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IN APPRECIATION OF “THE TARLOCK EFFECT”

J.B. RUHL*

Like many legal academics, I frequently underestimate how much time and energy it will take to embody my next great idea in writing. My most egregious misfire in this respect happened when I had the honor of being invited to deliver the 2009 annual environmental law lecture at Lewis & Clark Law School. I had noticed a new current in legal scholarship on the theme of climate change adaptation, which was a growing interest of mine as well, and decided that I would summarize, synthesize, typologize, and theorize the entire body of legal literature on the topic. You get the picture. Needless to say this turned into a black hole that took over my home’s dining room and crept into our living room in the form of piles of law review articles, each pile representing a different sub-sub-category in my ever-expanding typology. I was happy with the result,¹ but family, friends, and pets were less than pleased along the way.

At one point in this maelstrom of a project, I traced the legal scholarship on climate change adaptation back to its first entry of significance. My sleuthing led me to an article published in 1992 in the *Arizona Journal of International and Comparative Law*. The author? Dan Tarlock.² Why was I not surprised? Why would anyone working in the field of climate change law be surprised? And I could add many other fields of law to that question as well. *Of course it was Dan Tarlock!* But seriously, 1992—over fifteen years before I even thought of the topic?

Let me emphasize that this was not just a passing take on climate change adaptation law and policy. The journal issue collected contributions to a symposium the law school had convened early in 1992 on global issues facing energy and environmental policy. Several authors offered discussions about climate change mitigation, but only two addressed adaptation—Dan and Dr. Paul Waggoner, a scientist who had chaired a National Academy of

* David Daniels Allen Distinguished Chair of Law, Vanderbilt University Law School, Nashville, TN. I am thankful to the Chicago-Kent Law Review for inviting me to offer my thoughts about Dan Tarlock’s influence in the world of environmental law, and I am thankful to Dan Tarlock for being Dan Tarlock.

1. J.B. Ruhl, *Climate Change and the Structural Transformation of Environmental Law*, 40 ENVTL. L. 363 (2010).

2. A. Dan Tarlock, *Now, Think Again About Adaptation*, 9 ARIZ. J. INT’L & COMP. L. 169 (1992).

Sciences committee on the state and future of climate change adaptation, and whose keynote speech at the symposium advanced the theme of “Resolved: The Time Has Come to Think About Adaptation.”³ Dan’s job was to respond. He did a nice job.

The core idea of his response was that climate change policy was splitting into two increasingly hostile branches—environmentalists advocating for mitigation versus economists and other “rationalists” advocating for adaptation. Throwing all the eggs in the adaptation basket, Dan argued, placed undue faith in technological progress on the mitigation front, forced exceptionally difficult questions of allocation between winners and losers, and left under-resourced institutions and nations with essentially only a no-action option. Dan’s description of the emerging policy divide and the perils of going all in on adaptation while waiting for the miracle mitigation cure became the lead for my eventual article.⁴ Having reread his and my articles when preparing this tribute, I remain amazed by how prescient he was in 1992 in describing how the pieces on the chessboard of climate change policy were laid out then and predicting how the game could unfold.⁵

My point in telling this story is to offer a tangible example of what I call “The Tarlock Effect”—the propensity of Dan Tarlock to be the first to detect, unpack, assess, and make sense of important new movements in his scope of focus, the aperture of which is always widening. In short, if you think you have a new idea, Dan has probably already had something meaningful to say about it, and likely long before your inspirational moment. It’s just hard not to bump into him. And it doesn’t help to switch gears. Say you tire of him always being there, ahead of you, in environmental law and are thinking of moving to, say, water law. Sorry, that won’t escape The Tarlock Effect—he was one of the first there too. Energy law? Nope. Land use law? Again, no dice. And the same for natural resources law, biodiversity law, and, per my story, climate change law. But maybe you could try covering an intersection of two or more of these fields? Nice try, but that won’t work either—he’s done them. The international law versions of any of them? No. Stop trying. Just stop.

3. Paul E. Waggoner, *Now, Think of Adaptation*, 9 ARIZ. J. INT’L & COMP. L. 137 (1992).

4. Ruhl, *supra* note 1, at 365–68.

5. As it turned out, the “mitigationists” swamped the “adaptationists,” and adaptation theory and policy went underground. Its taboo status was lifted around the time of my project when just about everyone weighing in on climate policy realized that the policy of going all in on mitigation had both not met its aspirations—climate change was coming regardless—and had created an “adaptation gap” that needed to be filled. *Id.* at 368-75.

