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Derecho de Aguas. By Alejandro Vergara

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BOOK REVIEW

DERECHO DE AGUAS. By Alejandro Vergara Blanco, Santiago, Chile: Editorial Jurídica de Chile, 1998.

*Reviewed by Carl J. Bauer**

I.	INTRODUCTION	198
II.	VERGARA IS AN IMPORTANT FIGURE IN CHILEAN WATER LAW	198
III.	VERGARA APPROACHES CHILEAN WATER LAW LOGICALLY AND SCIENTIFICALLY	199
IV.	VERGARA EXAMINES TWO IMPORTANT PRINCIPLES OF WATER LAW: "THE UNITY OF THE CURRENT" AND THE "FREE TRANSFERABILITY" OF WATER RIGHTS	200
V.	A DETAILED EXAMINATION OF TECHNICAL LEGAL ISSUES	201
VI.	THE FUTURE OF CHILEAN WATER LAW	201
VII.	CONCLUSION	201

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I. INTRODUCTION

Chile has been a leading international model of free market water laws and policies for the last two decades. The Chilean military government, which was in power from 1973 to 1990, dictated a new Water Code in 1981 that strengthened private property rights, weakened state regulatory powers, and promoted market forces in water management. These changes reversed the highly centralized approach of Chile's previous water legislation, dating from the 1950s and 1960s. The new *laissez faire* approach includes key features such as free trading of water rights separate from land ownership, unrestricted private speculation in water rights, and reliance on voluntary private bargaining to coordinate the many different water users in a shared river basin. In 1990, Chile returned to a democratic form of government, but the governing coalition has been unable, and in some respects unwilling, to modify the Water Code. The 1981 Water Code remains in effect.

Chilean water laws have attracted growing attention from water experts around the world, especially economists. This increased attention is partly due to the World Bank's strong promotion of the Chilean model. Many other countries, including the United States and Mexico, have debated and experimented with water markets in certain circumstances, but the Chilean model is unique in its scope. In spite of this international interest, until now there has been no systematic and comprehensive text about the *legal* aspects of water rights in Chile. Chilean law professor, Alejandro Vergara Blanco, has met this need with the publication of his book *DERECHO DE AGUAS*.¹

II. VERGARA IS AN IMPORTANT FIGURE IN CHILEAN WATER LAW

Although Vergara is still relatively young, it would be difficult to exaggerate his importance in the field of Chilean water law. Vergara has earned doctorates in law in both Spain and France. He is a professor of water law and mining law at the

1. My own book about Chilean water rights discusses the law in combination with politics, economics, and geography, and thus does not aim to be a legal text. See CARL J. BAUER, *AGAINST THE CURRENT: PRIVATIZATION, WATER MARKETS, AND THE STATE IN CHILE* (1998).

Catholic University Law School in Santiago, Chile, the nation's capital. He is a professional lawyer with a busy practice² and was instrumental in establishing the Institute of Mining and Water Law.³ The Institute offers specialized, post-graduate training for Chilean lawyers, in addition to publishing two scholarly and professional journals: the *Revista de Derecho de Aguas* and the *Revista de Derecho de Minas*. Vergara was the editor of these journals during their first and formative years. He retains an influential role in their direction today. In 1998, Vergara organized Chile's first national conference on water law, the *Jornadas de Derecho de Aguas*. This conference was repeated in 1999 and is planned to become an annual event at the Catholic University. Vergara has brought a strong interest in comparative legal systems to all of these activities.

III. VERGARA APPROACHES CHILEAN WATER LAW LOGICALLY AND SCIENTIFICALLY

DERECHO DE AGUAS is a compilation of Vergara's writings since 1990. His method is based on a combination of doctrinal and historical analyses of law, particularly in the area of public and administrative law. He takes the highly logical "scientific" approach to law that so often characterizes the civil law tradition in Latin America as well as in Europe. This approach often surprises and seems formalistic to the Anglo-American lawyer, who tends to be more accustomed to concrete and pragmatic thinking than to abstract rationality. Vergara's approach will be more familiar to those readers already familiar with Latin American legal systems.

The book begins with a general overview of the essential issues of water law in Chile, both historically and today.

2. There are only a handful of expert water lawyers in Chile, although this has begun to change in the 1990s as economic development has raised the stakes of water conflicts.

3. The Institute of Mining and Water Law is located in Santiago although it pertains to the University of Atacama in Northern Chile. Most of the country's mining activity takes place in Northern Chile, a desert region.

Vergara's basic argument is that the core of water law can be reduced to four "working hypotheses." These are:

- 1) Water is publicly owned;
- 2) The state follows some administrative procedure in order to grant private individuals rights to use public waters;
- 3) Private use-rights are an unusual but valid category of property rights; and
- 4) The state must carry out certain administrative tasks, for which it has the necessary authority.

Following this general overview, in the first part of his book, Vergara traces these four working hypotheses through the historical roots of water law. His examination begins with Roman water law, continues with medieval through nineteenth-century Spanish water law and the water law of the Spanish colonies, and then concludes with an examination of Chilean water law from the nineteenth century up to, but not including, the current Water Code of 1981.

IV. VERGARA EXAMINES TWO IMPORTANT PRINCIPLES OF WATER LAW: "THE UNITY OF THE CURRENT" AND THE "FREE TRANSFERABILITY" OF WATER RIGHTS

The rest of the book discusses the 1981 Code. In Part Two, Vergara examines two important principles of current water law. One is the principle of "the unity of the current," which asserts that all the waters in a shared drainage basin are connected, both physically and legally. This principle is at the heart of the common argument that water resources should be managed according to hydrologic drainage basins rather than political boundaries. The second principle is the "free transferability" of water rights. Water rights in Chile are freely transferable in two senses: they are legally separate from land rights, which means they can be bought and sold separately from land, and private owners are free to transfer their water rights without government regulation. This principle of free transferability underlies water markets and other policies that promote market forces and incentives.

This chapter is one of the book's most useful and should get the widest audience, as Vergara discusses the advantages and

disadvantages of water markets in Chile. It is a controversial topic, hotly debated both nationally and internationally, and Vergara considers economic and hydrological factors as well as legal aspects. He concludes Part Two by arguing in favor of the current Water Code, while recognizing some of its problems and shortcomings.

V. A DETAILED EXAMINATION OF TECHNICAL LEGAL ISSUES

Part Three examines a number of more technical legal issues. The details will be interesting only to the dedicated specialist or student, but the general points are significant in showing how complicated water rights systems are in practice. Economists too often ignore or gloss over such legal complexities in their proposals for tradable property rights. One chapter looks at the intricate legal typology of the different kinds of water rights currently recognized in Chile. Vergara describes the uncertain and confusing status of many legal titles to water rights, and calls for a major governmental effort in regularization and record keeping. Another chapter deals with the variety of units of measurement that are used for water rights. Other chapters discuss legal details of building dams and reservoirs, and disputes over whether new water rights are created as a result of such projects or as a result of sewage treatment.

VI. THE FUTURE OF CHILEAN WATER LAW

In Part Four, Vergara concludes with an examination of the future problems and challenges for Chilean water law. The final chapters were originally delivered as conference papers or speeches. Vergara elaborates on several issues that were raised in earlier chapters: the fuzzy boundary between public and private ownership in water law, the role of courts in water conflicts, and the reforms needed to improve the working of the water market.

VII. CONCLUSION

DERECHO DE AGUAS offers the panoramic view of a leading national expert, fully up-to-date with current issues and problems. The book is an important addition to the field of

comparative Latin American water law and is the most important book on Chilean water law that is available in Spanish.