

Introduction to Water Rights and Agriculture

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Overview

- ▶ Generally
- ▶ Surface Water
- ▶ Groundwater
- ▶ Regulated Riparianism
- ▶ Exempt Wells
- ▶ Miscellaneous
- ▶ Conclusions

Water Rights Generally

- ▶ Principally determined by state law
- ▶ Created by common law
- ▶ Can be modified, in limited ways, by statute
- ▶ Impacted by federal statutes and policies
- ▶ Separate regimes for surface water, groundwater, stormwater and atmospheric water

Surface water

- ▶ Riparian rights (primarily east of the Mississippi)
- ▶ Prior Appropriation (primarily west of the Mississippi)

Riparian Rights

- ▶ System that allocates the right to use water to the owners of land that abut the water body
- ▶ Natural flow: right to have water flow past the property in natural state
- ▶ Reasonable use: reasonable consumption by riparian owners allowed, but cannot abridge the equal rights of other riparian owners

Riparian Rights

Alabama, Arkansas, California*, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma*, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington*, West Virginia, Wisconsin

Prior Appropriation Doctrine

- ▶ The first landowner to beneficially use or to divert water from a water source is granted priority of right
- ▶ Quantity may be limited based on reasonableness and beneficial purposes
- ▶ Many states use a permit system to administer the doctrine.

Prior Appropriation

Alaska, Arizona, California*, Colorado, Hawaii, Idaho, Kansas, Mississippi (not clear), Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma*, Oregon, South Dakota*, Texas, Utah, Washington* and Wyoming

Absolute Dominion Rule

- ▶ Landowner may intercept the groundwater that may otherwise have been available to a neighboring landowner and may even monopolize the yield of an aquifer without incurring liability
- ▶ Most states have exception for malicious use
- ▶ Law of the Biggest Pump

Absolute Dominion Rule (11)

Connecticut, Georgia, Indiana, Louisiana, Maine, Minnesota, Massachusetts, Mississippi, Rhode Island, Texas and Vermont*

*Vermont purports to abolish the absolute dominion rule by statute and replace it with correlative rights.

Reasonable Use Rule

- ▶ Limits a landowner's use to beneficial uses having a reasonable relationship to the use of the overlying land
- ▶ Off-site uses ("lift") are unreasonable
- ▶ So long as the use is reasonable, the landowner can withdraw all of the water, without liability

Reasonable Use Rule (17)

Alabama, Arizona, Arkansas,
Delaware, Illinois, Kentucky,
Maryland, Michigan, Missouri,
New Hampshire, New Jersey,
New York, North Carolina,
Oklahoma, Pennsylvania,
Virginia and West Virginia

Reasonable Use Rule

- ▶ Wyoming has adopted the Reasonable Use rule in conjunction with the Prior Appropriation doctrine
- ▶ Florida has abolished common law groundwater rights, but uses a reasonable use rule to allocate permits
- ▶ Nebraska has adopted a Reasonable Use rule in conjunction with the Correlative Rights doctrine
- ▶ Oklahoma uses a combination of the Reasonable Use rule and the Correlative Rights doctrine

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Prior Appropriation (13)

Alaska, Colorado, Idaho,
Kansas, Montana, Nevada,
New Mexico, North Dakota,
Oregon, South Dakota, Utah,
Washington and Wyoming

Correlative Rights

- ▶ Based on the Reasonable Use rule
- ▶ Courts often confuse and combine the two
- ▶ Does not prohibit off-site uses
- ▶ Uses a proportionality rule
- ▶ Owners of overlying land have co-equal (or correlative) rights

Correlative Rights (5)

California, Hawaii, Iowa, Oklahoma and Tennessee

- ▶ Vermont appears to have adopted the rule by statute
- ▶ Nebraska uses a combination of the Reasonable Use rule and the Correlative Rights doctrine
- ▶ Oklahoma uses a combination of Correlative Rights doctrine and the Reasonable Use rule

Restatement of Torts (2d)

