

Water Law in the Eastern United States

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A Conversation about Water

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Basic Premises of a Sound Water Law

- Water is a public good
- Water is constantly moving through the hydrologic cycle
- Water must be conjunctively managed
- Water management must be integrated with the management of related resources
- Water is subject to economic incentives

Public Goods

- Basic characteristics
 - Indivisible (“non-exclusive”)
 - Shared freely among a relevant population (“non-rivalrous”)
- Consequences of treating something as a public good
 - Funding is difficult
 - Market failures
 - The “tragedy of the commons”
- Raw water is the paradigm of a public good
 - Transaction costs are too high for efficient markets
 - Common metaphors for public goods are water-based

Three Patterns of Property in Water

- Common property (riparian rights)
- Private property (appropriative rights)
- Public property (regulated riparianism)

Riparian Rights: Common Property

- The term “riparian” derives from the Latin *ripa*, meaning the bank of a stream
- Riparian rights originated in the newly independent United States and later were imported back to England where water law was undeveloped with the right to use water seen as a “natural attribute” of riparian land
- The result: a type of common property
 - Anyone with lawful access (owning riparian land) can use water
 - Each person decides individually where, when, how, and how much to use based on the assumption that there is almost always enough water for every user
 - Courts become involved only if there is a direct conflict
- Early on courts shifted from a “natural flow” approach to a “reasonable use” approach

Problems with Riparian Rights

- Inherent instability
 - Reasonableness is a relational determination—*Harris v. Brooks*, 283 S.W.2d 129 (Ark. 1955)
 - A reasonable use today can be unreasonable tomorrow
 - Discourages investment in water use facilities
- Cannot cope with system-wide emergencies
 - Litigation is cumbersome and expensive
 - No other management tools available
- Scant protection for public values
- Systemic bias in favor of large users
 - Small users can aggregate
 - But collective users might not qualify as riparians
- Transfer apart from the land is nearly impossible
- The tragedy of the commons is inevitable

Appropriative Rights: Private Property

- Well defined rights to use water
 - Rights defined as to time, location, purpose, and amount of use
 - Strict priority—first in time, first in right
- Stability is secured for older rights by increasing the instability of newer rights
 - Junior rights are completely cut off before any restriction is imposed on a senior right
 - There is no reason to believe that older rights are always socially preferable
 - Encourages waste in order to create a history of use
- Cannot cope with system-wide emergencies
- No provision for protecting public values
- A most peculiar form of private property
 - True markets remained rare and small
 - Most uses were effectively frozen in place
 - The effects on third parties is the key—*City and County of Denver v. Fulton Irrigating Ditch Co.*, 506 P.2d 144 (Colo. 1972)

Importing Appropriative Rights into the East

- Many western states combine appropriative and riparian rights
 - Generally cutting off “unused” riparian rights after a set date
 - Three states (California, Nebraska, and Oklahoma) have preserved “unused” riparian rights to some extent creating massive confusion
- Mississippi tried and failed to import appropriative rights into an eastern state
 - Cut off “unused” riparian rights in 1955
 - The state supreme court decided 12 water cases in 30 years without ever referring to appropriative rights
 - Substituted regulated riparianism in 1985
 - No one attempted to preserve appropriative rights after 1985

Regulated Riparianism (Public Property)

- All riparian rights states have some regulations
- Burgeoning demand for water and climate disruption have made tradition riparian rights unworkable
- About half of the eastern states have enacted systems of more or less comprehensive regulation
 - Alabama*
 - Arizona**
 - Arkansas*
 - Connecticut
 - Delaware
 - Florida
 - Georgia***
 - Hawaii
 - Illinois**
 - Kentucky
 - Maryland
 - Massachusetts
 - Michigan***
 - Minnesota
 - Mississippi
 - New Jersey
 - New York***
 - North Carolina***
 - Ohio
 - Pennsylvania***
 - South Carolina***
 - Virginia*
 - Wisconsin
- The American Society of Civil Engineers has prepared a *Regulated Riparian Model Water Code*, adopted as an official standard by the Society, 40-12, approved in 2003

*Not fully implemented

**Groundwater only

***Limited scope

Basic Changes from Riparian Rights

- Water cannot be withdrawn without a time-limited permit
- Reasonableness remains the criterion of decision
 - Basically the same factors as under riparian rights
 - But decided administratively in advance of the use
 - Providing secure rights for the term of the permit
- Limitations based on the location of use are abolished
 - Use is not limited to riparian land
 - Special provisions for transbasin uses

Differences from Appropriative Rights

- Temporal priority of limited or no significance
- Allocations expire periodically, allowing reallocation or the imposition of more stringent conditions on uses
- Protections of the public interest, and potentially for benefiting those disadvantaged in society, are built into the system of water rights

Protects the Public Interest

- Comprehensive planning required
- Elaborate provisions for droughts
- Voluntary transfers (sales, etc.) are encouraged, but not likely to play a big role
- The State Agency can reallocate water
 - When permits expire
 - During emergencies
- The State Agency can devise conditions to protect the public interest
- Statutory preferences for certain classes of use
 - Time-based preferences are limited to the life of a permit
 - Elaborate provisions for the protection of minimum levels and flows

Is Regulated Riparianism Worth the Cost?

- Substantial financial costs
- The cost of deferring to a bureaucracy
 - Errors are replicated throughout the system
 - The problem of the “democratic deficit”
- What are the alternatives?
 - Let people with access decide for themselves (riparian rights)
 - First in time, first in right (appropriative rights)
 - Markets
 - Can we dream up something else?

Ric Masten, Stark Naked in '69 and '79 (1980)

To Nuke
or Not to

is it not disturbing to consider
that everything in and about
a nuclear power plant
will be furnished
by the lowest bidder