

The Nature of Legal Education and Its Links to Water Management

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When water decisions are made, water lawyers are central figures, and decisions are made within the framework of the governing institutions. In this essay, I discuss legal education and the training of a water lawyer. Students from other disciplines may seek out legal education, so approaches to their education are considered.

There is no set curriculum for the education of water lawyers; law schools do not have “majors,” although students may earn certificates in areas of study. A law school prepares its graduates for the practice of law, and to pass a bar exam that will require knowledge of a common body of law. A student’s first year studies focus on foundational courses such as contracts, torts, criminal law, and constitutional law, with the second two years providing opportunities for a limited number of specialized studies. The result is that the well-paid associate advising a water applicant may have had no prior classes in the relevant fields of law. (And, yes, this means that the agency may pay hourly fees to both a partner and an associate while the new lawyer acquires competency in the field).

But some law school students have their focus on water law during their law school years, and shape their educational experiences to be better prepared when they join the bar.

Defining an educational program for these students is complicated by the variety of water lawyers’ practices. A water lawyer may advise her client about differing courses of action, arrange a water lease or sale, assist in the licensing of a water project, consider water treatment alternatives, lobby an elected body, assert or defend a claim in court, participate in the adjudication of a water right, protect a river against development or a species

against extinction, and play other diverse roles. Most water lawyers are involved in transactional practices, but litigation occasionally is required. Law graduates may pursue policy-making careers: a lawyer may become a U.S. Senator with a keen interest in water, the Secretary of the Interior, the Administrator of the EPA, or the Administrator of the Bureau of Indian Affairs (BIA). Knowing the responsibility and authority that our graduates may have, what would we hope to impart in our three year J.D. program?

The practice of law requires both the understanding of substantive doctrines and the skills to bring about results. Law students learn about the practice of law in their studies of civil procedure, remedies, jurisdiction, and evidence. The skills of negotiating and consummating transactions are taught in elective classes. Legislative and administrative practice classes are necessary for the many lawyers in water-related fields who are involved in public water projects.

The traditional one semester water law class primarily focuses on private rights in water and how these rights are perfected. A student will gain familiarity with both riparianism and the prior appropriation doctrines. The textbooks now include federal regimes that affect water rights. Water law students should take a class on Natural Resources law to understand the legal treatment of other natural resources, such as land, wildlife, forests, and minerals. Every water law student should take “Environmental Law,” which is the title given to the regulatory and pollution-related programs. Should the student skip this class, the provisions of the Clean Water Act and the Endangered Species Act may be misunderstood as mere impediments to the important business of water allocation, rather

than an integral part of the modern legal regime for water management. In the West, an understanding of tribal water rights is crucial; the University of New Mexico School of Law offers a specialized course in this.

I would suspect that many readers have wondered how one can practice water law without exposure to hydrology, geohydrology, chemistry, biology, and related physical sciences, and economics, political science, planning and environmental ethics. The experienced lawyer may pick up a glimmering of these topics in practice, but will wish that they had formal instruction in these subjects. Students may enter law from any educational background, and those with an interest in environmental law may have undergraduate or graduate work in related areas. The University of New Mexico offers an interdisciplinary masters degree in water resources administration; a few of our law students have obtained both degrees.

Western water is deeply tied to the history and geography of the west, and I encourage my students to immerse themselves in this great literary tradition, including works by Wallace Stegner, John Wesley Powell, Jr., Bernard DeVoto, Daniel Worster, and John McPhee. Every water law student should read Marc Reisner's *Cadillac Desert*, and recently I've added Timothy Egan's masterful book on the dust bowl, *The Worst Hard Times*, and Jared Diamond's *Collapse*.

Ideally, legal education will include opportunities for externships and clinical experience. In an externship program, students work for attorneys, gaining exposure to legal practice, and typically providing research for the attorney. I recall my own astonishment when I held such a position for a western water lawyer and was told to think of any use, no matter how wasteful, to which the client could put its water, while awaiting the expected growth in the subdivision. "Use it or lose it" had new meaning to me. Clinical education is a growing part of legal education. Students are admitted to practice under special rules, and are given the responsibility for cases and other projects for a semester. Environmental clinics are offered by several law schools. In externships and clinics the experience is intended to be educational, rather than a source of inexpensive labor for a law firm. But, students are eager to learn from practicing

lawyers and to earn money, and so many find paid work in their expected field of practice during law school. Finally, experience on a law review can provide additional educational opportunities for law students. Law reviews are the professional journals for the legal profession, but, unlike those in other academic fields, typically are edited by law students, without outside professional peer review. Two decades ago there were only a handful of law reviews specializing in water, natural resources, public lands, and environmental law, but now there are many opportunities for law students to review and edit articles, and hold symposia on environmental and natural resources related topics.

Graduate students in other aspects of water management benefit from exposure to legal studies. Law schools have been reluctant to open classes to non-law students, but there are good reasons to open the doors a bit wider. The traditional reluctance is based on the capacity of law school classes, but also a concern that non-law students will have difficulty with upper level law school classes, which rely on the common educational foundation of the first year of law school. For example, the term "standing," a complex constitutional and jurisprudential concept, can trip up a student's reading of a case, yet it is inappropriate to devote class time to explaining the concept. Doctrines derived from administrative law often surface in cases, as well. On the other hand, students from other disciplines will bring useful perspectives to the law school classroom. My own preference has been to welcome these students and the benefits have far outweighed the occasional need to translate a Latin phrase for the non-law student.