- ▶ Combination of Reasonable Use and Absolute Dominion
- ▶ So long as the landowner uses the water for beneficial uses, no liability attaches unless one of three exceptions (all tied to unreasonableness) attaches
- ▶ A number of factors are applied to determine liability

Restatement of Torts (2)

Ohio, Wisconsin

"Regulated Riparian"

- ▶ 19 eastern states have statutory regimes that purport to alter water rights rules
- ▶ Many of these statutes apply special rules to or provide exemptions for agricultural water uses

Regulated Riparian (20)

Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois*, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, New York, North Carolina, Virginia, South Carolina and Wisconsin

*I found no significant regulation in Illinois

Regulated Riparian

- ▶ States with no special provision for agricultural withdrawals:

Alabama, Connecticut, Florida, Hawaii, Massachusetts and Michigan

- ▶ States with regulatory exemptions for at least some agricultural withdrawals:

Kentucky, New York, South Carolina and Virginia

Regulated Riparian

- ▶ Agricultural uses defined as reasonable:

Kentucky, Minnesota and Mississippi

- ▶ Priority to agricultural uses in times of shortage:

Arkansas and Iowa

Regulated Riparian

Special cases providing detailed and unique agricultural provisions

- ▶ Delaware
- ▶ Georgia
- ▶ Maryland
- ▶ New Jersey
- ▶ South Carolina
- ▶ Wisconsin

Regulated Riparian

Litigation is pending in the South Carolina Supreme that challenges the agricultural preference in that state's regulated riparian scheme, *Jowers v. South Carolina Department of Health & Environmental Control* (South Carolina Supreme Court, Case No. 2016-000428). Issues include regulatory takings, due process, and violation of the public trust.

Regulated Riparian

For more information, see:

Jesse J. Richardson, Agricultural Preferences in Eastern Water Allocation Statutes, 55 Nat. Res. J. 329 (2015).

Exempt Wells

- ▶ Misnomer- refers to groundwater withdrawals subject to relaxed or fewer requirements
- ▶ Domestic, stockwatering, *de minimus*
- ▶ Subject to increasing controversy, scrutiny and litigation

Exempt Wells

- ▶ Sixteen states- 12 of 13 Prior Appropriation states, plus Arizona, Nebraska, Oklahoma and Texas (which have detailed permitting schemes, some of which include priority)
- ▶ Utah is only Prior Appropriation state without exempt wells

Exempt Wells

- ▶ Limitations based on maximum quantities withdrawn, the use to which the water is applied, or both.
- ▶ New Mexico, Oregon and Washington State have no limits on quantities for stockwater wells
- ▶ Case law in Washington State on stockwatering exemption

Exempt Wells (16)

Alaska, Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Washington, Wyoming

Exempt Agricultural Wells

For more information:

- ▶ Nathan Bracken, Exempt Well Issues in the West, 40 *Envtl. L.* 141 (2010).
- ▶ Tiffany E. Dowell, You can Lead Livestock to Water...A Survey of Exempt Livestock Wells in the West, 17 *U. Denv. L. Rev.* 1 (2013).
- ▶ Jesse J. Richardson, Jr., Existing Regulation of Exempt Wells in the United States, 148 *J. of Contemp. Water Res. & Ed.* 3 (2012).
- ▶ Jesse J. Richardson, Jr. and Iris Aloï, Exempt Wells and Agricultural, National Agricultural Law Center.
- ▶ Jesse J. Richardson, Jr. and Tiffany E. Dowell, The Implications of *Bounds v. State of New Mexico*, 148 *J. of Contemp. Water Res. & Ed.* 17 (2012).

Miscellaneous

- ▶ Particularly in the East, a thorough title examination of all involved properties should be conducted
- ▶ Property owners often convey water rights via deed
- ▶ Each state is different- comb statutes, case law and any other sources that you can
- ▶ For a more detailed attempt at classifying the states, see the water rights table, National Agricultural Law Center

Conclusions

- ▶ Conflicts over water rights have and will continue to increase
- ▶ Water law is complex, however agricultural lawyers must be able to spot the issues for their clients
- ▶ Future opportunities for beginning lawyers or established attorneys wishing to expand their practice are bright in water law