Just take a look at Dan's CV. There are dozens of article titles from over the past four decades that could be titles for articles covering today's cutting edges. Take, for example, *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*. That was published in 1972.⁶ What about *The Uses of Scientific Information in Environmental Decision-Making?* 1974.⁷ There's also *Recent Developments in the Recognition of Instream Uses in Western Water Law* from 1975,⁸ and *Toward a Revised Theory of Zoning* from 1972.⁹ Dan's powers of anticipation did not end in the 1970s, though, as he was an early thinker on later-emerging themes such as (using his article titles and publication dates to illustrate): *The Endangered Species Act and Western Water Rights* (1985),¹⁰ *Environmental Protection: The Potential Misfit Between Equity and Efficiency* (1992),¹¹ *The Role of Non-Governmental Organizations in the Development of International Environmental Law* (1993),¹² *Local Government Biodiversity Protection: What Is Its Niche?* (1993),¹³ *How Well Can International Water Allocation Regimes Adapt to Global Climate Change* (2000),¹⁴ and *Takings, Water Rights, and Climate Change* (2012).¹⁵ And this is but a small sample. If this or any law journal were in its next issue to publish an article with any of these titles, it would appear perfectly timely and relevant, even cutting edge.

So, what is one to do about The Tarlock Effect? It didn't take long for me to realize early in my academic career—well before my foray into climate change adaptation policy—that there's just no escaping it. So I learned to appreciate it. Better yet, take advantage of The Tarlock Effect! My way of doing so is easy: when the next brilliant law review idea pops into my head, I read Dan's CV, knowing he probably has said something meaningful on the theme and hoping not *everything* worth saying. When I find the

6. A. Dan Tarlock, Roger Tippy & Frances Enseki Francis, *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 S. CAL. L. REV. 502 (1972).

7. Marcia R. Gelpe & A. Dan Tarlock, *The Uses of Scientific Information in Environmental Decisionmaking*, 48 S. CAL. L. REV. 371 (1974).

8. A. Dan Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law*, 1975 UTAH L. REV. 871 (1975).

9. A. Dan Tarlock, *Toward a Revised Theory of Zoning*, 1972 LAND USE CONTROLS ANN. 141.

10. A. Dan Tarlock, *The Endangered Species Act and Western Water Rights*, 20 LAND & WATER L. REV. 1 (1985).

11. A. Dan Tarlock, *Environmental Protection: The Potential Misfit between Equity and Efficiency*, 63 U. COLO. L. REV. 871 (1992).

12. A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI.-KENT L. REV. 61 (1993).

13. A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche*, 60 U. CHI. L. REV. 555 (1993).

14. A. Dan Tarlock, *How Well Can International Water Allocation Regimes Adapt to Global Climate Change*, 15 J. LAND USE & ENVTL. L. 423 (2000).

15. A. Dan Tarlock, *Takings, Water Rights, and Climate Change*, 36 VT. L. REV. 731 (2012).

inevitable—indeed he has thought of it—I read his article and, while doodling on a pad, think about what’s left for me, using Dan’s take as the lead. It has worked for as long as I can remember. I highly recommend the strategy—it makes The Tarlock Effect less . . . distressing.

Enough on the scholarship dimension of The Tarlock Effect. It also has a personal dimension, as Dan has mentored so many of those who followed in his footsteps in the many fields he has cultivated. I can think of no one in the community of legal scholars who has been so generous with his time, thoughtful in his guidance, and humble in his style. All who know him in the sphere of law and policy—whether academics, students, practitioners, judges, or politicians—know this about Dan Tarlock. He is also a good friend, full of sincerity and wit, able to talk at depth about last week’s football game and next week’s symphony, a fun lunch companion, and a world traveler. On that last point, I’ve been in Chicago several times this year and he hasn’t been able to make lunch a single time—he was in Beijing one time, I think Poland another, and who knows where the other times. As is his nature, these travels are to spread his goodwill to other nations and institutions—it is in high demand. I hope he also has some fun along the way!

There is plenty more I could say about Dan that would be fitting in a tribute like this issue. I’m glad, most of all, that I was in active legal practice and academia during his long and distinguished career. Practitioners and scholars will lean on his work far into the future; the lucky ones like me have been able to experience it, and The Tarlock Effect, in real time. And if you think his retirement will slow down The Tarlock Effect, think again!