Legal education is struggling with the relationship between its origins in scholarly models of the university and its role as the gateway to legal practice (Sullivan, et al. 2007). The practice of law requires both substantive knowledge and the skills and wisdom to apply this knowledge in an effective and ethical fashion. There are two implications from this that come to mind for education in water law and water management.

The first is that the nature of water management has changed from one in which expertise was applied by a closely limited group of experts (the term "Iron Triangle" described the very restricted

political processes) to a more open process in which multiple parties have gained access and power. While there are many who cling to the old paradigm (I encounter them in my efforts to assist citizens who are protecting free flowing rivers, for example), vocal citizen participation in water decision making can be seen across the country. This does not mean that specialized training is less important, but rather that other perspectives and forms of knowledge are now recognized. Environmental justice, for example, emerged from insistence by poor and minority communities that the heretofore neglected distributional consequences of facility siting be included in decision making. Further, the gender and race of these participants does not look like that of the last generation; women and minorities are asserting their interests in fields that previously were the exclusive domain of white men.

The educational implications of this transformation are in some ways subtle and I would argue poorly realized in the Academy. One implication is that educators attempt to bring the experience of diversity within the institution. In a recent class on western water policy, we drew from the diverse perspectives of female and male students from Anglo, Hispanic, and Native-American backgrounds, students who also differed from each other in their professional identification with development interests, science, water marketing, community protection, etc. Such a wealth of insights prepares students for careers in which open access to information and citizen participation will characterize much of their work.

A second implication from the merger of substantive law and practice is the need to train students to understand the nature of the institutions that govern water management and law. Experienced lawyers know and scholars now document that laws evolve in response to changing societal needs. A recent review of aquifer recharge for purposes of recovery (National Research Council 2007) provides examples of how both regulatory and common law constructs are changing in response to the need to use this new technology for water storage. I would note a caveat here about the challenge of providing an education for non-lawyers in the law. My impression is that the changing substance of law, which is what lawyers

revel in, is difficult for those with technological and scientific backgrounds to fully comprehend.

An example that comes up frequently in my work is the concept of “instream flows.” New Mexico does not have a statute that explicitly provides for the legal creation and protection of instream flows. I have repeatedly heard water professionals aver that there is no way to protect instream flows in the state, or that they “aren’t legal.” That statement, while accurate twenty years ago, no longer reflects the practice in the state. It is true that one cannot find a statute in the state’s water code that enshrines instream flows nor a case that establishes them as a beneficial use. Nonetheless, an Attorney General’s opinion condoned instream uses as beneficial, a state law provides for purchase of flows for compact deliveries and endangered species compliance, the state has consented to federal reserved waters for this purpose, and there are several other situations where de facto instream rights have been created. Thus, it requires expertise in the state’s water law, which includes familiarity with all the sources of law, to understand what can and is being done.

Lawyers seek to achieve beneficial outcomes for their clients in the practice of law. In response to litigation, courts will modify the accepted interpretation of the law (the identification of a public trust in Mono Lake is one such example; the narrowing of “waters of the United States” by the U.S. Supreme Court is another). Think of how the management of the river has evolved on the Colorado River over half a century. Recourse to the Congress or a state legislature also can overturn existing law. We experienced this when an appellate decision favorable to the endangered Rio Grande Silvery Minnow was overturned by a Congressional rider within weeks of its issuance. My understanding is that Darcy’s Law is unlikely to go through these sorts of transmutations.

For both lawyers and non-lawyers, then, it is critical to stay current with new legal developments. Lawyers who are able to achieve results for their clients despite seeming legal obstacles are the most successful: they understand the controlling statutes, regulations, and case law, but also understand where a legislator or court might change these, or how to structure an arrangement to meet the needs of the parties within the law.

A goal of legal education is to convey this

aspect of sophisticated legal practice, and to avoid the misleading implication that the laws governing water are like those governing the movement of bodies in space.

Finally, educators should be oriented towards the future. Those of us who are educating tomorrow's water managers, which includes water lawyers, must be aware of the extraordinary circumstances in which they will work. We don't know how disruptive climate change will be to the world, and to our nation. We don't know where the world's population will stabilize. We don't know if the U.S. will still be the leading economic power, nor the resources that will be available to the next generations. About all we know with certainty is that water resources will be important and contested.

The harsh environmental future that awaits our students should lead to a probing scrutiny of the status quo. After all, it is the status quo that has brought us to the very brink of sustainability, as a well educated, affluent nation has continued to rely on fossil fuels long after its highly capable scientists warned of their dangers. There is plenty of blame for our national failure to change course, but what about our educational system? And, more specifically, what will our students need to learn to be better natural resource managers than their predecessors?

I would hope that we are teaching critical thinking in every class, so that students are able to create better approaches to these challenges. Universities should model approaches to teaching that honor the interconnectedness of problems. Already there are water managers who want to wall "mitigation" (reduction of carbon pollution) off from "adaptation" (adjusting to climate change). We should prepare our students to tackle the water needs of the billion people who now lack access to fresh water, and the billions who are projected to be imperiled from the lack of fresh water, food, and seafood. We also need to prepare our students to address the plight of the nonhuman species that will go extinct unless action is taken.

Finally, the pace of change means that our students will need to be imbued with an interest in lifelong learning. After they graduate from the university, we lose control of their education. But, if they are reading and questioning in school, and

know that their professors are struggling with answers to the same questions, we can continue to learn together as they take their place as the new generation of water leaders.

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