Sax' position has generated considerable controversy, and it is good to get the point of view of someone other than a city attorney as to the validity of Sax' argument.

Finally, Ray Jan Davis, of the University of Arizona College of Law, contributes a chapter on Weather Modification. The material in this chapter is a distillation of a very extensive study Professor Davis made for the Bureau of Reclamation, which is engaged in experimental work in the field of weather modification.

This is a developing area in the law, and affords one an opportunity to observe the struggles of legislatures and the Congress to adapt mechanisms from existing fields of the law to something that is neither fish, flesh nor fowl.

Davis traces the history of the art of weather modification from its inception, discusses the attempts made in the legislative area up to this time, and reports the few decisions of courts of last resort which relate to actual application of weather modification techniques. Unfortunately—or perhaps fortunately, depending on the viewpoint—the horrendous problem of proof of causation limits the opportunity for the courts to develop much law on the subject.

It is really an exercise in frustration to attempt to review six very significant articles so briefly. There is, however, only one conclusion to reach—every practitioner with even a modicum of interest in the field of water law should have not only Volume IV, but the entire set of “Water and Water Rights” readily accessible.

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